NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1990 to December 31, 1990

VOLUME 2

PAGES 895-1821

Saul Cooperman
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2639-90
AGENCY DKT. NO. 71-4/90

CAROLYNN A. PAUZE,
Petitioner,
v.
WILLARD R. YOUNG, III,
Respondent.

Peter E. Moll, Esq., for petitioner

Willard R. Young, III, respondent, pro se

Record Closed: April 25, 1990 Decided: April 30, 1990

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner alleges that respondent, Willard R. Young, III, a member of the North Hunterdon Regional Board of Education ("Board") and the operator of an insurance agency, has involved himself in a conflict of interest because he has actively participated in Board actions relating to school bus transportation and because he has acted as agent for companies and/or individuals who provide school bus service to the Board. Petitioner demands relief, including (1) declaratory judgment holding that the respondent was in a conflict of interest and (2) an order removing respondent from the Board and from the ballot where he was a candidate for a seat on the Board in its April 24, 1990 election.

See, N.J.S.A. 18A:12-2; N.J.S.A. 18A:12-3; N.J.S.A. 18A:6-9; N.J.S.A. 52:14B-8; and N.J.A.C. 1:1-12.6

PROCEDURAL HISTORY

On April 3, 1990 petitioner's letter (motion for emergent relief) and petition for declaratory judgment were filed with the Commissioner of Education ("Commissioner.") See, N.J.S.A. 18A:6-9. On that day, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") where it was filed as a contested case and assigned an April 9, 1990 date for hearing the motion for emergent relief. N.J.S.A. 52:14B-1 et. seq.; N.J.S.A. 52:14F-1 et seq.; and N.J.A.C. 1:1-3.1.

On April 6, 1990, the respondent's attorney requested an adjournment of the matter because she had just received petitioner's papers and she had not yet had time to prepare a response to same. I granted the request and, in view of the Passover holiday, adjourned the hearing to April 11, 1990, on which day respondent's certification was filed; the parties stipulated to certain facts; and the parties argued the motion. On April 12, 1990, I issued a decision dismissing the demand for respondent's removal for failure to state a claim upon which relief can be granted; denying without prejudice the motion for declaratory judgment holding respondent to be in a conflict of interest; and reserving the matter of declaratory judgment for later disposition by motion or plenary hearing. By her letter dated April 17, 1990, the respondent's attorney requested permission to withdraw from the case and, there being no objection to same, I granted the request. Because of travel plans, etc. of the respondent and petitioner's attorney, the matter could not be heard prior to the election.

On April 25, 1990, petitioner's attorney (who by then had entered his appearance in the case); respondent (who by then was pro se); and I engaged in a telephone conference, during which the respondent represented and stipulated to facts including the following: Respondent is the president and owner of 50 percent of the stock of the New Jersey Insurance Agency, a closely held corporation of the state of New Jersey which trades as Young & Perry Insurance of Bridgewater, New Jersey. After respondent assumed his seat on the Board, Young & Perry did receive economic benefit (commissions) for the service of securing insurance coverage for contractors who have provided and do

provide the Board with student transportation. As a result of the Board's April 24, 1990 election, petitioner won and respondent lost seats on the Board. Following the discovery of these facts, petitioner's attorney moved for summary decision on the remaining issue: did respondent engage in a conflict of interest after assuming his seat on the Board?

FACTUAL DISCUSSION

I **FIND** the following **FACTS**, based upon the parties' papers and the stipulations of April 25, 1990.

Respondent is president and owner of 50 percent of the stock of the New Jersey Insurance Agency, a closely held corporation of the state of New Jersey which trades as Young & Perry Insurance of Bridgewater, New Jersey.

In 1989, the respondent acted as agent in securing insurance coverage for Polt Bus Service, Incorporated; Dr. John D. Polt; Tri J. Coach, Incorporated; Amwell Valley Bus Company, Incorporated and others, all of whom have provided the Board with student transportation. See, P-1, P-2 and P-3.

In January 1990, respondent was appointed to fill a vacancy on the Board.

After respondent assumed his seat on the Board, his agency did receive economic benefit (commissions) for the service of securing insurance coverage for the above named school transportation contractors.

During March 1990, the Board and its Transportation Committee, including the respondent, engaged in debate relative to the benefits and costs of student transportation provided by the Board versus that provided by private contractors. (Interestingly, one of the contractors for whom the respondent acted as agent was present and spoke during the transportation committee meeting.) See, P-4, P-5, P-6 and R-1 (paragraph 5).

As a result of the Board's April 24, 1990 election, petitioner won and respondent lost seats on the Board. At the Board's reorganization meeting in several weeks, respondent will leave the Board and petitioner will join it.

In late March 1990, the Board, which provided some student transportation by way of its own vehicles and drivers, debated the issue of whether to use private contractors for all student transportation. In that regard, respondent took part in this debate, voted on a motion and made another motion to invite private contractors to bid on routes presently served by the Board's own busses. (I have not been asked to void any of the Board's actions involving respondent's vote because apparently his motion, etc. did not pass.) See, P-5.

LEGAL DISCUSSION

I. Conflict of Interest

Public policy demands that one who holds public office discharge his duties with undivided loyalty and from this public policy have evolved the concepts of (1) the prohibited "incompatible" conflict that exists when an individual holds two public offices, each of which has interests that compete with the other and (2) the potential conflict that exists when an individual holds an office and has business or personal interests that may occasionally compete with his official duties.

The doctrine of "incompatibility" holds that one cannot hold two public offices where his performance in one office would be subordinate to the other, or subject to its control or requires him to choose the obligation of one office over another. In such circumstances, it is not enough for the office holder to abstain from participation when an area of conflict arises; holding both the public offices is prohibited. See, Jones v. MacDonald, 33 N.J. 132 (1960); Dunn v. Froehlich, 155 N.J. Super. 249 (App. Div. 1978); Kaufman v. Pannuccio, 121 N.J. Super. 27 (App. Div. 1972); and Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971).

Contrasted with the incompatible, prohibited conflict, an official's potential conflict may be avoided by his (1) abstention from the official body's (Board's) actions relating to matters from which he may reasonably derive a "special economic interest" or (2) withdrawal from, e.g. business involving his official body (Board.) See, Salerno v. Old Bridge Bd. of Ed., 6 N.J.A.R. 405, 412 (1984). In this way, the respondent could have also avoided violation of N.J.S.A. 18A:12-2, which provides: No member of any board of education shall be interested directly or indirectly in any contract with the board.

The respondent, during his Board membership, did through his business receive economic benefit related to contracts with the Board and he did participate in debate and vote in favor of inviting private transportation contractors to bid to provide transportation to the Board's students.

Public bidding for services to a board of education is consistent with the public policy of obtaining those services at the lowest reasonable price. See, N.J.S.A. 18A:18A-1 et seq. On the other hand, a public official may be in a conflict of interest while also securing an advantageous contract for the public.

There is no definitive test for the determination of whether an official is in conflict. The determination is a factual one which depends upon the circumstances of the particular case. The determination should not be made with a general feeling of suspicion and instead, should concentrate on whether the relevant circumstances have the likely capacity to tempt the official to depart from his sworn public duty. That is, the public official should not participate in a matter where he might reasonably be expected to favor or promote a special interest. Cf., Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958).

In these circumstances, the contractors for whom the respondent acted as insurance agent would reasonably be expected to bid on such a contract and, since he and his agency did not withdraw from the business of insurance agency for contractors seeking contracts with the Board, the respondent would reasonably be expected to again act as their insurance agent.

On the record made here, I **FIND** and **CONCLUDE** that the respondent did involve himself in a conflict of interest. See, N.J.S.A. 18A:12-2 and N.J.S.A. 52:14B-8.

II. Removal of Respondent from the Board and the Ballot

A limited number of causes are provided for removal of a member of a board of education:

> Whenever a member of a local or regional board of education shall cease to be a bona fide resident of the district, or of any

> constituent district of a consolidated or regional district which he represents, or shall become mayor or a member of the governing body of a municipality, his membership in the board shall immediately cease; and, any member who fails to attend three consecutive meetings of the board without good cause may be removed by it. Whenever a member of a county special service school district or a member of a county vocational school district shall cease to be a bona fide resident of the district, or shall hold office as a member of the governing body of a county, his membership on the board shall immediately cease.
>
> Notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, whenever a member of a board of education is disqualified as a voter pursuant to R.S. 19:4-1, or is convicted of false swearing as provided in section 5 of P.L. 1987, c. 328 (C. 18A:12-2.2), his membership on the board shall immediately cease. N.J.S.A. 18A:12-3.

A conflict of interest is not included among the statutory causes for removal and, since this case does not involve the incompatible, prohibited conflict, therefore, I **FIND** and **CONCLUDE** that the petition fails to state a claim upon which relief can be granted relative to petitioner's demand for removal of respondent from the Board.

Consistent with the above I also **FIND** and **CONCLUDE** that the petition does not state a claim for relief relative to petitioner's demand for removal of respondent from the ballot, although that matter is now moot.

Given the above, on my own motion I have **DISMISSED** the petition's demand for the relief of removal of respondent from the Board and the ballot. N.J.A.C. 1:1-1.3(a); N.J.A.C. 1:1-12.5; and R. 4:6-2(e).

ORDERS

I **FIND, CONCLUDE** and **DECLARE** that the respondent did involve himself in a conflict of interest and I **ORDER** the respondent to (1) refrain from participation in Board actions relating to school transportation provided by private contractors or (2) withdraw from any business activity involving school transportation provided to the Board by private contractors from which there is a potential for the respondent to derive income or interest.

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.

4/30/90
DATE

John R. Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

5/1/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 2 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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CAROLYNN A. PAUZE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
WILLARD R. YOUNG, III,	:	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 his careful and independent review of the instant matter, the Commissioner adopts in part and reverses in part the conclusions of the Office of Administrative Law for the reasons which follow.

Initially, the Commissioner notes the following language:

> As a result of the Board's April 24, 1990 election, petitioner won and respondent lost seats on the Board. At the Board's reorganization meeting in several weeks, respondent will leave the Board and petitioner will join it. (Initial Decision, at p. 3)

Because respondent no longer is a seated member of the Board of Education of the North Hunterdon Regional School District, the relief sought by petitioner, that is removal of respondent from the Board for allegedly being in conflict with it, is now moot. However, the Commissioner views the question raised in this case as being of sufficient public importance to warrant his review of the merits of whether petitioner is in conflict with the Board. See Clark v. Degnan, 83 N.J. 393 (1980). See also DeRose v. Byrne, 139 N.J. Super. 132 (App. Div. 1976).

As to the alleged conflict of interest, the Commissioner's review of the record comports with the ALJ's. ALJ Tassini found that respondent did involve himself in a conflict of interest with the Board. The Commissioner adopts the ALJ's findings and conclusions in this regard for the reasons expressed at pages 4-5 of the initial decision.

However, the Commissioner disagrees with the ALJ's conclusions that because a conflict of interest is not included among the statutory causes for removal of a board member pursuant to N.J.S.A. 18A:12-3, the petition fails to state a claim for relief relative to petitioner's demand for removal of respondent from the Board. The Commissioner finds, contrary to the conclusion of the ALJ, that the matter before him concerns the disqualification of a

board member pursuant to N.J.S.A. 18A:12-2, not removal of a board member pursuant to N.J.S.A. 18A:12-3. Consistent with N.J.S.A. 18A:6-9, the Commissioner's authority to hear and determine controversies and disputes, whenever a challenge arises concerning whether an inconsistent interest exists involving a board member under N.J.S.A. 18A:12-2, the Commissioner is obliged to resolve the dispute and to act to disqualify any such individual found to be in conflict with his or her duties as a board member. It cannot seriously be argued in the face of well-established case law such as Edgar Brown and Oliver Brown et al. v. Board of Education of the City of Newark, 1984 S.L.D. 671, aff'd State Board 683 that the Commissioner lacks authority to disqualify board members in violation of N.J.S.A. 18A:12-2.

In the instant matter, having determined that respondent herein has engaged in an inconsistent interest with the Board, the Commissioner rejects the ALJ's determination that the petition fails to state a claim for relief within the Commissioner's authority to grant. Rather, the Commissioner concludes that prior to the school election on April 24, 1990, when respondent's bid to secure a seat on the Board was defeated, respondent was disqualified from serving on said Board as a result of the events elaborated upon by the ALJ in the initial decision. N.J.S.A. 18A:12-2

Accordingly, for the reasons expressed herein, the initial decision in this matter is affirmed in part and reversed in part.

As a final note, the Commissioner observes that the ALJ below issued an Order on Motion for Emergent Relief in this case on April 12, 1990, which was never transmitted from the Office of Administrative Law for the Commissioner's review pursuant to N.J.A.C. 1:1-12.6(i) and (j). Instead, at the end of the judge's recommended initial decision on Motion for Emergent Relief he affixed the following language:

> This order may be reviewed by Commissioner of the Department of Education, Saul Cooperman, 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. (at p.7)

The Commissioner would draw attention to the distinction between interlocutory review, Commissioner review of which is triggered by appeal by the parties at the time of the ALJ's disposition of the Motion, or at the end of the case, as distinguished from emergent relief which requires Commissioner of Education review within 45 days of the ALJ's disposition of the Motion for Emergent Relief. In the instant matter, because the Commissioner was not served with a copy of the Recommended Initial Decision on Motion for Emergent Relief, the matters heard by Judge Tassini on April 11, 1990 and decided on April 12, 1990, were adopted by the passage of time without the Commissioner's review pursuant to N.J.A.C. 1:1-12.6(j).

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3012-89
AGENCY DKT. NO. 104-4/89

JOHN R. BARRON,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF OCEANPORT, MONMOUTH COUNTY,
Respondent.

Richard K. Sacks, Esq., for petitioner

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

Record Closed: October 30, 1989 Decided: April 30, 1990

BEFORE **RICHARD J. MURPHY,** ALJ:

Statement of the Case and Procedural History

Petitioner John R. Barron, a tenured middle school principal employed by the respondent Oceanport Board of Education (Board), appeals from that Board's action in withholding his 1989-90 employment and adjustment salary increments under *N.J.S.A.* 18A:29-14, as arbitrary, capricious, unreasonable and unwarranted under the circumstances as alleged. The Board claims that it had a reasonable basis to withhold petitioner's increment because of his inadequate handling of an alleged extortion incident between students at the Maple Place School and because of an overall deterioration in the behavioral climate of the school due to lack of adequate discipline.

John R. Barron filed his petition of appeal with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9 on April 10, 1989, it was answered on April 17, 1989. The matter was referred to the Office of Administrative Law on April 24, 1989 for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* And a telephone prehearing conference was held on August 8, 1989. The hearing was held in W. Long Branch on October 24, 25 and 30, 1989, when the record closed. At the hearing, I **GRANTED** John Barron's motion to amend his petition to include both a violation of the Open Public Meetings Act (*N.J.S.A.* 10:4-6 *et seq.*), because of the Board's alleged conduct of a close session meeting on February 13, 1989, and a violation of fundamental constitutional due process rights in connection with that meeting. The decision date was extended until April 30, 1990 because of a heavy backlog of overdue opinions resulting from a pending public utility case and other matters not related to this case. I regret any hardship or inconvenience that this unavoidable delay may have caused the parties.

Issue

The question presented is whether the action of the respondent Board of Education of the Borough of Oceanport in Monmouth County in withholding petitioner's employment and adjustment increment was without good cause under *N.J.S.A.* 18A:29-14 and therefore arbitrary, capricious and unreasonable under the circumstances.

Findings of Fact

The material facts are not in dispute and they involve an allegation of extortion at the Maple Place School in the fall of 1989 which the Board felt was inadequately dealt with by the petitioner, who was and is principal of the school. The basis for the Board's action in withholding petitioner's increment on March 16, 1989 is contained in a letter from Robert I. Price, Superintendent of Schools:

> [o]n Wednesday, March 1, 1989, I will recommend to the Board of Education that any salary or employment increment that would normally be due you for the 1989-90 school year be withheld and that your salary for 1989-90 school year be the same as your salary for 1988-89.
>
> The reasons for this recommendation are made on the basis of my investigation into the extortion incident that occurred at Maple Place and the handling of discipline at Maple Place in general. The specific reasons are as follows:

1. Failure to communicate with the parents of the alleged victims and boys responsible for the extortion throughout your investigation.

2. Failure to communicate with me regarding the extortion matter throughout the investigation.

3. Failure to resolve the fact that extortion was taking place in the school.

4. Failure to communicate to me that the police department called regarding the possibility that there was extortion taking place or had occurred.

5. Having, or allowing, victims of the extortion to be responsible for telling their parents about the situation before personally contacting the parents.

6. Failure to keep documentation about you investigations into the matter of extortion.

7. The fact that the parent of the child who shot the paper clip that hit another boy in the eye was never contacted.

8. The behavioral climate of the school was allowed to deteriorate to an unsatisfactory level due to lack of adequate disciplinary measures. [P-22]

Former Superintendent Price, who had worked with Principal Barron for ten years, testified that he generally directed principals, including petitioner, to keep him informed of what he described as student "incident,s" which he defined as any activity where a student became involved in an unsatisfactory manner. Principals and teachers were required to complete teacher disciplinary notices on problem students (P-1), and also to make office referrals describing incidents and steps taken in response. Dr. Price referred to several of the Board's written policies concerning discipline, to which the parties stipulate. Under policy 5114 (P-14) principals are given the power to suspend students for ten days or less following an informal hearing, and for longer periods after a full hearing (P-14). In the cases of pupils who are guilty of continued serious misconduct which interferes with the opportunity of other students to carry on their learning activities, the principal is required to " exhaust all means of bringing about a correction of the misconduct and shall bring the case before the superintendent," and expulsion may be recommended to the Board, after the parents or guardians are advised and interviewed, and a full due process hearing granted.

As an overall statement of student discipline, the Oceanport Board set forth in policy 5144 (P-15) that it "wishes to ensure the physical and mental health, safety, and welfare of students in the schools and to maintain an orderly environment conducive to learning. Therefore, each staff member shall share responsibility for supervising the behavior of students, and shall enforce the regulations developed by the Superintendent to implement this policy." The policy also makes clear that parents and guardians are to be afforded adequate opportunities to work with school staff in helping, supporting, and correcting students (Ibid). The school district also adopted a policy of cooperation with law enforcement agencies requiring the principal to prevent students from being interrogated by outside authorities without the knowledge of school officials and the parents or guardians and other measures (P-17). Principal and Superintendent are also empowered by Board policy to inspect the students' school lockers in pursuing its *in loco parentis* relationship and also to "employ every safeguard to protect the well being of those children . . . Discovery of illegal or dangerous materials shall be reported to the office of the Superintendent immediately" (P-18).

None of the policies adopted by the Board expressly set out the obligation of a principal to communicate with the Superintendent, as well as involve parents, or to document investigations into pupil misconduct. Dr. Price stated that he wanted to be kept abreast of problems with students and indicated that he required principals to report by phone when any incident occurred. Principals were expected to exercise their administrative judgment and discretion in deciding which matters were serious incidents that should be immediately reported to the Superintendent and Board. Prior evaluations of petitioner Barron by Dr. Price were offered and accepted as to the policies and track record on such communication (as well as to argue that the withholding of petitioner's increment was unduly harsh in light of his prior satisfactory performance). Dr. Price's evaluations of petitioner, in addition to finding his overall performance satisfactory, noted that he had in 1985 "shown firmness when necessary and compassion as needed" in supervising and observing personnel, had followed and implemented all Board of Education policies, and had prepared or supervised preparation of reports, records, lists and all other paperwork appropriate to school administration, which was an area of strength for him. In the area of student contact, guidance and counseling in 1985, and, again, this is relevant only in that it tends to show a prior policy or pattern of communications and goes to the penalty, Dr. Price concluded that "the overall discipline of the school has been very satisfactory," except for the 7th grade which was getting a bit "out-of-hand" according to the teachers. Dr. Price also noted that the petitioner brought about a

change and finished the year in a satisfactory manner, although he noted that "Mr. Barron must stay on top of this situation next year and promote a more positive attitude on the part of the teachers." [P-3 at 2]

Mr. Barron was also described by Dr. Price as "very protective" of his student "children," with a monthly report of all activities for the Superintendent of Schools that was "comprehensive! excellent!" (P-3 at 4). Petitioner's rapport with both parents and the police department was described as very good and excellent in 1985 (Ibid). Dr. Price also rated as satisfactory petitioner's maintenance of records and responsibility for all other duties assigned by the Superintendent of Schools: "At no time have I ever hesitated to call on Mr. Barron for assistance beyond his normal duties. Mr. Barron has been extremely cooperative" (Id. at 5). Dr. Price's evaluation of petitioner for 1986 also found him satisfactory in all areas, including observing and implementing Board policies and regulations, governing student conduct, maintaining records, and relating to parents and the police, and Dr. Price also noted that he had "witnessed encounters between Mr. Barron and individual students. I found him to be able to personable when appropriate and firm when warranted" (P-4 at 3). Principal Barron's monthly report of all activities, needs, etc., for the Superintendent of Schools was found to be "very comprehensive!" (Id. at 5).

Similarly Dr. Price evaluated Mr. Barron's performance as satisfactory for the 1986 school year for July through December and noted that he was "pleased" with the behavior of the students and that several "severe problems" were being handled appropriately, but that some family situations were beyond the principal's control, although communications had been maintained by him (P-5 at 2). Dr. Price observed that "through many conversations, it is apparent that Mr. Barron is knowledgeable about the individual students and expresses his care for their well-being" (Ibid). The annual evaluation for the 1986-87 school year again found Mr. Barron satisfactory in all areas and, as to student conduct, guidance and counseling, Dr. Price noted that "Having substituted for Mr. Barron on many occasions I know firsthand that the overall student behavior is very satisfactory. The children do not disrupt classes, the movement in the halls is good and recess is satisfactory" (P-7 at 3). His monthly reports to the Superintendent continued to be "informative, on time and comprehensive" and he continued to have satisfactory relationships with the parents and favorable relationships with the local police (P-7 at 5). Records continued to be properly maintained in the 1986-87 school year and petitioner was found to respond favorably to any request that the Superintendent made that was not covered by any other areas.

In a non-classroom observation report dated May 2, 1988, Dr. Price noted that he continued to find student behavior very satisfactory and was also satisfied with the work being done with several "difficult" students, about whom there had been fewer complaints that year with no visits from parents (P-10 at 2). Dr. Price's overall evaluation for the 1987-88 school year included that Mr. Barron's preparation of reports continued to be satisfactory ("on time, comprehensive and informative") and that student conduct was "an excellent area for Mr. Barron! The discipline (by my own observation) is very good for a middle school. The 'problem grade' seems to have had a better year in Maple Place than at Wolf Hill (P-11 at 3).

The last evaluation or observation report completed prior to mid-November 1988 noted no problems in the area pertinent to this case. Beyond the general categories of report keeping, student conduct, and reports to the Superintendent, Dr. Price stated that there was no express procedure for the investigation of rumors or incidents of student misconduct, and no express policy as to communications with parents during investigations of rumors of misconduct. There is also no policy or administrative directive for reports of investigations to the Superintendent, beyond that of keeping the Superintendent generally informed as to misconduct and problems.

According to Dr. Price, and others, there were several incidents of student misconduct starting in November of 1988, which were not adequately responded to by petitioner, and not promptly communicated to the Superintendent or the parents involved. These incidents involved two occasions of what has been described as extortion between students, an incident in which another student's glasses were broken, use of profanity by students and failure to contact the parent of a student who had been struck in the eye by paper clip. It was the accumulation of these incidents, and petitioner's alleged failure to control document and communicate them, that led Dr. Price to the conclusion that discipline had unexpectedly deteriorated at the Maple Place School due to Mr. Barron's failure to properly discharge his duties, which warranted the loss of his increment for the 1988-89 school year.

The most unusual and troubling incident for Dr. Price was that involving the alleged extortion or shakedown of students by other students. Principal Barron testified that he first heard allegations of extortion in the fall of 1988, possibly in late September or early October, when one of the teachers at the Maple Place

School heard several students discussing the problem. Teachers brought it to Mr. Barron's attention and he spoke to the students who had been discussing the rumor. They stated that they had heard of a student demanding money in return for not being physically assaulted, a sort of middle school protection racket. Mr. Barron called in the alleged victims, G.F. and D.Y., who denied that any incident of extortion had happened. Principal Barron decided to observe the victims and the alleged extortionist and states that he never observed any further problems between the victims and the alleged extortionist (C.T.). The only matter reported to Mr. Barron by G.F. and D.Y. was an incident in which one of the two had borrowed a sweatshirt from a female pupil, who said that she would have her boyfriend C.T. "muscle" them if they didn't pay for it, but this problem was resolved. Barron stated that he kept a "close eye" on C.T. after the allegations, from mid-December into January, but saw no untoward activity by C.T. against the alleged victims. At this point, Principal Barron did not report this matter to the Superintendent or the police, and did not contact the parents of the involved pupils.

In mid-January of 1989, petitioner again heard a rumor of extortion, which was relayed by a parent at a basketball game who had overheard her daughter on the telephone discussing the alleged "protection" arrangement. Mr. Barron claims that the parent refused to come to his office to discuss the allegation, and G.F. and D.Y. denied any further extortion incidents when interviewed. After hearing this rumor again in mid-January, petitioner was called by Detective John Rawley of the Oceanport Police, who had received a complaint about the extortion. Principal Barron stated that he gave the detective the names of students he had under observation in connection with the extortion incident and testified that the detective said this was a school matter and that the principal was doing all he could. Mr. Barron did not tell the Superintendent that the detective had contacted him as to the extortion rumor, and felt that he did not have enough facts to communicate with the Superintendent on this point, and that such a communication was not required by policy. Mr. Barron also chose not to contact the parents of the victims between November 12, 1988 and January 21, 1989, because he felt he had insufficient evidence in the form of personal observations or testimony from witnesses that anything along the lines of extortion had indeed occurred.

By January these rumors had reached Dr. Price and on January 21, 1989, Saturday, the Superintendent called the principal concerning a fight between two students, as well as the rumors of extortion. Barron told Price that he had unsuccessfully tried to observe the extortion and had been contacted by Detective

Rawley, who provided no information as to the charge. The fact of the extortion was confirmed to Dr. Price by pupil C.C. prior to his conversation with the petitioner a meeting was scheduled to determine how to proceed that following Monday, when Mr. Barron told Dr. Price that he had been unable to confirm the rumors, and had nothing "firm" to communicate to the Superintendent. Dr. Price replied that he was "not pleased" by petitioner's failure to communicate this information and the Superintendent then took control of the investigation, in which C.T. admitted that he received money from C.C. on behalf of G.F. and D.Y. for "not picking on them." C.T. was ultimately suspended for a 5-day period, in addition to an earlier three-day suspension for fighting. In order to call off the apparently aggressive and combative C.T., D.Y. offered money through C.C., and this was accepted. The petitioner spoke to G.F. and D.Y. on several occasions but claims that they gave conflicting accounts as to the details of the transaction. Mr. Barron asked D.Y. and G.F. why they had failed to admit the extortion before and they indicated that they had been embarrassed and afraid of the consequences.

After completing the investigation with Dr. Price, petitioner concluded that D.Y. and G.F. were indeed the victims of extortion and he waited to contact their parents while the students had an opportunity to talk with them first to "clear matters up," in light of their embarrassment. The mother of G.F. did not express any unhappiness that she had not learned of this matter from the principal, but D.Y.'s father was displeased with not being informed. The whole extortion matter was wrapped-up according to the petitioner. Mr. Barron explained in cross-examination that he had not felt that the initial report of the threat concerning the sweatshirt was serious or presented any imminent danger, although C.T. had a history of violence and a discipline record that was one of the worst in the school. The petitioner spoke to D.Y. and the involved female pupil, but did not speak to C.T. because he concluded that there was no need to, in the absence of any testimony that there had been direct threats. Petitioner did not interpret the whole incident as indicative of any extortion, which he does consider as a very serious disciplinary problem.

Petitioner also stated on cross-examination that he spoke to the teacher who had overheard further rumors of extortion before Christmas break, but the teacher was somewhat unclear as to exactly what she had heard by way of rumor, and the petitioner decided that he did not have sufficient information to communicate with D.Y.'s parents, or to pass the matter on to the Superintendent. Mr. Barron did advise several teachers of the extortion allegations, and asked if they would keep their eyes

open for any threats. He chose to keep his investigation low-keyed and not involve the whole staff in order that he might better uncover any clandestine extortion occurring. He also stated, that although he and three staff members were looking for a sign of extortion, no evidence was uncovered and he had no "confirmed source or verifiable victim" and chose not to communicate with any parents or the Superintendent. The petitioner emphasized that he was not aware of any Board policy specifying when he must communicate with the Superintendent except in circumstances of suspension, and viewed the matter as being left to his own sound judgment. He also argued that the decision to contact parents was left to his professional judgment, which he reasonably exercised. On the basis of his conclusion that he was unable to substantiate the allegations of extortion. He stated that he has frequently communicated with parents over disciplinary matters in the past, including the parents of C.T., but failed to do so in this instance because of the absence of any verifiable information as to misconduct. He was also concerned in this instance with fueling rumors of extortion by calling parents and viewed such rumors of intimidation and extortion as commonplace in the 7th and 8th grades.

The mystery of the extortion at the Maple Place School was initially solved by concerned parents, who had heard the same rumors that passed on to Principal Barron. Denise Manzi, parent of three students in Oceanport, heard her children discussing protection pay-offs by students and found a note in her daughter's room from another pupil asking contributions of protection money. Mrs. Manzi's children told her that G.F. and D.Y. had been paying money each week so as not to be beaten up. Although Mrs. Manzi first heard of the extortion in October or November of 1988, she did not speak to the principal about it until the two crossed paths at a basketball game in the first week of January 1989. However when she showed him the note sent to her daughter, petitioner replied, according to Mrs. Manzi, that he was aware of the accusation but felt that it was hard to prove. No effort was made by the principal to call in Mrs. Manzi's daughter for an interview. Mrs. Manzi denies that the petitioner asked her to come down to his office to discuss it and I **FIND** as a matter of fact that the petitioner did not arrange any meeting with Mrs. Manzi to discuss her allegations, although the setting of the conversation, being a basketball game, was not particularly conducive to making these sorts of arrangements. Mrs. Manzi also claims that she offered to give Mr. Barron her daughter's note, which she no longer can find, but the testimony was inconclusive on this point.

As part of the investigation of the incidents of extortion and discipline at the Maple Place School, the Oceanport Board of Education met in executive session on Thursday, February 9, 1989 and Superintendent Price gave Mr. Barron notice of this meeting and of his right to have this matter discussed in public session, (a so-called "rights" notice") on February 3, 1989. Further executive session was held by the Board of Education on February 13, 1989, which was attended by a number of concerned parents, including Denise Manzi. The minutes of that meeting reflect the following statement by Mrs. Manzi, and I include it because it was part of the basis on which the Board of Education acted:

> The first time we realized it was a problem was in the beginning of December. When they [her children] come in from school they usually tell you what went on. E. [her daughter] didn't know I was home and she ran in and grabbed the phone and wanted to know if they killed [D.Y.]. I sat her down and I knew it was [G.F.] and [D.Y.]. In December I found a note written to The girls are giving their baby-sitting money because they don't want to see these kids beaten up. E. was outside by the locker when G.F. got his head bashed in. I spoke to Mr. Barron and explained the situation at a basketball game one day [the first week of January 1989]. G.F. and D.Y. are different kids today. They're in a shell and don't talk. I know it happened and it shouldn't go on. He [petitioner] said it is hard to prove and said thanks for the information. [P-26 at 2]

The mother of D.Y., Margaret Elizabeth Yerves, was also present at the Board's executive session, along with her husband Dennis Yerves. At the hearing, Mrs. Yerves essentially reiterated the comments she had made before the Board which are reflected in the executive session meeting minutes (P-26), and stated that her son, D.Y., who was classified as neurologicaly impaired, went to the petitioner in the fall of 1988 to seek his help to prevent C.T. from assaulting and extorting him. According to Mrs. Yerves, petitioner told her son that there was nothing he could do until he saw them hit him. The petitioner never communicated with Mrs. Yerves, who claims that D.Y. was "in constant torment" due to his abuse at the hands of C.T., who extorted a total of $48 between October of 1988 and January of 1989. D.Y., who had problems in school due to an attention deficiency disorder, said, his mother claims, that kids were being beaten by C.T., including pupil G.R., who was sent to the emergency room. There is no dispute that C.T. did in fact assault G.R. on the school grounds and was subsequently suspended for three days. Mrs. Yerves did not learn until January of 1989 that D.Y. had been roughed up by C.T., or that other students have been subjected to the same treatment.

Also at the Board meeting on February 13, 1989 was Greg Roonan, whose son, G.R., had been assaulted by C.T. and C.C., resulting in the suspension of C.T. Mr. Roonan did not testify at the hearing but Dr. Price testified as to his conversations with Mr. Roonan, who had called the parents of C.T. and C.C. and obtained admissions from both that the extortion had occurred. This is later confirmed by Dr. Price and the petitioner through interviews with the involved pupils, and the parents of C.T.

As to the matter of the allegedly extortion, I make the following **FINDINGS OF FACT**, which track the reasons specified by Dr. Price in his letter of February 23, 1989 for withholding petitioner's increment:

(1) Petitioner John R. Barron failed to communicate with the parents of the alleged victims and boys responsible for the extortion;

(2) Petitioner failed to communicate with Superintendent Price regarding the extortion matter throughout the investigation;

(3) Petitioner failed to resolve the fact that extortion was taking place at the school;

(4) Petitioner failed to communicate to the Superintendent that the police department contacted him regarding the possibility that there was extortion taking place at the school or that it had occurred;

(5) Petitioner did allow the victims of the extortion to be responsible for telling their parents about the situation, before he made any efforts to contact the parents; and

(6) Petitioner failed to keep documentation about his investigations in the matter of the extortion.

There is no dispute of fact as to any of the above findings.

Dr. Price's letter of February 23, 1989 also cites as a basis for withholding petitioner's increment that Mr. Barron failed to contact the parents of a child who had been shot in the eye with a paper clip by another boy, as well as what Superintendent Price describes as the deterioration of the behavioral climate of the

school to an unsatisfactory level due to a lack of adequate disciplinary measures. In addition to the paper clip and extortion incidents, Dr. Price was referring to incidents in which a student's glasses were broken in a fight and profanity was used by another student. Dr. Price testified that fighting was unusual at Oceanport compared to other districts. The paper clip incident occurred when student J.J., at the end of a health class held in the auditorium, shot a paper clip at student D.Z. Petitioner investigated and found that J.J. was the shooter and, because the student had had a few discipline problems in the past, petitioner penalized him by assigning him a safety composition and preparing a note requesting that his parents come in. Due to an oversight, and distraction caused by the extortion incident and a fight in playground, the notice was never sent. There is no dispute as to this fact and I so **FIND.** There is also no dispute that, in late December of 1988, part of Christmas vacation, a student's glasses were bent and broken in an altercation with two other students at the lockers. Petitioner investigated the matter and found that, in the aftermath the boys, who had historically been friends, were friendly still and the student who broke the glasses, C.C., offered to pay for them. Petitioner then concluded that it was an impulsive act, despite C.C.'s history of discipline. Petitioner, who spoke to both sets of parents, imposed no penalty, even in the form of essay writing, because the matter was resolved when C.C.'s parents agreed to pay for the repair of the glasses. Petitioner thought this adequately conveyed the lesson.

As to the use of profanity by students C.T. and G.R., which occurred in three incidents cited by Dr. Price in his testimony, petitioner was not aware of G.R.'s use of profanity, and he responded to C.T.'s use of profanity with a substitute teacher by giving him a "stern warning as to his mouth and the control of it" and told him he wouldn't deal with that particular substitute teacher again. Petitioner was satisfied that C.T.'s record was improving and decided to give him an opportunity to demonstrate his changed attitude. There is no dispute as to the facts of these incidents and I so **FIND.**

Petitioner expressed that his philosophy of discipline was to make sure that infractions met with fair punishment, which is to be instructional as opposed to purely punitive. He states that he frequently sought alternative means to suspension as a way to make the punishment fit the crime or misconduct. He noted no particular deterioration in discipline after November of 1988, although he felt that things became "unnerving" as the holidays approached, as was often the case in each school year. Mr. Barron stated that he had, in the course of his ten years as principal at Oceanport, become familiar with the Board's policy manual and

administrative practice, which were both written and oral. He was not, however, aware of any written or oral direction as to the conduct of investigations or contact with parents, which were both left to the sound discretion of the principal. As to communication with the Superintendent, petitioner noted that one section of the monthly report pertained suspensions of students, with infractions noted. Warnings, detentions, and other minor disciplinary actions were not required to be reported on any monthly basis. Rumors, allegations and preliminary investigations were, so far as Mr. Barron knew, left within the professional judgment of the principal. Nor was there any formal policy requiring communication with the Superintendent after contact from the police. There is no dispute, the parties stipulate, that Dr. Price did not, prior to November of 1988, criticize or have reason to complain of communication problems involving petitioner during his ten years of service as principal at the Maple Place School.

At issue is whether the above facts provide good cause for the action of the Board of Education in withholding petitioner's increment for the 1988-89 school year. There is no dispute that there was no written policy regarding communication with parents following incidents of misconduct by students at school, nor were there any written policies as to communication with the Superintendent or police department, or documentation of investigations.

Arguments and Conclusions of Law

Petitioner acknowledges that his burden is to show that the Board's action in withholding his increment on March 16, 1989 was arbitrary, capricious, and unreasonable and without showing of insufficiency or other good cause. He notes that there is no allegation of insufficiency involved here and argues that there is no other good cause in his conduct, because he violated no policies concerning communication with the Superintendent, police or parents and acted reasonably and soundly in exercising his discretion as a principal. He also argues that the Board violated his fundamental right to due process when meeting on February 13, 1989 when it held a hearing to which it invited members of the public and effectively deprived petitioner of his right to confrontation. He argues that it would be fundamentally unfair to withhold his increment on the basis of directions as to communication which were not previously given to him and thus are pretty much after the fact. He maintains that his overall record was highly satisfactory and any errors of judgment in handling the extortion matter was an isolated incident and not sufficient to support the drastic sanction of withholding of an increment.

The Board argues that it had good cause to withhold petitioner's increment, and was not obliged to give him notice of his deficiencies and an opportunity to correct them, which only relates to the tenure charge of inefficiency and not the withholding of an increment. Oceanport maintains that the circumstances of petitioner's handling of the extortion incident, as well as other examples of deteriorating discipline such as fighting, profanity, and paper clip shooting do to create a scenario of rapidly deteriorating student behavior which is attributable to petitioner's lack of active discipline for a period which warrants withholding of his increment.

Boards of Education are empowered to withhold increments under certain circumstances:

> [a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education . . . The member may appeal from such action to the commissioner under the rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. . . . [*N.J.S.A.* 18A:29-14; emphasis added]

Annual increments are "in the nature of a reward for meritorious service to the school district" and are a management prerogative that serves the purposes of "affording teachers economic security and of encouraging quality in performance." *See, North Plainfield Education Ass'n v. Bd. of Ed. of North Plainfield,* 96 *N.J.* 587, 593 (1984); *see,* also, *Bernards Township Board of Education v. Bernards Township Education Association,* 79 *N.J.* 311, 321 (1979). Lack of knowledge on the part of teachers and principals as to the criteria used by a school superintendent to make a recommendation of withholding of an increment can render that action arbitrary, especially when based on only one criterion of evaluation. *See, Basile v. Bd. of Ed.,* 2 *N.J.A.R.* 199 (1980).

The purpose of the Commissioner's review on appeals of withheld increments is to determine whether the Board had a reasonable basis for its conclusion, and not to substitute his judgment for that of the Board and redetermine for himself whether a teacher's performance had in fact been unsatisfactory. *See, Kopera v. Bd. of Ed. of Town of W. Orange,* 60 *N.J. Super.* 288 (App. Div. 1960). A single incident alone if

intentional and sufficiently serious can provide a basis for withholding an increment. *See, Smilon v. Mahwah Bd. of Ed.*, OAL Dkt. No. EDU 6441-87, aff'd N.J. Comm. of Ed. (May 13, 1988), reversed N.J. State Board (January 4, 1989). Although Superintendent Price cited the general deterioration in the behavioral climate of the school, the primary basis for withholding petitioner's increment was his handling of the investigation of the alleged extortion and his failure to communicate with the Superintendent and parents. Although I found above that petitioner did indeed fail to communicate with parents of the victims and alleged extortionist pupils, and also failed to communicate with the Superintendent or keep adequate documentation about the investigation, I **CONCLUDE** that these matters alone do not warrant withholding of an increment because the petitioner was exercising his professional judgment and discretion and was not guided by any clear written or verbal policy as to how to handle such an investigation.

But, although the principal did not violate any written or clear verbal policies of the Board, I further **CONCLUDE** that he did fail to properly discharge his overriding duty and obligation to protect students by promptly and effectively investigating and resolving allegations of extortion at the Maple Place School and that this failure constituted good cause for withholding his increment. A principal's primary duty is to maintain discipline and order at school and to protect the physical safety and well-being of students. When allegations of extortion were made to the petitioner he responded by, first, talking to the students who denied or minimized the allegations, and then by conducting his own investigation in which he observed the alleged victims and extortionist, and found insufficient evidence to refer the matter to the Superintendent or to notify affected parents. Even after being contacted by Detective Rawley, who had heard of the allegations of extortion, petitioner did not assertively pursue an investigation by talking to parents, or even by talking to C.T., who is alleged to have been the mastermind of the extortion plan. Consequently, C.T.'s extortion by the threat of violence continued and protection payments were made from lunch money and baby-sitting receipts and other resources that the intimidated students were able to come up with. Yet the petitioner was satisfied with the denials of the alleged victims, who, if the allegations were true, would have compelling reason to continue to deny the extortion. By waiting and watching and not involving, or even notifying, the Superintendent or the affected parents, principal Barron failed in his foremost duty to maintain discipline and protect the safety of students. The Board's action in withholding his increment because of this failure was for good cause within the

meaning of *N.J.S.A.* 18A:29-14 and was not arbitrary, capricious, or unreasonable so as to warrant reversal by the Commissioner.

A principal is not expected to solve schoolyard crimes with incisive ease of a Lieutenant Columbo, but must exercise reasonable care and diligence in protecting students from threats of violence and extortion by their peers. The means chosen by the petitioner to investigate the serious allegations of extortion and intimidation were the ineffective and unreasonably restrained ones of watching and waiting without contacting parents, communicating with the Superintendent, or even interviewing the alleged extortionist, who had a history of physical violence. Because of petitioner's failure to take reasonable and effective action to investigate the allegations of extortion, or to inform a higher authority of the allegations he permitted a small reign of terror to exist at the school for several months. This was an unacceptable state of affairs and was caused primarily by the petitioner's failure to take effective action to investigate the allegations of extortion by contacting the parents, interviewing all students involved, and communicating with the Superintendent. Even though the petitioner was not required by written or verbal policy to take these actions, it was his duty to take reasonable and effective steps to promptly and thoroughly investigate allegations of acts of extortion which were taking place on the grounds of the school that he was charged with overseeing. No principal should be held strictly liable for failure to uncover misconduct, but it is not unreasonable for a Board of Education to expect and demand that a principal will take those reasonable actions most likely to thoroughly investigate and swiftly resolve serious allegations of misconduct, and this the petitioner failed to do, as discussed above. On that basis, I **CONCLUDE** that the action of the Oceanport Board of Education in withholding petitioner's increment for the 1989-90 school year was supported by good cause under *N.J.S.A.* 18A:29-14 and was not arbitrary, capricious, or unreasonable.

I further **CONCLUDE** that any procedural defects in the process used by the Board of Education did not negate the factual good cause basis on which the Board acted and should not be relied upon by the Commissioner to reverse the withholding of petitioner's increment. On the basis of the above findings of fact and conclusions of law it is **ORDERED** that the action of the Oceanport Board of Education in withholding the annual salary increment of petitioner John R. Barron is **AFFIRMED**, and is being supported by good cause under *N.J.S.A.* 18A:29-14.

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 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.

April 30, 1990
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

5/1/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 3 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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JOHN R. BARRON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF OCEANPORT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4 and are summarized and excerpted below.

Petitioner first argues that the procedural defects alluded to by the ALJ at page 16 denied him even the most basic due process and should thus have been found fatal to respondent's actions. He states:

> It is respectfully submitted that the procedural defects unduly prejudiced petitioner and violated the very elementary right of due process. It is not disputed that the Board held a private meeting with parents of the district on February 13, 1989. (P-26). Mr. Barron received a Rice notice which afforded him the opportunity to have the discussion in public rather than in private. (P-23). He was not afforded the opportunity to attend the meeting, listen to the testimony and evidence presented by the parents, or cross-examine the people addressing the Board. In effect, the Board held a hearing on February 13, 1989, and excluded petitioner from attendance at the hearing.
>
> While a Board does not have an obligation to afford a teaching staff member a hearing with respect to the withholding of an increment, fundamental fairness requires that, if a hearing is held, the affected staff member must be invited to it and be given the opportunity to hear witnesses and cross-examine them. Fitzpatrick v. Montvale Boro. Board of Education, 1969 SLD 4. Once Respondent Board undertook to consider evidence in the form of testimony from parents which related to petitioner's conduct, it was obligated to afford petitioner the right to attend that meeting and participate in the hearing. In the matter sub judice, the right to attend the hearing was crucial since the very

> testimony offered by the parents was the basis for the recommendation of the Superintendent on which the Board based its decision.
> (Exceptions, Point I, at pp. 1-2)

Petitioner next objects to the ALJ's finding that petitioner violated his duty to protect students, particularly since no opinion was offered as to what would have constituted appropriate action under the circumstances and it is undisputed that there were no policies or procedures to guide petitioner in exercising his professional discretion. He avers:

> Petitioner, in his professional judgment, acted as he thought best under the circumstances. While the Superintendent may have acted differently, such a difference of style or opinion is not a sufficient basis to conclude that petitioner did not act appropriately. The Random House Dictionary, Concise Edition, 1983, defines appropriate as "suitable for a purpose or use." There was no testimony or evidence presented that petitioner acted contrary to established or recognized standards for conduct in a similar situation. The incident or series of problems which were presented to petitioner required his daily professional judgment. He and only he was in the school environment daily dealing with the students involved. Caution was exercised because Mr. Barron did not want to cast blame without sufficient basis. This is not a situation in which the principal did nothing. Rather, Mr. Barron regularly observed and spoke with the students involved. While he may have had suspicions, he never felt he had sufficient basis to confront parents or take disciplinary action.
>
> It is interesting to note that the parents who took time to complain about Mr. Barron to the Board of Education never took the time to come to school to see Mr. Barron and express to him their fears or concerns. It was only after some students admitted what they had done was action taken. Mr. Barron tried to have students tell him what was going on, but petitioner was met with denials on each attempt.
>
> Hindsight is always easier than making decisions under the circumstances as the events unfold. Petitioner acted and behaved as he thought appropriate in his professional judgment under the circumstances. The testimony and evidence presented by petitioner clearly showed that he did not violate a duty or obligation to protect his students. The action of the Board reflects a

> reaction to parental pressure and was not warranted under the facts presented.
> (Id., at pp. 2-3)

Finally, petitioner objects to the severity of penalty for this one incident, given his documented history of overall excellent performance and the fact that his action constituted not willful misconduct or disregard of accepted norms but a different professional opinion as to how to deal with a particular situation in the absence of district guidelines. He argues:

> Petitioner has not been cited for disregarding district policies or directives and, in fact, the district has no policy or administrative directive governing the handling and reporting of investigations. The Respondent district, by withholding petitioner's increment, has identified the way in which it would like investigations to be handled and has sought to penalize the petitioner for not acting according to standards developed after the incident was concluded. Fundamental fairness precludes the retroactive application of standards of conduct. (Id., at p. 3)

In reply to petitioner's first exception, respondent (hereinafter "the Board") contends that petitioner had ample notice of all occasions when the Board intended to discuss the incidents forming the basis of his increment withholding, referencing three Rice notices in evidence (R-1, R-2 and P-23), and that in each case petitioner declined to have the matter discussed in public. Further, a Board committee met with petitioner prior to the final meeting at which it made a full report to the Board on petitioner's handling of discipline, so that he was not denied an opportunity to be heard. Moreover, Superintendent Price wrote to petitioner on February 23, 1989 (P-22) to notify him and apprise him of the reasons that he would be recommending increment withholding to the Board on March 1 (the Board so resolved on March 16, R-6). Petitioner was thus afforded both ample notice of the Board's intentions and substantial opportunity to respond, factors which clearly distinguish the instant matter from Fitzpatrick, supra, wherein petitioner had no notice that his increment was to be withheld and no opportunity to speak on his own behalf.

The Board addresses petitioner's second exception by noting that the ALJ was under no obligation to identify and define what might have constituted a prompt and effective investigation in this case; it was enough for him to find, as he did on page 16, that what was done was totally insufficient under the circumstances and therefore the Board's decision to withhold an increment was warranted. The Board construes petitioner's third exception as an argument that the single incident involved herein does not constitute a basis for withholding, and replies that if single incidents can be found to warrant dismissal of tenured staff, they certainly can be found to justify withholding of increment.

Upon careful review of this matter, the Commissioner finds no basis to upset the Board's determination to withhold petitioner's increment.

Initially, the Commissioner is unpursuaded by petitioner's argument that he was denied procedural due process. Petitioner was properly notified of all meetings at which the matters that ultimately formed the basis for his increment withholding were discussed and, had he so chosen, could have requested any or all such meetings to be held in public where he would have been free to attend, if not necessarily to participate, as neither Rice rights nor decisional law confer an entitlement in this area. Moreover, after the disputed meeting and prior to the decision to withhold his increment, petitioner met with the committee of the Board charged with investigating these matters and thereby had full opportunity to be heard on his own behalf. Finally, petitioner received both due notice that the superintendent would be recommending withholding, and the reasons for it, and notice of the meetings at which the Board would be discussing this recommendation. Petitioner therefore had ample opportunity to respond to both the allegations against him and the concerns of the Board and the superintendent.

The case cited by petitioner to the contrary (Fitzpatrick, supra), as noted by the Board, stands only for the proposition that before an increment can fairly be withheld the affected staff member must be notified and given an opportunity to speak on his own behalf. Standing alone, it does not support petitioner's contention that the Board's procedure was fatally flawed because petitioner did not attend or participate in the initial closed session at which parents expressed their concerns on discipline at Maple Point. Indeed, that meeting did not even deal with the eventual increment withholding, but served only as the starting point of the district's investigation of the matters that eventually led to the withholding decision.

Moreover, the Commissioner cannot concur that the instant matter represents nothing more than a difference of professional opinion as to how to handle a particular situation, as alleged by petitioner. Clearly, what led to the Board's criticism of petitioner's procedures was not that they failed to conform to desired practice or standards, but that they were demonstrably ineffective in resolving serious discipline problems to which they nonetheless continued to be applied. It may well be that in choosing and continuing with his methods petitioner was merely exercising his professional discretion in an area where the Board or superintendent provided no guidance; however, when the results so seriously called petitioner's judgment into question, particularly over a period of many months, the Board cannot be faulted for considering these matters in its assessment of his performance for the year. On the contrary, in the absence of such consideration, evaluation of any staff member whose essential duties entail significant exercise of professional discretion would be rendered meaningless.

Accordingly, for the reasons expressed therein together with the additional reasons set forth above, the Commissioner adopts the initial decision of the Office of Administrative Law affirming the action of the Oceanport Board of Education in withholding petitioner's increment for good cause pursuant to N.J.S.A. 18A:29-14.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8669-89
AGENCY DKT. NO. 288-9/89

IN THE MATTER OF THE TENURE HEARING OF DONALD W. CHRIST, CHERRY HILL SCHOOL DISTRICT,

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William C. Davis, Esq., for petitioner, Board of Education of Cherry Hill School District (Davis, Reberkenny & Abramowitz, attorneys)

Steven R. Cohen, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: April 2, 1990 Decided: May 4, 1990

BEFORE **NAOMI DOWER-LA BASTILLE, ALJ:**

The Board of Education of Cherry Hill School District (Board) certified tenure charges against Donald W. Christ on September 11, 1989 alleging one incident of conduct unbecoming a public school teacher. On November 13, 1989, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14f-1 et seq. At a prehearing conference on December 20, 1989, the parties agreed that two of the three issues posited should be determined on the papers.

The Board's contention at prehearing was that respondent was convicted and forfeited his position, thus rendering a plenary hearing on the charge of conduct unbecoming a teacher unnecessary. Respondent's position was that an Administrative Law Judge (ALJ) has no jurisdiction to interpret the forfeiture statute and declare a forfeiture of position. In the event the ALJ determined jurisdiction, respondent then argued that the contempt judgment issued by the Superior Court is not for an offense subject to forfeiture of position under N.J.S.A. 2C:51-2.

On March 12, 1990, the undersigned ALJ issued an opinion on motion which determined the issues of jurisdiction to interpret the forfeiture statute and of whether or not the contempt of court imposed on Christ was an offense subjecting him to forfeiture of employment. My order and decision dated March 12, 1990 is made a part of this initial decision by reference. Having determined the threshold issue of jurisdiction positively and the forfeiture issue in favor of respondent, I heard the remaining issue of conduct unbecoming a teaching staff member at plenary hearing on April 2, 1990. The record closed on that date. A list of exhibits entered into evidence is appended to this decision.

The basic conduct of tenured mathematics teacher Donald Christ which the Board alleges was conduct unbecoming a teaching staff member sufficient to warrant dismissal, was not disputed. On June 5, 1989, Christ drafted and signed in the name of George Shubic, his mathematics department chairperson, a letter on the letterhead of the Cherry Hill Public Schools. The letter requested postponement of Christ's divorce case scheduled for June 12 and 13, 1989 on grounds that Christ's end of the school year duties made it imperative that he be present during the last week of school, when his court appearance had been scheduled. Christ had asked Shubic to sign such a letter on his behalf to delay the court proceedings, but Shubic had refused. Christ gave the letter to his attorney who forwarded it to J.S.C. Gaydos; in reliance upon the letter Judge Gaydos postponed the divorce hearing. The civil contempt adjudication followed. Respondent's factual presentation focused on his state of mind at the time of his action, the reasons for it and the reasons why the sanction of dismissal should not be imposed. In addition to respondent, he presented as a witness, James P. King, a part-time teacher in the Cherry Hill district and colleague in one of respondent's supplemental employments who served as a confidante to Christ during the period just prior to the divorce proceeding.

King testified that he and Christ sold insurance for Phoenix Mutual Life Insurance Company out of its Marlton office. Christ called or spoke to him every day between March 1988 and October 1989 "to vent his problems" concerning the ongoing divorce proceedings and his financial problems. King described Christ during this period as extremely nervous, under duress, constantly biting his nails and "a driven man." Christ told King he did not really want the divorce, and that he felt everything was being taken away — his wife of many years, his children and his place to live. King noted that Christ was "quick with people" self-absorbed with his problems and not a nice person to be around during that period. Only three weeks after meeting King, Christ asked him for a loan of $5,000, citing terrible problems with creditors and the need to save his home. King

refused. King believed that Christ felt his house was the last thing he had to hang on to. He needed money immediately for refinancing the house and for creditors. King was aware Christ had various jobs, including selling insurance and selling swimming pools, in addition to his teaching position. King believed Christ eventually obtained the money. After his divorce in October 1989, Christ would call King only about once a month.

Respondent testified that he is now age 40 and still lives in the marital residence in Medford to which his family moved in 1976. He married when he was 19 years old on July 31, 1976, having known his wife since 1969. He began working as a teacher for the Cherry Hill District in September 1973, the same year he graduated from college. In 1978, Christ and his wife opened a helth food store in Medford where they lived. His wife worked from 10 a.m. to 3:30 p.m. and respondent worked from 3:30 p.m. until closing. The business was so successful that in 1981, Christ took out a $55,000 equity loan on his house and opened a second store in Voorhees. While his wife ran the first store, they hired a manager for the second, but Christ worked there from 3:30 p.m. to closing at 9 p.m. Unlike the Medford store, there was competition and high rent at Voorhees, and the second store lost money, but Christ was hopeful, and allowed the first store to support the second for two years; both were forced to close by 1984 or 1985. Christ testified that he was sued by ten or twelve creditors, "mostly" due to business and liens were placed on his house. Cross-examination revealed that the creditors were not "mostly" business creditors, but included various Atlantic City casinos.

According to respondent, the business failure placed a tremendous strain on the marriage because "we were used to a certain life style" and made "three or four times" the salary of a school teacher. In school years 1986-87 and 1987-88, respondent took a leave of absence to go into other business. It is not of record why the School District would grant a leave of absence for such a purpose. In March 1987, respondent's wife filed for divorce. The couple had two children, aged five and three. During his leave of absence, respondent had tried several jobs to try to make more money than he made as a teacher. He had a stock broker acquaintance who told him he could make substantial money as an insurance salesman. Christ had been working at Phoenix Mutual in March of 1987, when his wife filed for divorce. He claimed that when he came home in September 1987, his wife was gone and had taken most of the furniture. He also stated that he learned in September that no bills had been paid after March 1987, and that the bank was foreclosing on the house.

Respondent's interest was to save the house. He felt that his wife was trying to force foreclosure. During the period of high income, Christ had put very substantial monies into improving the property. He was afraid it would be sold at a sheriff's sale and his last tangible asset would be gone. He also felt that it would affect visitation of his children since he had no other place to live. After his wife moved away in September 1987, the court ordered that the house be placed on the market. Fortunately for Christ, his wife had placed a high price on it and it wasn't selling. Respondent needed $10,000 to $12,000 and a refinance of the mortgage. He tried to borrow money from everyone he knew. His wife refused Christ's settlement offers. He was aware that the plenary hearing of his divorce case in June would foreclose a settlement opportunity and he still didn't have enough money to save the house. The date certain of June 12 and 13, 1989 set by the court was crisis time to respondent. In fact, the postponement he achieved through forging an excuse for an adjournment and the subsequent period needed to conclude the contempt proceedings and reschedule the case allowed respondent to achieve his purpose. He obtained enough money to conclude a settlement with his wife prior to the divorce hearing in October 1989.

The thrust of respondent's argument and the facts presented were that respondent's conduct was understandable and somewhat excusable because of his state of mind at the time. It was represented that Christ was beside himself, emotionally unbalanced at the loss of his wife and children and clung to his house as a kind of security blanket. In that context, respondent is represented as a somewhat broken man who now seeks to return to the profession he was raised to respect, his dreams of financial glory having dissipated in a major crash. To some extent this is true and indeed, respondent's able counsel would not make such representations if the facts could not arguably support such a conclusion. The facts which were elicited on cross-examination could be interpreted to support another view of respondent's character, however. These facts and that view prevail in my findings.

FINDINGS OF FACT

1. Donald W. Christ began working as a teaching staff member in the Cherry Hill District in 1973. He became tenured as a mathematics teacher and was assigned to the Beck Middle School where his immediate supervisor in 1989 was George Shubic, Department Chairperson.

2. Christ married in 1976, after several years of teaching. He aspired to a more affluent life style than the teaching profession would allow, and with the assistance of his wife, who worked at the business until his school day was over, the couple opened a health food store in 1978 which was very successful.

3. The Christs opened a second store in Voorhees in 1981. To do so, respondent had to take out an equity loan of $55,000 on his house. He also had to hire a manager for the store and he himself worked there from 3:30, after his teaching job, to its 9 p.m. closing time. The new store had competition and was not successful, but respondent kept it going until 1983, subsidizing it through profits on the first store.

4. The first health food store was so successful that Christ made two or three times his teaching salary from it. He and his wife took lavish vacations, bought new cars and spent a lot of money improving their house during these years.

5. Even though the second store failed, Christ was confident that the first was a bonanza: so much so that he personally refused a $50,000 offer from a health food chain to buy the first store. Christ's refusal was contrary to his wife's judgment. The chain store established a branch down the street and Christ's first store failed due to competition. He closed it in 1985.

6. In 1986, Christ needed more money than the teaching profession could provide to pay his creditors, not only creditors from the failed businesses, but also casino creditors, for during his years of enhanced life style, Christ had incurred some habits which resulted in substantial debts to casinos of between $5,000 to $25,000. He had markers out of $1,000 to $5,000 per casino.

7. Seeking more financial rewards, Christ encountered a "financial planner" stock broker who advised a new vocation, selling insurance for CIGMA, which promised rewards in three figures.

8. Christ took a leave of absence from his teaching job in 1986-87 and 1987-88 school years. He worked for CIGMA, but didn't make enough money. During the period 1985 to 1988, his wife could not work as she had done at the health food stores, because they had two young children.

9. Since he wasn't making the money he anticipated at CIGMA, Christ also sold Kayak Pools from about 1988 to 1990. He began work for Phoenix Insurance Company in March 1987 because CIGMA was not remunerative enough.

10. Christ's wife filed for divorce in March 1987. After his wife left the family home in September 1987, the court ordered that it be sold. Since the home was the last remaining asset Christ had, he did everything possible to secure it, including going back to work for the Cherry Hill District in 1988-89 school year, since he could hold down that job and still work for Kayak Pools and sell insurance after school hours. He also tried to borrow money everywhere, including from acquaintances whom he had only known for a month. He did manage to save the house from foreclosure and continued to live there.

11. Christ was unable to obtain enough money to purchase his wife's interest in the house when, in June 1989, the court set a date certain for his divorce hearing. To buy more time, he forged his supervisor Shubic's signature to a letter on school stationery, purportedly claiming he could not be spared from his employment during the last week of school.

12. Although he was judged in contempt of court as a result of his actions, Christ obtained his end of buying time to get enough money to save his only asset due to the postponement of his divorce proceeding.

13. Respondent was suspended from his teaching position on September 1, 1989 after certification of charges and received no salary until February 1, 1990.

DISCUSSION AND DISPOSITION

The above findings demonstrate that respondent's motives were consistently venal and self-serving. Respondent did not return to teaching after his health food stores failed. He found more remunerative work in 1986-87 and 1987-88. It was only after his wife filed for divorce and left the marital abode in 1987 that respondent returned to teaching for the 1988-89 school year. His job as a teacher was simply a fail-safe source of income and one which would reflect a lower income at the time of the divorce hearing. The reasons I discuss respondent's relationship to teaching as a profession is that in summation, respondent made a point of Christ's identification with the profession of teaching. Respondent's testimony implied that the only means of satisfaction and respect left to him was the teaching profession, which was his first love. Respondent's conduct for the past five years controverts his current pretensions.

Respondent also argues that the effect of his conduct on the district was minimal since it did not involve staff other than his supervisor and affected no students. He cites cases in which teachers were penalized only two weeks' salary for anti-semetic remarks (Blasko, 1980 S.L.D. 987, 81 S.L.D. 1392), 30 days for threatening a school secretary with a knife (Cohn, 1983 S.L.D. 633), 120 days for using the term "nigger" in a joking way (Ference, A-130987T7, April 18, 1989) and the withholding of an increment for use of profane and vulgar language and threatening bodily harm to a pupil. (Glassboro BOE v. DeMarco).

The Board argues that the essence of Christ's actions was dishonesty in that he deliberately planned action intended to deceive others for his own selfish interests. The Board points out that respondent clearly intended to make a career change during the two

years he was granted a leave of absence and he has thus demonstrated his lack of interest in the profession. The Board also pointed out that Christ had repeatedly placed himself in situations of financial duress by lavish spending, incurring large gambling debts, risking the equity in his home, and refusing a $50,000 buyout offer for his store.

An analysis of Christ's conduct illustrates how seriously I regard it. Respondent's wife filed for divorce in March 1987. Their house was the only asset. She obtained a court order to place the house on the market in September or October 1987. Christ sought to avoid the date certain set by the court in June 1989 to forward his financial interests. He planned to use the school district and his supervisor to achieve his ends. His supervisor, George Shubic, refused to do what Christ wanted. That did not matter to respondent. He used a school letterhead and forged Shubic's name, thus implicating Shubic in a very distasteful situation. With the letter, Christ deceived his own attorney, deceived the court and obstructed the administration of justice. At the contempt hearing, he suggested to the court that delaying the trial was only part of his reasons for forging the letter, "the other part was that it was the last week of school." (P-1), 13T25 to 14T4). In fact, his motive was entirely to protect his last asset by delaying the trial. The effect of the long drawn out divorce proceedings on the other party was irrelevant to respondent.

If respondent had been convicted of a forgery or a disorderly persons offense touching his employment (and there is no doubt that his offense touched his employment), N.J.S.A. 2C:51-2 would mandate forfeiture of position. I **CONCLUDE** that the levels of deceit in respondent's conduct exceed in gravity those of many convictions mandating forfeiture. A teacher is a model to his students. For this reason the conduct unbecoming a teaching staff member exhibited by respondent cannot be mitigated. His action does not fall into the class of cases in which a foolish act was done in a time of mental or emotional derrangement or there was bad judgment in an attempt to be humorous. Respondent's deceits were multiple, studied, deliberate and for financial purposes. He used his position, his supervisor and the system to his ends. At age 40, respondent is a relatively young man. Although he worked over ten years for the Board, he has extensive experience in other endeavors. He has had no prior offenses. My discussion has addressed the factors to be considered as set forth in In re Fulcomer, 93 N.J. Super. 404, 422 (App. Div. 1967).

The conduct of respondent, in addition to being of the kind of dishonesty which could have resulted in criminal charges, was akin to misrepresentation and misappropriation because of his venal motives. The Commissioner has dismissed staff for misrepresentation of academic credentials to obtain a higher salary. (Deer, 1975 S.L.D. 752, 762, October 22, 1975; Pitch 1975 S.L.D. 764, 773, November 25, 1975.) The reasons why dishonesty in a school setting call for a severe penalty have been expressed in In re Tordo, 1974 S.L.D. 77, 98.

> "***Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, only only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully *** violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner.***" (at pp. 98-99)

The example which respondent set for students by his conduct is one which is not acceptable or excusable for any reason in my view. It is sufficiently flagrant to clearly demonstrate unfitness.

It is therefore **ORDERED** that Donald W. Christ be **DISMISSED** from his tenured teaching position effective as of the date of certification of charges on September 11, 1989.

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.

May 4, 1990
DATE

NAOMI DOWER-LA BASTILLE, ALJ

Receipt Acknowledged:

5-8-90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 9 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

ij

IN THE MATTER OF THE TENURE	:	
HEARING OF DONALD W. CHRIST,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF CHERRY HILL,	:	DECISION
CAMDEN COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondent and replies by petitioner were timely filed pursuant to N.J.A.C. 1:1-18.4 and are briefly summarized below.

Respondent (hereinafter "Christ") first excepts to the ALJ's characterization of his testimony, objecting in particular to her having made an issue of his gambling debts, to her construing his 1986-87 leave of absence as a lack of commitment to teaching and to her imputation of purely financial motive to his attempt to save his home. In the first instance, the debts were legally incurred and not misrepresented as business debts, and are in any case irrelevant to the tenure matter at hand; in the second, the ALJ's characterization is belied by the fact that Christ continued teaching even during his years of financial success, when he might have left the profession to devote full time to more lucrative ventures; and in the third, the ALJ competely disregards the testimony of "neutral witness" King as accurately summarized on page 2 of the initial decision and ignores the "sentimental value [of] of residence which would be familiar to his children who had already been traumatized by the divorce." (Exceptions, at pp. 1-3)

Christ next excepts to the tone and thrust of the initial decision's "Discussion and Disposition" section, chastising the ALJ for a host of speculative and subjective observations totally devoid of support in the record. In particular, he objects to her characterization of Christ's teaching as "simply a fail-safe source of income and one which would reflect a lower income at the time of the divorce hearing" and to her comments to the effect that "[Christ's] motives were consistently venal and self-serving*** [seeking to] protect his last asset by delaying the trial [with no concern for] the effect of the long drawn out divorce proceedings on the other party***" especially given that neither Christ nor anyone else testified to the substance of the divorce proceedings or their impact on Christ's ex-wife. (Initial Decision, at pp. 7-8) He further objects to the ALJ's "leapfrogging" to accept the Board's contention that he intended to make a career change during his two-year leave of absence, when the evidence clearly shows that he was only attempting to fend off his creditors through opportunities for greater income and that he chose to continue teaching rather than pursue business ventures on a full-time basis.

Finally, Christ excepts to the ALJ's penalty of dismissal as too harsh, reiterating his reliance on Blasko, supra; Cohn, supra; Ferenz supra; and DeMarco, supra, and contending that, had the ALJ properly analyzed and applied those decisions, she would have considered Christ's mitigating circumstances and rejected dismissal as a penalty for his far less egregious offense. He further cites In the Matter of the Tenure Hearing of Wolf, 231 N.J. Super. 365 (App. Div. 1989), Cert. denied 117 N.J. 138 (1989) and In the Matter of the Tenure Hearing of Jude Martin, School District of the Borough of Union Beach, Monmouth County, decided by the Commissioner on July 14, 1988, as additional evidence of the excessiveness of the ALJ's penalty, and contends that analysis of his conduct under the standards of Fulcomer, supra, will show that a penalty less than dismissal is warranted in his case.

In reply to Christ's exception to the ALJ's characterization of his testimony, the Board notes that the ALJ had the opportunity to observe witnesses and assess their veracity, and that she did so in the context of Christ's interposing a defense focusing on his state of mind at the time he took the disputed action. In response to the cases cited by Christ in support of penalty other than dismissal, the Board notes In the Matter of the Tenure Hearing of John Ahern, School District of the Township of Middletown, Monmouth County, decided October 24, 1985, where a teacher was found guilty of unbecoming conduct for forging a student's signature, thereby committing an act of dishonesty and setting a negative example for students; and In the Matter of the Tenure Hearing of Daniel Tomassone, Camden County Vocational School District, decided August 31, 1989, wherein the Commissioner rejected a proposed settlement because the charges involved allegations of dishonesty directly related to respondent's teaching duties.

Upon careful review of the record, the Commissioner concurs with the ALJ that dismissal is the appropriate penalty in this instance. To find otherwise, the Commissioner would have to hold either that Christ's conduct was not sufficiently flagrant to merit dismissal or that mitigating circumstances preclude application of this penalty to him. Neither conclusion is warranted in the Commissioner's view.

Initially, the Commissioner notes his concurrence with the ALJ's determination, contained in the opinion on motion referenced on page 2 of the initial decision, that a summary contempt of court does not fall within the term "offense" as intended by N.J.S.A. 2C:51-2, so that Christ's employment was not subject to automatic forfeiture as a result of the Superior Court's judgment against him. However, like the ALJ, the Commissioner views Christ's behavior as far more serious than many offenses of dishonesty which would have led to forfeiture. Not only did it relate directly to his school employment, it represented a deliberate, calculated attempt to manipulate and use to his own advantage the deference properly accorded to school teachers in situations where conflicts with their duties to children arise. In acting as he did, Christ compromised his profession, violated the public trust and obstructed the course of justice for his own ends.

Christ argues that the ALJ mischaracterizes his state of mind at the time he undertook his deception and his motivation for so doing, both factors which under Fulcomer, supra, would militate against imposing the penalty of dismissal. He further objects to her characterization of his self-professed devotion to teaching. However, he offers the Commissioner no meaningful basis on which to overturn the credibility assessment of the ALJ, despite the fact that his entire defense hinges on his own credibility and that of his one witness. Christ asks the Commissioner to cast a different light upon the events interpreted by the ALJ, but provides no hearing transcript or other basis that could justify setting aside the first-hand observation of an experienced trier of fact. Nor does he provide any of the supporting personal or professional evidence -- such as testimony from colleagues and students as to character, effectiveness and commitment, or indications of an underlying physical or mental disorder -- that turned the tide in prior cases where lesser penalties were imposed by the Commissioner for offenses similarly egregious at first sight. Although the Commissioner concurs with Christ that the ALJ appears to have made some specific speculative comments not supported by the record, these do not undermine the basic thrust of her characterization. On the basis of the record before him, the Commissioner fully agrees that Christ's forgery (Petition of Appeal, Exhibit A) was not an impulsive, desperate moment of bad judgment blemishing the career of an otherwise exemplary teacher, but a shrewd, carefully crafted means of extricating himself from an unpleasant and potentially decisive situation until he could meet it on his own terms. It is also worth observing that Judge Tunney of the Burlington County Superior Court explicitly stated, in sentencing proceedings for the contempt citation wherein Christ's defense was much as it has been in these proceedings, that he saw "no justification whatsoever" for Christ's actions. (Exhibit P-2, at p. 5)

Accordingly, in concurrence with the recommendation of the Office of Administrative Law, Donald W. Christ is dismissed from his tenured teaching position as of the date of the Commissioner's decision, a copy of which shall be forwarded to the State Board of Examiners for its consideration pursuant to N.J.A.C. 6:11-3.7(b).

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

SCOTCH PLAINS-FANWOOD BOARD OF EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
ALBERT J. SYVERTSEN,	:	DECISION
RESPONDENT.	:	
	:	

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

For the Respondent, Albert J. Syvertsen, Pro Se

The matter was opened before the Commissioner by way of a Petition for Declaratory Judgment filed by the Scotch Plains-Fanwood Board of Education (Board) with respect to a dispute it has with respondent, a Board member, over his refusal to recuse himself from a closed session of the Board wherein it wishes to discuss litigation filed against it by respondent. More specifically, the Board requests the Commissioner to construe the provisions of N.J.S.A. 18A:12-2 to allow the exclusion of respondent from that portion of its closed meeting pursuant to N.J.S.A. 10:4-12b(7) in which it discusses said litigation.

Respondent's litigation against the Board consists of a Petition of Appeal filed with the Commissioner pursuant to N.J.A.C. 6:24-1.1 et seq. in which he alleges that the Board engaged in certain wrongful acts concerning the contract issued to the district's superintendent.

The Commissioner accepted the request to decide the matter on a declaratory judgment basis. N.J.A.C. 6:24-2.1

SUMMARY OF PARTIES' POSITIONS

The Board argues, inter alia, that the decision in Board of Education of the Borough of Barrington, Camden County v. Theodore T. Heins, decided April 24, 1986 is applicable to the instant matter. In the Barrington matter the ALJ determined that a board member with a suit against the board may be excluded from a closed session wherein the board attorney was discussing strategy for litigating the suit. The decision reads in pertinent part:

> ***However, a real problem exists for the Board because of Mr. Heins' suit and the fact that he remains a Board member.
>
> The Board solicitor is bound by statute to save

> harmless the Board members and the Superintendent, from any act arising out of their duties (N.J.S.A. 18A:12-20; 18A:17-20). In carrying out this responsibility, he must meet with the Board in executive session to decide strategy. In these executive sessions it is ludicrous to have respondent in attendance while his litigation against the Board is being discussed.
>
> Accordingly, Mr. Heins is hereafter barred from that portion of any executive session called by the Board for the sole purpose of discussing his litigation against the Board. This Order will terminate upon the completion of respondent's litigation in Superior Court.
>
> (Slip Opinion, at pp. 3-4)

The Board also cites in support of its position Woodstown-Pilesgrove Regional Board of Education v. John J. Ketas, 1980 S.L.D. 1563; Board of Education of the City of Newark v. Edgar Brown et al., 1984 S.L.D. 671; and Aldom v. Borough of Roseland, 42 N.J. Super. 495 (App. Div. 1956).

Respondent urges that his exclusion or implied removal as a Board member under N.J.S.A. 18A:12-2 from a closed session is unwarranted as the litigation pending against the Board which he filed, like that in Bd. of Ed. of Newark, supra, does not constitute a claim against the Board pursuant to that statute. N.J.S.A. 18A:12-2 reads in part:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor***.

Respondent avers that said statute contains no provision that would allow or require him to be excused from his duties and responsibilities when he is not disqualified from board membership under N.J.S.A. 18A:12-2 and that none of the case law cited by the Board leads to that interpretation either. Moreover, he believes it essential he be present during closed session discussion of the litigation so as to represent those who elected him.

Respondent also avers that the business of his litigation should be undertaken at an open public meeting in accordance with the requirements of the Open Public Meetings Act (OPMA). As to this, respondent argues that the exception to the OPMA contained in N.J.S.A. 10:4-12b(7), i.e., pending or anticipated litigation, must be viewed in relation to the Legislature's intent as expressed in its declaration of policy contained in the act which reads in pertinent part:

> The Legislature finds and declares that the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to

> the enhancement and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society, and hereby declares it to be the public policy of this State to insure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion.***
>
> (N.J.S.A. 10:4-7)

In respondent's view the subject of the litigation in the instant matter cannot be construed as "***circumstances where otherwise the public interest would be clearly endangered***" because its purpose is in the public interest and it fits the criteria stated above. (Respondent's Brief, at p. 3) He argues among other things that litigation per se should not be the indicator of endangerment but rather the purpose of said litigation. Thus, according to respondent, there would be no cause for the Board's request to exclude him from a closed session if the business concerning his litigation were rightly recognized by the Board as a subject falling under the requirement for an open meeting.

Finally, in rebuttal to the Board's position, respondent contends that Bd. of Ed. of Barrington, supra, is not applicable because

> (1) the decision is based on characterization of the factual situation, rather than on a legal basis; and
>
> (2) different facts are readily distinguishable from the cited case; and also,
>
> (3) a flaw in the representation of the situation the ALJ perceives he is adjudicating.
>
> (Respondent's Reply Brief, at p. 1)

* * * *

The Commissioner has carefully reviewed the arguments of the parties and concurs with the Board that respondent may be excluded from a closed session of the Board, wherein it is meeting with its attorney to discuss the litigation respondent has filed against it but not for the reasons advanced by the Board as shall be explained below.

Despite respondent's arguments otherwise, the Board is entitled to discuss in private session the litigation to which it

has been named as a party-respondent by Mr. Syvertsen. The plain and unequivocable wording of the OPMA allows a public body such as the Board herein to exclude the public from discussions involving:

> Any pending or anticipated litigation or contract negotiation other than in subsection b. (4) herein in which the public body is, or may become a party.
>
> Any matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer.
>
> (N.J.S.A. 10:4-12b(7))

The question remains, however, as to whether respondent as a member of the Scotch Plains-Fanwood Board of Education, as opposed to the public, may be excluded from the closed session. The Commissioner determines that he may, even though the claim against the Board does not disqualify him from membership on the Board under the provisions of N.J.S.A. 18A:12-2. If the OPMA permits exclusion of the public from the Board's discussion of litigation against it, it is beyond reason to suggest that the party filing the litigation against the Board has the right to be present at a closed session simply because he is a member of the Board. Although the ALJ's decision in Bd. of Ed. of Barrington, supra, was not adopted by the Commissioner having been remanded to the Office of Administrative Law, the Commissioner does agree with that portion of the initial decision wherein the ALJ states that it is ludicrous to have a board member who has a suit against the board in attendance at a closed session while his litigation against the board is discussed.

Were respondent permitted to be privy to the Board's discussions with its attorney relative to the litigation he has filed against it, respondent would clearly have an unfair advantage and the attorney-client privilege eroded. The intent of that privilege is to afford the client "freedom from apprehension in consulting his legal adviser." In re Richardson, 31 N.J. 391, 396 (1960) Its purpose is to allow for consultation between attorney and client without fear of public disclosure. State v. Humphreys, 89 N.J. Super. 322, 365 (App. Div. 1965) As stated above, if the public is denied such disclosure, so too must the individual who has filed the litigation against the board albeit that he or she is a member of the board. By way of illustration as to why this conclusion must be drawn, respondent's failure to recuse himself from the Board's deliberations with its attorney regarding his litigation has denied the Board the freedom to consult with its legal adviser, thus, inhibiting its ability to consider and develop an Answer to the Petition of Appeal he has filed with the Commissioner.

Respondent's opportunity to represent those who elected him will occur when appearing before the judge, not when the Board is preparing its defense with its attorney.

Accordingly, the Commissioner orders that respondent be excluded from any portion of an executive session of the Board wherein it is discussing the litigation filed against it by Mr. Syvertsen.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE SCOTCH PLAINS-FANWOOD SCHOOL DISTRICT, UNION COUNTY,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
ALBERT J. SYVERTSEN,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 13, 1990

For the Petitioner-Respondent, Casper P. Boehm, Jr., Esq.

For the Respondent-Appellant, Albert J. Syvertsen, pro se

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. Respondent's motion for a stay of the Commissioner's decision pending our determination in this matter is denied as moot.

October 3, 1990

Pending NJ Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5063-89
AGENCY DKT. NO. 175-5/89

SHARON TAXMAN,
Petitioner,
v.
PISCATAWAY TOWNSHIP BOARD OF EDUCATION,
Respondent.

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

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

Richard A. Friedman, Esq., for intervenor Deborah Williams (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Record Closed: March 20, 1990 Decided: May 2, 1990

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

Sharon Taxman (petitioner), in a Petition filed to the Commissioner of Education, claims she had more enforcable seniority as a teaching staff member in the employ of the Piscataway Township Board of Education (Board) than colleague Deborah Williams (intervenor) and, as such, petitioner claims her employment should have been continued following a reduction in force on June 30, 1989. Petitioner demands reinstatement in the Board's employ, together with back pay and other benefits which may have been withheld from her. After the Commissioner transferred the matter on July 13, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted October 19,

1989 during which it was agreed among all counsel of record that the singular issue presented is to what relief petitioner is entitled if she establishes by a preponderance of credible evidence she has greater enforceable seniority than intervenor.

A hearing was conducted January 12, 1990 at the Metuchen Borough Municipal Court after which the parties filed letter memorandum in support of their respective positions. After the memoranda were filed petitioner's counsel extended the closing of the record by submitting a "Determination" of the Equal Employment Opportunity Commission regarding a complaint filed there by petitioner on a issue wholly unrelated to the issue presented here. Nevertheless, counsel filed the document in this forum ostensibly for purposes of this case. The document is not relevant to this case, it should not have been filed by petitioner's counsel in this case, and I decline his invitation to consider the document for any purpose here.

The record in this case finally closed March 20, 1990 when intervenor filed her letter in opposition to the document.

Findings are reached in this initial decision that the evidence presented by petitioner fails to establish she had greater seniority than intervenor. The conclusion is therefore reached that there is no basis upon which the Commissioner should interfere with the controverted determination of the Board regarding petitioner's employment being subjected to a reduction in force.

BACKGROUND FACTS

Sometime prior to June 30, 1989 the Board determined to reduce the number of its teaching staff pursuant to its authority at N.J.S.A. 18A:28-9, et seq. The good faith of that determiniation by the Board is not challenged in this action. The Board determined the individual seniority of those most likely to be affected by its determination. The Board further determined that the seniority of employment accrued by petitioner and by intervenor was identical. The Board, through a tie-breaking process which is not challenged in this action, determined to retain intervenor as a teacher rather than petitioner.

The sole issue petitioner raises in this action is the assertion the Board granted intervenor seniority credit to which she was not entitled in the 1982-83 academic year.

The essential facts regarding seniority credit granted intervenor by the Board for 1982-83 are these. At the commencement of that academic year in September 1982, intervenor had accumulated sick leave of 15 days, plus one accumulated personal leave day, together with 11 days sick leave days granted in 1982-83 for a total of 27 sick days available for use in 1982-83. In addition, intervenor also had available two additional personal leave days. (P-1, p.3).

On September 24, 1982 intervenor gave birth. Prior to that event, intervenor remaind at her teaching post until the day before, or September 23, 1982. Intervenor was absent from her teaching position from September 24 through November 4, 1982. The teaching days missed total 28 days. Intervenor was paid for each and every one of those days by using the 27 accumulated sick days available to her, plus one of the two personal leave days available to her for 1982-83.

On January 12, 1983 intervenor was involved in a motor vehicle accident while on her way to school at about 7:30 a.m. After being questioned by the investigating police officer regarding the accident, intervenor reported for her teaching duties. Although intervenor did not remain at her teaching post for the full school day, the Board did pay her as if she attended her duties the entire day. It is noted intervenor left school ill as the result of the accident. The following day, January 13, intervenor was absent from school because of the accident but, through the use of the remaining personal day, the Board did pay her. The following day, January 14, 1983, was the day established by the Board for the celebration of Dr. Martin Luther King's day and, consequently, the school was closed to staff and pupils. Intervenor was paid for that day. Intervenor was thereafter absent without pay from school January 17 through February 14, 1983, with three exceptions. February 7 and 14, 1983 were officially declared "snow days" and, because the entire school was closed to staff and to pupils, intervenor did receive compensation for those two days. Intervenor was also paid for February 11, 1983, a holiday declared by the Board.

The entire period of time between January 12 through February 14 was included in the Board's determination regarding intervenor's seniority accrual which, of course, led to the tie with petitioner. Petitioner contends intervenor should have been placed on an unpaid leave of absence between January 12 through February 14, 1983, which, when counting all days including weekends, exceeds a 30 day unpaid leave of absence which, under N.J.A.C. 6:3-1.10(b), may not be counted for seniority.

PETITIONER'S ARGUMENT

Petitioner contends intervenor should have been placed on an unpaid leave of absence between January 12 through February 14, 1983, which, when counting all days including weekends, exceeds a 30 days unpaid leave of absence which, under N.J.A.C. 6:3-1.10(b), may not be counted for seniority. Petitioner further contends the Board should not have treated January 12, the day of intervenor's accident as a creditable full day for seniority because she left work early; that the Board should not have allowed intervenor the use of a personal day on January 13 but without explanation why it should not have allowed such use; that intervenor should have been placed on an unpaid leave of absence the very day of her accident, January 12; that because intervenor should have been placed on an unpaid leave that day the Board erred in treating her as being on active duty January 12, 13, and 14, as well as on the two snow days of February 7 and 14, along with the holiday of February 11; and, that the referenced State Board of Education regulation as interpreted in Cohen v. Emerson Bd. of Educ., 225 N.J. Super 324 (App. Div.), cert. den. 114 N.J. 488 (1989). Petitioner maintains that under the Cohen court analysis intervenor should not be credited with seniority with days between January 13 through February 15, 1983, for a total of 34 days including weekends, nor should she be granted more than 1/2 day seniority for January 12, 1983 when she left work early.

Thus, petitioner asserts she has more enforceable senoirity than intervenor when the foregoing adjustments are made to intervenor's credited seniority.

PROOFS OF THE PARTIES

Intervenor testified that after she left the accident scene January 12, 1983 she reported directly to her teaching duties at about 8:30 a.m. As the day wore on intervenor began feeling the effects of the accident and determined after about four or four 1/2

hours she should go home. When pressed on cross-examination regarding the exact time she left school that day, seven years ago, intervenor could not recall the exact time other than "around lunchtime." Lunchtime, intervenor believes, for staff and pupils commenced at 10:20 a.m. and concluded sometime on or around 12:30 p.m.

Gordon Moore, the Board's Director of Staff Personnel who was called by petitioner as her witness, testified that if a teacher works at least 1/2 day and must leave, inferentially, for illness or some other legitimate and approved reason, that person is considered to have been in attendance a full day for all purposes. In this case, Mr. Moore has no knowledge how long intervenor remained on duty January 12, 1983 but because the record (P-1, p.3) shows she was paid for that day he testified she had to have been on duty at least four hours.

It is noted that the same record shows that intervenor was entitled on January 13, 1983 to use the one remaining personal day available to her. Mr. Moore also testified that the record reveals intervenor was paid for January 14, 1983, Dr. Martin Luther King's day, because she was still on active duty. Moore explained that as of the following Monday, January 17, 1983, intervenor's status at her request was day-to-day. That is, intervenor wanted to return to active duty as soon as possible without taking an extended leave of absence. So, beginning January 17, 1983 intervenor would be in daily contact with school authorities to advise whether she intended to report for work the following day. If intervenor did not report for work on days when school was opened, she was not paid for those days calcuated on a per-diem basis compared to her annual salary. In regard to intervenor being paid for February 7, 11, and 14, Moore acknowledges that payment was made to intervenor without explicit prior approval by the Board although Mr. Moore pointed out the Board president did sign each and every payroll voucher for all staff and intervenor's name was contained in each and every voucher for payment on those days.

Mr. Moore acknowledges, as does petitioner, having received a letter sometime after January 21, 1983 from intervenor's attending physican following the accident (P-3). That letter states that intervenor suffered a cerebral concussion, acute cervical, dorsal and lumbo-sacral strain in the accident and that the physician anticipated she would not return to work for several months. Nevertheless, intervenor disagreed with the prognosis of the extent of her recuperative period prior to returning full time to work and, as noted above, maintained daily communication with her supervisor regarding her availability for the following day's work. That arrangement satisfied Mr. Moore who

did not refer the physician's letter to the Board for any purpose.

FINDING'S OF FACT

A review of the evidence submitted in this case shows, I find, the following facts to exist in addition to the background facts receipted above.

1. Intervenor reported for work January 12, 1983 following her early morning automobile accident.

2. Intervenor remained on duty at least four hours as is evidenced by her attendance record (P-1,at p.3). I am more persuaded by the official attendance record of intervenor than I am by her attempt to presently recall the exact time she left school that day because of the effects of the automobile accident. Intervenor was considered for all purposes to have been in school a full day.

3. Intervenor was absent from school January 13, 1983. Intervenor used the remaining personal day available to her.

4. Intervenor was on active duty January 14, 1983, a day reserved for the celebration of Dr. Martin Luther King's day, when the entire school system was officially declared closed.

5. Intervenor's unpaid absences began January 17, 1983.

6. Intervenor returned to full active status on February 15, 1983 following a snow day.

7. The number of days between January 17 through February 14, 1983, inclusive, is 29 days.

8. Petitioner has offered no evidence to show the attendance record (P-1, p.3) of intervenor is not trustworthy as an accurate description of intervenor's attendance during 1982-83.

ANALYSIS

N.J.A.C. 6:3-1.10(b) provides in part:

> [P]eriods of unpaid absences not exceeding 30 calendar days aggregate in one academic or calendar year * * * shall be credited toward seniority. All other unpaid absences or leaves of absence shall not receive seniority credit * * *

The facts in this case lead to the inescapable conclusion that intervenor did not exceed the 30 day unpaid absence in 1982-83. Thus, she should not be denied seniority credit under the rule. Petitioner has presented no rule nor regulation to support her assertion that intervenor should have immediately been placed on an unpaid leave of absence January 12, 1983 when she, in fact, reported for duty following her accident. Moreover, with one available personal day intervenor certainly was entitled to use that day on January 13, 1983 and, in that context, no lawful reason has been advanced by petitioner why intervenor should not have been considered on active status January 14, 1983.

In view of the foregoing, and in light of the background facts together with the facts established by a preponderance of credible evidence in this record, the conclusion must be reached that even if all days between January 17 through February 14, 1983 are counted as unpaid absences for purposes of the referenced administrative regulation, the threshold of more than 30 calendar days was not achieved by intervenor in this case. Accordingly, I conclude petitioner failed in her burden to establish by a preponderance of credible evidence that the Board erred in calculating intervenor's seniority. That being so, and in light of the fact petitioner does not challenge the tie breaking process used by the Board in its determination to retain intervenor, the Petition of Appeal must be and is dismissed.

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.

May 2, 1990
DATE

Daniel B McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

5/3/90
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 8 1990
DATE

Jayne Nicholas
OFFICE OF ADMINISTRATIVE LAW

tmp

SHARON TAXMAN,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PISCATAWAY, MIDDLESEX COUNTY,	:	COMMISSIONER OF EDUCATION
RESPONDENT,	:	DECISION
AND	:	
DEBRA WILLIAMS,	:	
INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board and Intervenor filed timely reply exceptions thereto.

Petitioner reiterates in exceptions the arguments raised before the ALJ. In support of such arguments, petitioner annexes to her exceptions her post-hearing submission. Additionally, petitioner asserts the ALJ made three findings of fact that are not supported by the evidence.

Regarding Finding of Fact #2, relating to intervenor's attendance on January 12, 1983, the date of her automobile accident, petitioner contends intervenor's reporting to work and remaining approximately four hours cannot be considered a full day, as the ALJ found. Rather, petitioner avers, that day "***was and is a sick day. Reporting to work, battered and bruised, physically and emotionally incapable of teaching is not a work day. The Administrative Law Judge's Finding of Fact on this issue must be reversed." (Exceptions, at p. 2)

Regarding Finding of Fact #3, relating to intervenor's absence from school on January 13, 1983, petitioner notes that P-1 indicates that that date was changed from a "no pay day" to a "personal leave day" at a later date. (Id.) Further, petitioner claims, traditionally, personal leave days are not granted the day before or day after a holiday. January 14, 1983 was a school holiday, Martin Luther King Day. Absent payroll records for intervenor, which were never produced at hearing, petitioner contends intervenor's absence on that date must remain a "no pay" day. Further, petitioner avers that while the Board's personnel director, Mr. Gordon Moore, testified to the accuracy of the document, he could not explain when, or why, the January 13, 1983

date was changed from a no pay day to a personal leave day. Petitioner urges that intervenor's record for January 13, 1989 was "falsified" at a later date. (Id.) She challenges Mr. Moore's testimony citing In the Matter of the Tenure Hearing of Gordon Moore, 1978 S.L.D. 862.

Regarding Finding of Fact #5, relating to the ALJ's conclusion that intervenor's unpaid absences began January 17, 1983, petitioner states:

> N.J.S.A. 18A:27-6 requires a Board of Education to pay the salaries of teaching staff "in equal semi-monthly or monthly installments." In Piscataway, the teaching staff received their semi-monthly installment in January, 1983 on Thursday, January 13th. The check would have been for the period ending January 15, 1983. The A.L.J. should have started his count pursuant to Cohen no later than January 16th and probably the end of the payroll period of Thursday, January 13th. (Id., at p. 3)

By way of reply exceptions intervenor also incorporates her post-hearing brief in support of her position and the ALJ's decision. She responds to the exceptions posed as follows.

First, intervenor objects to consideration of petitioner's exceptions asserting that she and the Board have been prejudiced by petitioner's failure to supply hearing transcripts, or to cite any portions of the transcript in support of her exceptions. Intervenor so claims particularly in light of petitioner's assertion that the ALJ incorrectly found that intervenor worked half a day on January 12, 1983, and also challenged the credibility of Mr. Moore. Intervenor relies on In the Matter of Raymond Morrison, 216 N.J. Super. 143 (App. Div. 1987) in support of her position.

Intervenor claims petitioner errs in arguing that she failed to work at least four hours on January 12, 1983. Claiming that petitioner first summarized the testimony without reference to transcript citation, petitioner then challenges intevenor's testimony concerning the specific number of hours she worked on one day, seven years ago. Intervenor contends the Commissioner shouldn't consider the exceptions without relevant transcript citations.

Moreover, intervenor claims that petitioner's exceptions are factually inaccurate, and she cites the ALJ's conclusion to the contrary from pages 4-5 of the initial decision and Findings of Fact #2. Further, intervenor agrees with the ALJ that it was reasonable to rely upon official Board attendance records in this regard.

Intervenor further notes that the burden of proof rests on petitioner in this matter, and that in support of her argument that the Board improperly paid her for January 12, 1983, petitioner offered no evidence at all. Rather, intervenor claims, she relied

upon unsubstantiated attacks on the Board's business records, and attempted to cross-examine intervenor on events which transpired seven years ago. Having failed to produce sufficient evidence that the Board improperly paid intervenor for that work day, petitioner cannot now claim that the ALJ erred, intervenor argues. Additionally, even if petitioner's exceptions were factually correct, intervenor submits that as a matter of law she is entitled to seniority credit for January 12, 1983 pursuant to N.J.A.C. 6:3-1.10(b), which states that if a teacher is paid for a specific day, she is entitled to seniority credit.

As to the personal leave day on January 13, 1983, Intervenor again contends that petitioner fails to cite any relevant transcript portion or to present any documentary evidence. Absent Board policy or transcript citation indicating that that day could not have been a personal day, it is difficult to respond to this exception, intervenor submits. Relying upon the testimony of Mr. Moore, the Board's pay records, and her own testimony, there is no basis in the record for the Commissioner to reject the ALJ's Finding of Fact #3, intervenor avows.

Next intervenor rebuts petitioner's argument that intevenor's unpaid absences began January 17, 1983. Citing Levitt v. Elizabeth Bd. of Ed., 1979 S.L.D. 847, intervenor claims that as a matter of law, the Board properly paid her because January 14, 1983 was a school holiday. Stating that she has already demonstrated she was paid for January 12, and took a personal day on January 13, 1983, intervenor states that no day before January 17, 1983 could have been considered an unpaid absence. Intervenor further notes in footnote that there is nothing in the record to support petitioner's assertion that teaching staff received their semi-monthly salary installments on January 13, 1983 in respondent's district.

Moreover, even apart from petitioner's arguments regarding these three dates, intervenor avers it is clear that she could not have taken more than 30 days unpaid absences for two reasons. First, as noted by the ALJ, February 7, was a snow day, on which no staff or students reported to work. All staff were paid, including intervenor, she contends. Further, February 11 was a holiday, for which all staff were paid and on which no staff worked. Pursuant to Levitt, supra, she was not absent therefore, and the Board was required to pay her for those two days. Further, N.J.A.C. 6:3-1.10(b) establishes that such days are creditable for seniority.

Second, in rebutting petitioner's argument attempting to subtract weekends for seniority purposes, intervenor claims petitioner misreads Cohen v. Emerson Bd. of Ed., 225 N.J. Super. 324 (App. Div. 1988), Cert. denied 114 N.J. 488 (1989). Intervenor finds no basis, either in the language of the regulations, or in Cohen, to deduct weekends for seniority purposes, and intervenor relies on her post-hearing brief at pages 17-19 in support of this contention. For these reasons, intervenor submits that the ALJ's decision should be affirmed.

The Board too relies on the evidence and post-hearing memorandum submitted before the ALJ, with the following additional observations. In rebuttal to petitioner's attempt in exceptions to impeach the credibility of the Board's Director of Personnel, relying on a 1989 Commissioner's decision concerning Mr. Moore, the Board states:

> Counsel's assault on Moore's integrity should be rejected out of hand, for two reasons. First, such a position was never advanced by Mr. Klausner before the ALJ. We invite the Commissioner's attention to Mr. Klausner's February 1, 1990 post-hearing memorandum to Judge McKeown, annexed to his exceptions. Counsel certainly challenged Moore's legal authority to take certain actions, and his interpretation of the State Board's leave-of-absence regulations, but never claimed Moore falsified records, or otherwise put Moore's honesty in issue. Such an obvious credibility issue cannot be raised for the first time at this juncture after the factual record has been closed. Second, counsel has pointed to no evidence in the record before ALJ McKeown to support his claim.
>
> For these reasons, and those advanced by us below, the initial decision of ALJ McKeown should be sustained.(Board's Reply Exception, at pp. 1-2)

Upon his careful and independent review of the record, which, it is noted, does not include transcripts of the hearing below, the Commissioner affirms the initial decision below for the reasons expressed therein. Under the facts before him, the Commissioner finds no such demonstration of Board arbitrariness and so will not substitute his judgment for that of the Board. Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948) Because the issue is clear on its face, as found by the ALJ, the Commissioner dismisses petitioner's exceptions as being without merit.

Accordingly, for the reasons expressed in the initial decision, 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.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
EMERGENT
OAL DKT. NO. EDU 4669-90
AGENCY DKT. NO. 179-6/90

J.DeV. AND C.DeV.,
Petitioners,
v.
BOARD OF EDUCATION OF STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,
Respondent.

Joseph I. Picillo, Esq., for petitioners (Picillo, Harvey, Bromberg & Caruso, attorneys)

Kenneth V. Roth, Esq., for respondent (Davis, Reberkenney & Abramowitz, attorneys)

Record Closed: June 18, 1990 Decided: June 19, 1990

BEFORE **JEFF S. MASIN**, ALJ:

This case comes before the Office of Administrative Law following transmittal from the Department of Education. Petitioners seek emergent relief in connection with a decision of the respondent Board of Education to exclude their son, J.DeV. from graduation exercises to be held for the Sterling Regional High School District on the evening of Tuesday, June 19, 1990 and a senior brunch to be held on the morning of June 19. The Board's decision to exclude the 18-year old senior from the graduation exercises was based upon his having failed to achieve a passing grade in a total of three mathematics courses during his four years of high school. The parties agree that J. did pass qualifying mathematics courses in his freshman and

sophomore years, however he has failed geometry in his junior year and Algebra II in his senior year. Pursuant to Board policy, students must have completed three years of qualifying mathematics courses in order to graduate from the district high school. At the time that J. entered high school as a freshman, the parties agree that the existing requirement was for two years of qualifying mathematics courses in order to graduate, the two-year requirement being the same as that required by the State Board of Education. However, the local board decided to require three years and adopted a policy to such affect in January 1988, at which time J. was a sophomore. The record reflects that the student handbooks which were distributed prior to the beginning of each school year contained reference to the graduation requirements with respect to mathematics courses which showed the two-year requirement for school years 1986-87 and 1987-88. The 1988-89 document lists the graduation requirements for mathematics as three years of mathematics, computational skills, or applied mathematics other than compensatory or remedial mathematics. The 1989-90 handbook shows that three-year requirement and updates the date of the latest revision of the graduation requirement policy to incorporate the amendment which in fact had been adopted prior to the adoption of the 1988-89 handbook, but which had not been shown as a revision at the top of the page, although incorporated in the text.

In addition to the student handbooks, program planning guides which are booklets handed out in February of each school year and which are used by students for the purpose of determining which courses they will be selecting during the course selection process in February-March of each school year contained reference to the two-year requirement in the 1986-87 and 1987-88 booklets, but contained reference to the three-year requirement in 1988-89 booklets. At hearing the Board agreed that no special notification of the change from two to three-year requirement was placed in these booklets, that is there was no bold print, special warnings or notices, attention-getting listings or other special means of advising students that the booklets contained changed requirements. In addition, the Board is unable to produce any notification which may have been produced in memorandum or letter form to students or parents separate and apart from the handbooks and any oral notification which may have occurred during school, this despite some testimony indicating that some people in the district believe that a notice was sent home to parents following the adoption of the Board's amended mathematics requirement policy.

Petitioners' position in this case is that it would be inappropriate to prevent J. from participating in the graduation ceremonies despite the fact that he has not fulfilled the current Board mathematics course requirement. Initially, petitioners argue that they did not receive notice of the change in policy. In addition, they contend that even if notice had been received and even if J. is not currently eligible to receive an actual diploma, it would be detrimental to him and inappropriate for him to be excluded from the graduation ceremony. Petitioners anticipate that J. would attend summer school in order to successfully complete the third year of the mathematics requirement and then would be eligible to receive an actual diploma dated upon the completion of his course requirement.

Based upon the record made at the hearing, which is contained in the tape recordings which will be forwarded to the Commissioner for his consideration upon this emergent application, and upon the evidence otherwise presented in the hearing, I **CONCLUDE** that J. should be permitted to participate in the graduation ceremonies with his class. The reasons are expressed below. Because of the emergent nature of this matter, the discussion will be somewhat abbreviated.

The record reflects that formal notification of the change from two to three-year requirements for mathematics was in fact given by the Board of Education. Both the handbooks and the program guide contain clear reference to the mathematics requirement and show that while it was two years at one time, it eventually became three years. Anyone carefully reading these documents would have noticed that there was a three-year mathematics requirement. At the same time, I strongly question whether these booklets in and of themselves can be considered to be a reasonable or effective way of advising students and parent that a requirement which existed at the time they entered school and during the first year and a half that they attended the school in a fundamental area of education such as mathematics, had been changed mid-stream. Surely it would have been appropriate, far more reasonable, and fair, for the Board to have sent all students and/or parents or guardians a formal notification advising them that the Board's policy had been changed and that they should be alert and assure that they, or their children, took a third year of mathematics in order to meet graduation requirements. It is possible that such occurred in this case, but the Board is unable to produce evidence of such a notice and I must **FIND** that it did not occur.

There is testimony from Mr. Stubits, J.'s guidance counselor, that in the course of meetings held in English classes with all students during the early part of February

of each year, students were in fact informed of any changes in graduation requirements and that such was done in connection with the change in the mathematics requirement. There is no evidence other than Stubits' own recollection that this in fact occurred. J. denies ever hearing of such a change. He only learned of it within the last two weeks in discussions with fellow students.

Although I have some strong reservations as to whether or not effective notice of this change was ever communicated, at the same time there is no question but that actual notice was provided in an acceptable form, that is the student handbooks and program planning guides and that at the same time it seems somewhat unreasonable to assume that a board of education would change its policies as to how many years of mathematics students were required to take and not at least assure that the guidance counselors knew of this change. At the same time it would be quite unlikely that the guidance counselors would ignore advising students of this change. Based upon the evidence presented, I **FIND** that notice was in fact given, although there is of course no way to assure that J. himself ever personally heard any oral announcements, be they from the guidance counselor in his English class or over the loudspeaker. His stepmother asserts that she never received the notice nor did the relatives with whom J. lives within the school district. Notice to high school students contained in program guides and handbooks is sufficient notice. It is not necessary that the Board of Education actually notify the parents separate and apart from the notice provided to the students in the official school publications.

Despite the fact that I **CONCLUDE** that J. had actual or constructive notice that he was required to successfully complete three years of mathematics in order to graduate, there is another basis upon which I **CONCLUDE** that the Board cannot prevent him from participating in the graduation ceremonies and events. The Board concedes that it has no written policies governing who may participate in such ceremonies. In addition the current superintendent testified that in the recent past an exception to the policy was made at the request of several teachers on behalf of a Vietnamese refugee student who had failed to pass the writing portion of the state high school proficiency examination. Passing this examination is a requirement for graduation from the district. The student was permitted to participate in the graduation ceremonies in June, took a course in the summer, and successfully passed the writing element in the early fall and then received a diploma. The superintendent was unable to explain the exact reasons why the request was made on behalf of this student that she be permitted to participate in the ceremonies, nor

could he explicate in any detail the thinking of the Board as to why it acceded to the request. He was not personally involved in that decision, serving at the time in the capacity of assistant principal and having no involvement with the particular decision.

In the absence of a written policy or set of guidelines accessible to Board members, school officials, parents and students, it appears that the district's determination as to who it should or should not permit to participate in graduation ceremonies is subject to unidentified factors which are unknown and unknowable by those who may be affected by the policy. While the Board may have its own internal, unwritten, unannounced policy, it has not chosen to reduce the same to writing. This is the fatal and fundamental flaw in its position.

J. currently stands in much the same position as the Vietnamese student previously permitted to participate in the ceremonies. Each was a senior, failed to pass a course required in order to receive the diploma, each could, if they chose, avail themselves of the opportunity to take a summer course in order to achieve a passing grade on the required course or test, and each faced exclusion from graduation ceremonies based upon the Board's unwritten policy prohibiting participation in the absence of completion of academic requirements for graduation. While there may have been substantial and sufficient good reasons for permitting the other student to participate in the ceremonies, the Board has failed to produce these reasons and beyond that, in the absence of written policy, procedure and guidelines for determining who should or should not be permitted to participate, the decision process is opened up to a good deal of arbitrary and capricious decision-making. There is no way to tell what considerations the Board took into account in deciding to allow one student to participate while deciding to exclude another. While J.'s failure to pass his mathematics course is regrettable and while in fact the Board may be fully justified in its determination that he cannot yet receive a diploma, at the same time, it would be arbitrary, capricious and unreasonable to deny him participation with his fellow classmates in the important, albeit only ceremonial, graduation exercises.

The Board has been unable to identify any substantial detriment which may arise from permitting J. to participate. While there are clearly arguments to be made that participation by individuals not yet academically qualified to graduate may dilute the significance of the graduation ceremony for those who have in fact achieved all graduation requirements, such possible harm is at best suppositional.

Even if such constitutes a legitimate basis for excluding students, which in fact it may, in the context of this particular case, in the absence of a written policy and standards, the Board's decision cannot be upheld on so flimsy a basis.

Prior determinations of the Commissioner seem to support exclusion where a written policy exists. In a disciplinary exclusion treated in Kennqott v. Lower Camden Cty. Reg. Bd. of Ed., 1975 S.L.D. 489, and the companion case of Holmes v. Lower Camden Reg. High Sch. Dist., 1975 S.L.D. 491, the Commissioner reviewed exclusions which were based upon petitioners having been suspended from school attendance four times during their senior years. In each case the Board had a written policy which specifically indicated that seniors who had been suspended four times during their senior year would not be permitted to participate in the graduation ceremonies. Upon a finding that parents had received notice of the suspensions and that the petitioners had knowledge of the Board policy, the Commissioner concluded that exclusion was not an excessively harsh penalty.

The Commissioner noted that he would not set aside discretionary action taken by the Board unless he found it to be an exercise of discretion which constituted "arbitrary, capricious or unreasonable action." Kennqott, at 493.

The Board cites Dooner, Jr. v. Bd. of Ed. of the Toms River Sch. Dist., 1976 S.L.D. 619 in supports of its decision. That case dealt with a determination by the Board not to award a diploma because of a failure to meet established academic requirements. The case deals with notice and finds that such had been accorded. The case is not on point with respect to whether the Board is acting in an arbitrary and capricious manner in view of the lack of a written policy.

Based on the above, and upon consideration of all of the evidence, I **CONCLUDE** that the decision of the Board of Education to exclude J. from the graduation exercises is arbitrary, capricious and unreasonable. While such a determination might well be sustainable had the Board taken the trouble to reduce its policies to writing and to notify all affected by such policy in a proper manner, in the absence of such written policy and notice the decision as to which students may or may not participate is open to arbitrary decision-making. The Board should take steps to reduce its policies to written form and provide proper notice of same. In the meantime, it cannot enforce its unwritten policies in this case.

This recommended order on application for emergent relief 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. The final decision shall be issued without delay, but no later than forty-five (45) days following the entry of this order. If Saul Cooperman does not so act in forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

DATE

JEFF S. MASIN, ALJ

jz

J. DeV. and C. DeV.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF STERLING REGIONAL HIGH SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

Whereas, this matter was opened before the Commissioner on June 18, 1990 by way of Verified Petition of Appeal and Request for Emergent Relief seeking an Order which would permit Petitioners' son, J. DeV., to participate in graduation exercises despite his having failed to satisfy the local mathematics requirements for graduation; and

Whereas, the Commissioner immediately transmitted the aforesaid Petition and Request to the Office of Administrative Law for an emergent relief hearing; and

Whereas, said emergent relief hearing was held before Jeff S. Masin, ALJ, a tape recording of the aforesaid hearing being provided as part of the record; and

Whereas, in a written decision dated June 19, 1990 the ALJ concluded that J. should be permitted to participate in graduation exercises even though the ALJ further concluded that J. did have actual or constructive notice that a third year of mathematics was necessary to meet local graduation requirements; and

Whereas, the aforesaid conclusion of the ALJ was based upon the fact that the Board had permitted an exception in the past but lacked a formal written policy establishing standards for determining when a student who fails to graduate may participate in graduation exercises; and

Whereas, the parties were permitted by way of telephone conference call to set forth their exceptions to the ALJ's determination; and

Whereas, the decision, the tapes of the proceeding and the exceptions were reviewed by Assistant Commissioner Cummings Piatt, the Commissioner's representative for deciding matters of emergent relief; and

The Assistant Commissioner having concluded that the ALJ correctly determined that J. had actual or constructive notice of the change in the mathematics requirement sufficient to know that a third year was required for graduation; and

The Assistant Commissioner having therefore determined that J. did not meet the requirements for graduation, and having further concluded that the ALJ erred in his finding that the action of the Board in denying participation in graduation exercises required a formal written policy because an exception had been made once in the past; and

The Assistant Commissioner having further concluded that there exists no absolute legal right for a pupil to participate in graduation exercises and that a determination to withhold such privilege rests within the broad discretionary power of the Board and will not be upset in the absence of a preponderance of the evidence that such action was arbitrary and capricious (J.C. v. Bd. of Ed. of the City of Long Branch, 1984 S.L.D. 1091, 1098); and

The Assistant Commissioner having concluded that no such showing has been made in the matter before him; now therefore

Petitioners' Request for Emergent Relief to participate in graduation exercises is denied and the Petition of Appeal is dismissed.

IT IS SO ORDERED.

ASSISTANT COMMISSIONER OF EDUCATION

JUNE 22, 1990

DATE OF MAILING - JUNE 22, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 4337-90
AGENCY DKT. NO. 145-6/90

DR. MICHAEL SCHILL, JR., THOMAS LA PORTE, CHARLES NEBBIA, III, AND MICHAEL SCARPA,
Petitioners,
v.
ELMWOOD PARK BOARD OF EDUCATION,
Respondent.

Stanley Turitz, Esq., for petitioners (Greenberg, Ferraro, Covitz, Turitz, Harraka and Goldberg, attorneys)

Glen T. Leonard, Esq., for respondent

Record Closed: June 8, 1990 Decided: June 11, 1990

BEFORE **STEVEN L. LEFELT**, ALJ:

At the Elmwood Park Board of Education organizational meeting on May 1, 1990, Dr. Michael Schill was elected president by a vote of four in favor, one opposed, three abstentions and one absent. Both parties agree that this election was valid. However, the three abstainers claimed a mistake in that they misunderstood the board's attorney's advice and had they known an abstention would result in the election of Dr. Schill, they would have voted "no."

Consequently, at the first regular meeting of the board on May 22, 1990, the board voted five to four to suspend the application of *Robert's Rules of Order* (contained within board by-law #9325.4) to permit rescission of the vote electing Dr. Schill president. Paragraph four of the board's by-law #9311 permitted the board to suspend its by-laws by majority vote of the entire board. The board voted five to four to rescind Dr. Schill's election and five to three, with Dr. Schill absent for the vote, to reopen the position of president. Immediately thereafter, by a vote of five to two with one abstention and Dr. Schill absent for the vote, Louis Mangano was elected president of the Elmwood Park Board of Education for the 1990/91 school year, commencing on May 22, 1990 and terminating at the last meeting prior to the reorganization meeting of 1991.

The petitioners filed an application for temporary relief with the Commissioner of Education seeking to have the election of Louis Mangano as president of the Elmwood Park Board of Education temporarily stayed pending an expedited hearing on its application for emergent relief to restore Dr. Schill to the presidency. The Commissioner did not act on the application for temporary relief under *N.J.A.C.* 1:1-12.6(e) and instead on June 5, 1990 transmitted this matter to the Office of Administrative Law for action under *N.J.A.C.* 1:1-12.6(c). Consequently, the undersigned conducted an oral argument at the Newark Office of Administrative Law on June 8, 1990. On this same date, respondent filed responsive papers.

Based exclusively upon the papers filed in this matter and counsel's oral arguments, I believe that the mistake the Elmwood Board sought to correct by its May 22, 1990 action amounted to a misunderstanding of the effect of abstaining on the vote for the presidency. According to his affidavit, one of the abstainers was advised on May 1, 1990 that, despite his misunderstanding, he could not change his vote to "no" after the vote for Dr. Schill had been declared. It is unclear whether the other abstainers were similarly advised. Counsel for petitioners argues that this "mistake" could have been cured on May 1, 1990, but not thereafter. All three abstainers have indicated that they preferred Mr. Mangano for president and had they known the consequence of an abstention, they would have voted "no." This would have made the May 1 vote four for Dr. Schill, four against and one absent. It is unclear, however, whether these abstainers would all have voted "no" on Dr. Schill's nomination if the consequence would have been not to elect Mr. Mangano,

but to relinquish the appointment to the county superintendent. *See N.J.S.A.* 18A:15-1.

I do not believe that such a "mistake" can be cured after the organization meeting. I decline to conduct a hearing that would probe the minds of board members to determine how they might have voted at some time in the past. Besides establishing a dangerous precedent, to permit a board to reopen an election because of an alleged mistake in announcing a vote for the office of presidency, could lead to political maneuvering that may divert a board from its main mission of running the public schools. I believe that the alleged mistake in this case is insufficient as a matter of law to void a valid election of a board of education president.

N.J.S.A. 18A:15-1 provides that "At its first regular meeting each board shall organize by electing one of its members as president and another as vice-president, who shall serve for one year and until their respective successors are elected. . ." Following this provision, the statute indicates that the county superintendent is to appoint a president if the board fails to elect a president at this meeting.

Local board action must be consistent with the State Board law and rules. *N.J.S.A.* 18A:11-1d. "The school laws contain no provision for organizing the board at any other time, for reorganizing during the year, or for otherwise electing officers except in the case of a vacancy. Nor is there any statute or rule which provides for the removal of a president or vice-president of a board of education except for refusal to perform a duty imposed upon such office by law. *N.J.S.A.* 18A:15-2. Absent such authorization, there is no power in a board of education to reorganize during the course of the year or to elect new officers." *Eagan and Blair v. Brody, Braid, Denight, Hamilton and Mann*, 70 *S.L.D.* 153, 155 (May 6, 1970).

Consequently, it is on this 11th day of June, 1990, **ORDERED** that until the Commissioner of Education's final decision in this matter:

1. The actions taken by the Elmwood Board of Education on May 22, 1990, relating to rescinding the May 1, 1990 election of Dr. Schill, are declared invalid.

2. Mr. Mangano shall take no further actions as president of the Elmwood Board of Education, except those absolutely necessary to continue the day-to-day operations of the board, such as signing checks.

3. Unless Dr. Schill concurs, Mr. Mangano may not sign resolutions or certifications, appoint further committees or committee chairmen or women and may not set the agenda for any board meeting.

4. If there is any disagreement over what constitutes action absolutely necessary to continue the day-to-day operations, the parties may apply for an interlocutory resolution of the question by telephone conference call to the undersigned.

5. This matter shall be set down for an expeditious plenary hearing to determine whether Dr. Schill should be restored to the presidency immediately and which actions, if any, taken by Mr. Mangano after May 22, 1990 as board president, must be set aside.

6. At the evidentiary hearing, any evidence relating to the "mistake" made by the abstaining board members is hereby declared immaterial and irrelevant.

7. The parties are advised that since the Commissioner elected to transmit this action to the Office of Administrative Law, without issuing any temporary restraints, directives 1-6 stated above cannot be effective until the Commissioner adopts this order, either affirmatively or by inaction under *N.J.A.C.* 1:1-12.6(j). The parties are cautioned not to further exacerbate this situation during the Commissioner's review period.

8. After the parties receive the Commissioner's ruling, they can place a conference telephone call to the undersigned to schedule an expeditious hearing date, should one remain necessary.

This recommended order on application for emergency relief may be adopted, modified or rejected by **Saul Cooperman, Commissioner of the Department of Education,** who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **Saul Cooperman** does not so act in forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

6/11/90
DATE

STEVEN L. LEFELT, ALJ

DR. MICHAEL SCHILL, JR., THOMAS LA PORTE, CHARLES NEBBIA, III AND MICHAEL SCARPA,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF ELMWOOD PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Acting Commissioner has reviewed the Order of the ALJ granting emergent relief, the papers filed by the parties, as well as reviewed the taped proceeding before the ALJ. The Acting Commissioner notes that no exceptions were filed by the parties.

Based upon his review of the above, the Acting Commissioner affirms the decision of the ALJ for the reasons stated therein. In so doing, the Acting Commissioner notes that notwithstanding any allegation of misunderstanding by certain individual Board members relative to the impact of their abstentions in the vote to elect a president at the annual reorganization meeting of the Elmwood Park Board of Education, Dr. Michael Schill was duly elected president of that body. The Acting Commissioner would further add his agreement to that of the ALJ that since Dr. Schill was duly and properly elected to the office of president, he was, pursuant to N.J.S.A. 18A:15-2, subject to removal only for refusal to perform any duty imposed by law. He likewise concurs with the ALJ that the only time

when a district board of education may elect a president or vice president is at its annual reorganization meeting.

Therefore, notwithstanding any allegations of mistake and suspension of bylaws on the part of the Board in its machinations to set aside the election of Dr. Schill as president at the May 1st reorganization meeting, the Board was precluded by law from removing Dr. Schill and replacing him with another candidate. This decision having resulted in declaring ultra vires the actions of the Elmwood Park Board of Education in setting aside the election of Dr. Schill, the Acting Commissioner concludes that there no longer exists any necessity for further hearing on the merits. This affirmance of the granting of the emergent relief by the ALJ is therefore to be considered a final decision concluding the controversy.

ACTING COMMISSIONER OF EDUCATION

JUNE 25, 1990

DATE OF MAILING - JUNE 25, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5216-89
AGENCY DKT. NO. 189-6/89

ELSA DENNERY,
Petitioner,
v.
BOARD OF EDUCATION OF PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT # 1, PASSAIC COUNTY,
Respondent.

Robert A. Fagella, Esq., for petitioner
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

Richard H. Bauch, Esq., for respondent
(DeMaria, Ellis & Hunt, attorneys)

Record Closed: April 6, 1990 Decided: May 16, 1990

BEFORE STEPHEN G. WEISS, ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case on July 10, 1989, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was conducted by the undersigned administrative law judge on October 2, 1989, and a prehearing order issued on October 4, 1989. Paragraph one of the order identified the nature of the proceedings to involve a "petition by a former tenured guidance counselor [Elsa Dennery] alleging that the respondent [Board of Education of Passaic County Regional High School District # 1] violated her tenure and seniority rights by abolishing her position and/or failing to appoint her to a newly created position."

The issue to be resolved at the hearing was stated to be the following: "Was the abolition of petitioner's position as a tenured guidance counselor and/or the respondent's failure to appoint her to the newly created position . . . a violation of petitioner's tenure and seniority rights?"

A plenary hearing was conducted at the Office of Administrative Law on January 18, 19, and 25, 1990. Following the conclusion of the hearing, counsel were afforded an opportunity to file posthearing proposed findings of fact, conclusions of law, and supporting briefs. Following the grant of an extension of time for the filing, the record closed on April 6, 1990.

TESTIMONY AND FINDINGS OF FACT

A. Joint Stipulation of Facts

At the outset of the hearing, counsel entered into a joint stipulation of facts (Exhibit J-1), which sets forth the following undisputed matters:

1. Petitioner served as a guidance counselor at Passaic Valley Regional High School since 1962, including a one-year leave of absence.

2. Between 1961-1962, petitioner served as a teacher/guidance counselor at Teaneck High School.

3. Between 1957-1961, petitioner served as a teacher at Union Hill High School, in Union City, New Jersey

4. Between 1956-1957, petitioner served as a teacher for the Ridgefield Park Board of Education.

5. Petitioner has no prior disciplinary record for the 27 years that she served as a guidance counselor for respondent.

6. Petitioner holds the following certificates received as of the dates shown:

    a. Teacher of Business and English -- 1960.

b. Student Personnel Services -- 1964.
c. Learning Disability Consultant -- 1982.
d. Supervisor -- 1988.
e. Director of Student Personnel -- 1989.

7. In or about spring 1989, petitioner was advised that her guidance counselor position was being abolished.

8. Petitioner applied for the newly created positions of "Class Supervisor" but was advised that she would not be awarded a "Class Supervisor" position.

9. Petitioner holds all certifications required for the class supervisor positions.

10. The following teaching staff members hold the credentials required for, and presently hold the position of, "Class Supervisor":

1. Supervisor of Class of 1990 -- Roger Tanis
2. Supervisor of Class of 1991 -- Thomas Kean
3. Supervisor of Class of 1992 -- Janet Immitt
4. Director of Guidance/Supervisor of Class of 1993 -- Dr Frances Colie

B. Testimony for Petitioner

The first witness for petitioner was Ms. Dennery herself. She noted that, as set forth in the stipulation, as of the time her employment was terminated by the Board in June 1989, she had worked in the school district for many years as a guidance counselor and at all times her performance evaluations were satisfactory.

She testified that, as of June 1986, the guidance department at Passaic Valley consisted of five guidance counselors and a director. In September 1986, one of the guidance counselors was transferred to a classroom, and another left. At that same time, the guidance department entered a reorganization phase wherein the Board created the position of Supervisor-Class of 1990. That position was filled by Tanis, who previously was employed in the district in another capacity not involving any guidance functions. Dennery did not apply for the job.

The creation of the new position resulted in no changes in the duties of the guidance counselor as far as Dennery was concerned. She continued to provide regular guidance services on a "vertical" basis to students in grades 10, 11, and 12. In other words, she had counselees in each of the three grades. These services included, inter alia, meeting with students to discuss their college and/or career plans, handling telephone calls, meeting with parents, counseling students regarding matters of mutual concern, and coverage of homerooms when a teacher was absent. In addition, guidance counselors continued to be involved in processing students who arrived late to school. Dennery also participated in certain testing activities and, with the other guidance counselors, sent out warning notices when students were absent.

In 1987, the position of Supervisor-Class of 1991 was established and filled by one of the existing guidance counselors, Mr. Thomas Kean. Dennery did not apply for the position. Thus, as of September 1987, the assignments in the guidance department were as follows: Tanis handled the Class of 1990, Kean the Class of 1991, petitioner shared guidance duties for students in the other two classes with the remaining guidance counselor, Mr. Robert Steffy, and Dr. Frances Colie was the director. According to Dennery, as far as she could see, the duties and responsibilities carried out by the "supervisors," Tanis and Kean, did not differ from her activities in any meaningful way.

When Kean's position was created in 1987, it required that one hold a supervisor's certificate (Exhibit P-2). Since Dennery did not hold such a certificate, with the approval of the Superintendent of Schools, she took courses at William Paterson College during 1987-88 to obtain the same.

In May 1988, the position of Supervisor-Class of 1992 was posted. Dennery applied for the job but, in August 1988, the Board appointed Ms. Janet Immitt. Thus, as of September 1988, the guidance department consisted of the director, Dr. Colie, class supervisors Tanis, Kean, and Immitt, and guidance counselors Steffy and Dennery.

In May 1989, the position of Director of Guidance/Supervisor-Class of 1993 was created (Exhibit P-3) and Dr. Colie, the director at that time, was appointed to it. Thus, since there were now class supervisors for each of the four classes at the high

school, Dennery was told that she would not be reappointed. Since there was no other position available for which she was certified, her employment ended in June.

Petitioner then compared the duties and responsibilities of the class supervisors with her own. She opined that everything she did as a guidance counselor was also performed by them and, except for certain minor differences, everything they did she either did, had done, or was capable of doing. With respect, in particular, to the area of evaluation, she insisted that although as a guidance counselor she did not undertake "formal" evaluations of teachers, she often would confer with teachers and believed that she had the right to make recommendations to senior administrative staff regarding correction of teacher performance deficiencies

In short, Dennery maintained that her duties, responsibilities, and functions as a guidance counselor were, if not identical to, substantially the same as those of the class supervisors.

On cross-examination, Dennery agreed that her contact with teachers in the "evaluation" context did not involve formal observations with respect to gauging their performance in any regularized fashion and she admitted that she had no authority to evaluate as such. With regard to her "supervisory" activities, Dennery said that as guidance counselor she did undertake such duties from time to time, including bus, fire drill, study hall, and cafeteria duty.

Petitioner explained that the reason she did not apply for the positions filled by Kean in 1986 and Tanis in 1987 was that she was not certified as a supervisor at the time those jobs were posted. She also agreed that, as a guidance counselor, she is represented for collective negotiations purposes by the teachers' association, whereas Tanis, Kean, Immitt, and Colie are members of a separate supervisors' unit

Anna Maria Betro, the next witness for petitioner, has been employed as a teacher of languages at Passaic Valley for 23 years. Betro said that she sees no functional distinction between the duties of a guidance counselor and those of the class supervisors and she treats both positions as the same. She, personally, has never been evaluated by any class supervisor, although she knows other teachers have. On cross-examination, she agreed that guidance counselors had no supervisory relationship with classroom teachers. While she conceded that the class supervisors

do have building-wide supervisory authority one period a day, she considered that activity essentially to be peripheral to their primary guidance function.

The next witness for petitioner was Thomas Kean, Supervisor-Class of 1991. He has been employed in the school district for 42 years and was a guidance counselor for approximately eight years before becoming a class supervisor in 1987. He agreed that all of the duties listed on the guidance counselor job description (Exhibit P-1) are also carried out by class supervisors. However, the class supervisor position includes, in addition thereto, certain distinctive responsibilities which he never had as a guidance counselor. Those functions include, most importantly, the authority to go into the classroom to observe teacher performance and to report on the same as part of the formal evaluation process. In his opinion, his ability to function in this role can be of great help with regard to his having to deal with potential problems between and among students, parents, and the teachers. During the 1988-89 school year, he performed approximately 30 formal teacher evaluations, more than half of which were generated by some sort of student problem. He also performed informal evaluations. Kean also noted that the hours of work of the classroom supervisors are 7:45 a.m. to 4:15 p.m., whereas guidance counselors work from 8 a.m. to 3:25 p.m.

According to Kean, class supervisors are expected by the superintendent to be "on call" all the time and cannot depend on any particular formal schedule. Their salary is pegged to a step on the teacher guide, plus an additional percentage as a stipend.

Kean went on to point out additional class supervisor functions which he believed represented differences between the two positions in issue. For example, he is now more involved in the area of discipline, and one period per day he has building-wide supervision. In that latter capacity, he directs teachers to various posts for student supervision. However, he stressed that the major difference as far as he was concerned had to do with the evaluation function. Classroom supervisors, he said, have discretion concerning when to go into a classroom, and to whose classroom they will go. They are expected to exercise that function diligently and are not to confine their activities to mere conferences with teachers.

On cross-examination, Kean reiterated that the major additional duties which he now has involve discipline, building-wide supervision and observation, and formal evaluation of classroom teachers. He explained that he is more involved in the direct imposition of certain types of discipline with respect to students who arrive late. Although he also functioned in this area as a guidance counselor, it was always through the associate principals. In Kean's judgment, he spends about 25 to 30 percent of the school day carrying out the supervisory duties mentioned.

Petitioner's next witness was Paul A. Hoelscher, a social studies teacher who has been employed at Passaic Valley since 1963. From his own observations of what guidance counselors did, and what classroom supervisors now do, Hoelscher sees no qualitative difference in terms of his needs. He, personally, has never been evaluated either formally or informally by a class supervisor and is aware of only one teacher having been so observed. However, he has not spoken to any other teachers about that subject. On cross-examination, Hoelscher agreed that he considers the class supervisors to be his "supervisors" both in and out of class. If one of them ever came into his classroom to observe and evaluate him, he would agree that they were properly carrying out that function.

C. Testimony for respondent

Respondent's sole witness was the Superintendent of Schools, Dr. Louis R. Centolanza. He has been superintendent since March 1984 and had been the assistant superintendent for five years previous thereto. As assistant superintendent between 1982 and 1984, Centolanza had oversight with respect to the Department of Pupil Personnel Services, which included the guidance staff. When he became superintendent, one of his main objectives was to assess the guidance needs in the district and to make recommendations to the Board concerning it. According to Centolanza, he wanted "an independent view" of the department since he entertained concerns that it was not meeting student needs in either career planning or personal and social counseling. He also was concerned that there had been many parental requests for a change in the guidance counselor to whom their children were assigned.

When parental complaints continued in 1985, Centolanza recommended to the Board that there be an independent, overall assessment of the entire guidance

function. As part of that activity, he distributed a survey to all of the homes in the district, and also handed the document out to students and staff members (Exhibit R-1). The results of the survey revealed that those who responded were highly critical of both the quality and scope of the guidance services. There were, for example, problems regarding the Scholastic Aptitude Test and achievement test cutoff dates, financial aid availability, and knowledge of course offerings, and there were several complaints of rudeness.

As part of his overview, Centolanza asked the director of guidance, Dr. Colie, to evaluate her guidance counselor personnel, which she did. In the spring of 1986, Centolanza made specific recommendations to the Board concerning restructuring the guidance department, including abolition of the position of "guidance counselor" and substitution for it of a position to be known as "academic advisor" (see Exhibit P-4). Thus, in September 1986, one guidance position was abolished and the position of Supervisor-Class of 1990 was created and filled by Tanis. As Centolanza put it, he was looking "for leaders, not followers"--people who could make a meaningful impact and avoid mediocrity. He also wanted people whom he felt could "pinch hit" as administrators. Although Tanis had no previous background in student personnel services, he had been a teacher in the district and a department head as well. In order to function in the guidance area, Tanis obtained emergency certification. Thus, as of September 1986, four guidance counselors handled grades 10, 11, and 12, Tanis was Supervisor-Class of 1990 (the ninth grade), and Dr. Colie was the director. In 1987, the position of Supervisor-Class of 1991 was posted and, in August, Kean was appointed to the position. His prior position as guidance counselor was left vacant and has remained unfilled to the present time.

By late August 1987, the class supervisor position was beginning to crystallize further in Centolanza's mind and by now represented what he believed to be a desirable combination of guidance functions, plus grade level supervision responsibilities. The superintendent observed that the teacher evaluations performed by the class supervisors have helped him in his determination as to whom to fire and to whom to give tenure. In his judgment, they serve as "another pair of eyes."

In April 1988, the Board abolished another guidance counselor position and the position of Supervisor-Class of 1992 was posted. Janice Immitt was hired for that job. Petitioner also applied for it.

Although the class supervisor positions were first created in 1986, the titles had not been recognized by the county superintendent. This oversight was cured in 1989 (Exhibits P-6, P-7). Originally, Centolanza felt that such action was not needed, but he eventually determined to submit the titles for approval in anticipation of state monitoring, which was to take place in early 1990.

As far as Centolanza is concerned, the guidance counselors essentially were teaching staff members solely responsible for handling pupil concerns. They were, as he put it, "an appendage," not directly in the "line of fire." On the other hand, the class supervisor position was envisioned to be and is "a directive, decision-making" one. It is a position which, in his judgment, is part and parcel of "administration" and they have direct authority over teachers, a role which guidance counselors could not and should not have. Tanis, Kean, Immitt, and Colie also operate, according to Centolanza, at a "higher level" in the areas of program, budget, supervision, and high-level decision making. They exercise, he said, a more proactive role than did guidance counselors in the area of discipline as well, especially insofar as "cuts" are concerned.

On cross-examination, Centolanza repeated that his concerns with the guidance department in 1984 and 1985 related to the quality and scope of the services being provided, primarily to students and secondarily to parents. While guidance services unquestionably are an essential part of the high school program, in his opinion they can and rightly should be combined with supervisory activities to enhance their value. While he agreed that when Tanis was appointed in 1986 he did not have appropriate guidance certification, that temporary gap was covered by having Dr. Colie perform the needed guidance services. More importantly, Tanis did have supervisory certification and during 1986-87, in addition to recording attendance and the like, he formally observed teaching staff members in grade nine and was engaged in a number of evaluations that school year. In addition, Tanis also performed the one period per day building-wide supervision, which includes oversight of the entire building viz-a-viz security, discipline, etc. As far as Centolanza is concerned, a supervisor's certificate is needed to direct other certified people in

that context--something a guidance counselor could not do. In addition, although not acting as a guidance counselor per se during 1986-87, Tanis was involved in class meetings and acted in other ways as a class advisor. By September 1987, Tanis had become certified in the area of student personnel services and all four of the present class supervisors hold dual pupil personnel and supervision certification and are performing classical supervisory work.

While Centolanza agreed that the class supervisor positions existed for over three years without county superintendent approval, this was the product of his belief that the administrative code did not require the same. However, he repeated that in order to eliminate any problem with respect to state monitoring, he sought and obtained approval from the county superintendent in 1989 (Exhibits P-6, P-7).

It was Centolanza's opinion that up to 40 percent of the total activities of class supervisors involve activities other than standard guidance counselor functions. These include: (1) formal classroom observations and evaluations; (2) post-observation and evaluation conferences with teachers; (3) write ups with respect to recommendations; (4) building-wide supervision of the grounds, including cafeteria, study hall, and corridors; (5) supervision of in-school suspension; (6) disposition of cuts; (7) enforcement of the Board's tardiness policy; (8) substituting for associate principals in their absence where needed; (9) participation in review and modification of curriculum; and (10) participation and close involvement in high-level administrative meetings and general readiness to carry out assignments as directed by the superintendent.

FINDINGS OF FACT

Based upon my review and consideration of the testimony in this matter, I herewith make the following findings of fact:

1. The contents of the joint stipulation of facts, Exhibit J-1, previously set forth are hereby incorporated by reference as if expressly set forth.

2. Although petitioner now holds all those certifications required for the position of class supervisor, she did not do so until 1988. At no time during her 27-year employment with the Board did petitioner ever serve in a position which

required a supervisor's certificate. In 1989, she obtained a Director of Student Personnel Services Certificate, which is a requirement of the position held by Dr. Colie.

3. The job description for guidance counselor, the only position held by petitioner while employed in the school district, did not require performance of any function requiring possession of a supervisor's certificate, nor did guidance counselors perform any supervisory function which would have required possession of the same.

4. In 1984-85, Dr. Louis R. Centolanza became Superintendent of Schools. At that time, the guidance department consisted of five guidance counselors, including petitioner.

5. Soon after becoming superintendent, Centolanza undertook a review of the department in response to various complaints, particularly from parents, regarding the activities of the same. Based upon his own independent review, together with consideration of the results of a survey he conducted involving students, parents, and others, Centolanza determined that the department was not meeting the needs of the students with respect to career planning and personal and/or social counseling.

6. Centolanza therefore recommended to the Board that it create the position of Director of Pupil Personnel Services to oversee the guidance department. He also presented a report to the Board recommending that the existing guidance department structure be replaced by a system whereby there would be a supervisor responsible for each of the four classes of students at the high school level. In Dr. Centolanza's view, these would be individuals holding supervisor's certificates who would be engaged not only in the guidance function, but in the evaluation and supervision of staff as well.

7. In the spring of 1986, one guidance counselor position was abolished following that individual's retirement. There then was posted the position of Supervisor-Class of 1990. The work year for that position was to be September 1 through June 30, and the hours were to be 7:45 a.m. to 4:15 p.m. The compensation for

the position would be placement on the teacher salary guide plus an additional stipend.

8. Petitioner did not apply for the Supervisor-Class of 1990 position and Roger Tanis, previously a department head, was appointed to it, effective September 1, 1986.

9. Since Tanis did not possess a student personnel services certificate, he performed no guidance services during 1986-87. These were provided to the Class of 1990 by the director, Dr. Frances Colie.

10. For 1987-88, Tanis received emergency certification for student personnel services and a formal job description was established for the class supervisor position. That job description provided that the class supervisor would supervise and evaluate homeroom teachers assigned to the grade level, periodically observe and evaluate subject matter teachers, and have school-wide supervisory duties.

11. In June 1987, the position of Supervisor-Class of 1991 was posted. The position required possession of a supervisor's and/or a principal's certificate. Petitioner did not apply for the position. Thomas Kean, a guidance counselor, applied for and was appointed to the position in August 1987. Kean's guidance counselor position remained vacant and has never been filled.

12. Both Tanis and Kean undertook formal evaluations of teachers in accordance with the procedure established in the school district. The evaluations were carried out in a fashion identical to that of other persons performing this function. Class supervisors are expected to and do perform a minimum of 15 formal teacher evaluations per year.

13. Building-wide supervisory activities are carried out by class supervisors one period per day. In that time, the supervisor is responsible for corridor supervision, cafeteria supervision, and supervision of the exterior school grounds. As needed, class supervisors also direct the activity of teachers during this time. Formerly, this action was carried out by associate principals.

14. In May 1988, the Board advertised for the position of Supervisor-Class of 1992. The requirements of the position included possession of supervisory as well as student personnel services certification. Petitioner did not apply for the position and the Board appointed Janet Immitt to it.

15. In March 1989, the Board authorized the creation of the position of Director of Guidance/Supervisor-Class of 1993, and that position was posted and advertised. The position requires performance of administrative tasks related to guidance services beyond those undertaken by class supervisors. Although petitioner applied for the position, she did not, at that time, hold the necessary certifications, which included the Director of Student Personnel Services certificate.

16. In April 1989, the Board abolished the guidance counselor position held by petitioner, the last remaining such position which had been filled in the school district. Thus, Dennery's employment terminated in June 1989.

17. In June 1989, Dr. Centolanza belatedly applied to the Passaic County Superintendent of Schools for approval of the unrecognized titles of Director of Guidance/Supervisor-Class of 1993, Supervisor-Class of 1992, Supervisor-Class of 1991, and Supervisor-Class of 1990. On August 1, 1989, County Superintendent Melindo A. Persi granted such approval.

18. Centolanza did not earlier request the county superintendent's approval since he understood the regulations not to require it. However, in the anticipation of state monitoring in the school district scheduled for early 1990, he determined to apply for such approval and did so.

19. The supervisory functions exercised by class supervisors include, in addition to teacher observation and evaluation, building-wide supervisory authority at least one period per day, filling in for associate principals as needed, attendance at high-level administrative meetings, administration of discipline to students, and special oversight responsibilities for a variety of projects as directed by the superintendent. In that latter capacity, the class supervisors may be involved in directing the activities of teaching staff members.

DISCUSSION

Although there was a great deal of fact-sensitive testimony in this case covering the three days of hearings, many of those facts were undisputed. In essence, the case boils down to the need for a legal determination as to whether the petitioner's tenure and seniority rights were violated by virtue of the reorganization of the guidance department which eventually resulted in Dennery's termination in 1989. The major issue is whether the newly-created position of class supervisor is so substantially similar to that of guidance counselor that the failure to appoint Dennery and/or the failure to consider her in respect to any application for the same was so egregious as to be set aside.

Both sides cite many of the same cases since the underlying issue has been addressed by the Commissioner on several previous occasions. A leading case is Santarsiero v. Parsippany-Troy Hills Board of Education, OAL DKT. EDU 5667-83 (March 30, 1984), Commissioner of Education (May 14, 1984), aff'd, State Board (Oct. 3, 1984). In that case, the Board had implemented an administrative reorganization which impacted upon area chairpersons. At issue was whether newly created positions were the same as, or substantially identical to, the area chairperson position. Both the administrative law judge and the Commissioner determined that they were not. In his decision, the Commissioner made the following pertinent observations:

> The Commissioner is in agreement with the Board and with the conclusion of the judge that the two positions are not substantially the same or identical. Mere overlap of duties between the two positions does not make them identical nor is the difference between the two positions merely quantitative. While the area chairperson position entailed subject area supervisory responsibilities, the two positions differ in terms of primary responsibility, scope of functions, calendar years, type and manner of compensation and a line of authority and reporting. The area chairperson position was a teaching position with additional supervisory responsibility, compensated in the form of stipend and carried out with "release time" during the academic year.
>
> The abolishment of the area chairperson positions and creation of the district program supervisory positions was motivated by the Board's desire to restructure and strengthen the supervision, evaluation and curriculum of the district's program. . . . The Board has the power to determine who is best qualified to be appointed

> to the newly-created district supervisory program position. Therefore, it is the Commissioner's determination that Jablonski, supra, is controlling in the instant matter and that the Board is correct in asserting that Franklin, supra, is similar. Santarsiero, at 27-8.

The two cases cited by the Commissioner (Jablonski and Franklin), which were also referenced in the administrative law judge's decision in Santarsiero, essentially stand for the same proposition; namely, that the critical area of inquiry is whether or not the two positions in issue involved duties and responsibilities which were "substantially identical." See also, Schaeffer v. Bd. of Educ. of South Orange, OAL DKT. EDU 5776-87 (January 15, 1988), aff'd, Commissioner of Education (March 14, 1988), aff'd, State Board (March 1, 1989); DeCarlo v. Bd. of Educ. of South Plainfield, OAL DKT. EDU 6111-87 (June 20, 1988), aff'd, Commissioner of Education (Aug. 4, 1988). Essentially, the inquiry involves an examination of whether, intentionally or otherwise, the creation of the new position and the failure to recognize the tenure or seniority rights of an employee holding the previous position was tantamount to a circumvention of the tenure and/or seniority rights of that employee.

In addition to arguing that what the Board did in this case was to create a new position whose duties, functions, and responsibilities qualitatively were substantially the same as that of guidance counselor, Dennery also argues that the imposition of a supervisory certificate requirement for the class supervisor position was an improper effort to deprive petitioner of her tenure rights and a tactic which could not and should not be condoned. See, e.g., Walldov v. Board of Education of East Brunswick, OAL DKT. EDU 6540-84 (March 28, 1985), aff'd in part and rev'd in part, Commissioner of Education (May 10, 1985).

With respect to respondent's claim that the duties and responsibilities of the class supervisor position entail activities which are distinct, Dennery maintained that a close examination of the duties fails to support that view. In particular, Dennery argues that the major area of claimed distinction, the "evaluation" function exercised by class supervisors, is, upon close scrutiny, of little significance--"far too slender a reed" to support denial of her tenure rights. In particular, she pointed out that the testimony of the class supervisors themselves reveals that the time devoted to performance of the evaluative function approximated only two percent of their

total for the year. Petitioner further pointed out that the evaluations were not of all instructional staff generally, but were limited to teachers whose students were assigned to the particular class supervisor for guidance, and both historically and at the present time the essential evaluative function is still exercised by the associate principal. In other words, the so-called "evaluation" by class supervisors is really only a minor adjunct of their guidance counseling function.

Another point raised by petitioner is the claim that even if it is determined that the guidance counselor position was properly abolished, her tenure rights nevertheless entitled her at least to the Supervisor-Class of 1992 position awarded to Immitt. In support of this argument, petitioner refers to the decisions in Capodilupo v. West Orange Tp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987); Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1988); and Mirandi v. Board of Education of West Orange, OAL DKT. EDU 5756-84 (Feb. 19, 1985), decided by the Commissioner (April 1, 1985). In other words, if the action by the Board in this case is condoned, and a nontenured person (Immitt) is permitted to prevail over petitioner, it will, in Dennery's view, "signal an open-ended invitation to public employers to evade the rights of tenured employees by 'abolishing' tenured positions, tacking on a new certification requirement, and effectively continuing the responsibilities of the old job."

In its initial reply brief, the Board argued that petitioner cannot claim any tenure entitlement to the position of class supervisor since she has never served under a supervisor's certificate. See, Howley v. Board of Ed. of Ewing Township, 1982 S.L.D. 1328, aff'd, State Board of Education, 1983 S.L.D. 1554 (June 1, 1983); DeCarlo v. Board of Education of South Plainfield, supra; Kaprow v. Board of Education of Berkeley Township, OAL DKT. EDU 6578-88 (Oct. 12, 1989), decided by the Commissioner (November 29, 1989). Thus, pointing out that Dennery did not even acquire her supervisor's certificate until July 1988, nor her Director of Pupil Personnel Services certificate until 1989, it was impossible for her to have served under either of those certificates for the requisite period of time necessary for the acquisition of tenure under N.J.S.A. 18A:28-6. Therefore, since Dennery has never actually served as a supervisor, she has no tenure or reemployment claims to any position other than that of guidance counselor and mere possession as of 1988 of a supervisor's certification does not, standing alone, entitle her to claim Immitt's job.

Referring to the decisions in Capodilupo, Bednar and Kaprow, the Board maintained that those decisions stand for the proposition that a teaching staff member only obtains tenure within an endorsement on a certificate and that the scope of the tenure is then determined by the endorsement under which the teaching staff member has actually served. Thus, relying upon the decision of the Commissioner in Grosso v. Board of Ed. of New Providence, OAL DKT. EDU 5253-88 (April 15, 1989), decided by the Commissioner (May 22, 1989), rev'd, State Board (March 9, 1990), the Board argued that any expansive reading of the Capodilupo and Bednar decisions had to be rejected, at least to the extent that they are attempted by Dennery to be read to permit her to obtain tenure without regard to service under an endorsement. Since Dennery's service in the district was limited to that of a guidance counselor under a student personnel services certification, her mere possession as of July 1988 of a supervisor's certificate without service in any position which requires such certification precludes her obtaining tenure or seniority insofar as the class supervisor job is concerned.

In her reply brief, Dennery argued that the interpretations relied upon by the Board simply did not support the conclusion urged, particularly since the continuing viability of the cases cited by the Board is now "suspect" in light of the State Board of Education's reversal of the Commissioner's decision in Grosso. As noted, the Commissioner determined in Grosso that petitioner's mere possession of an elementary endorsement on an instructional certificate did not provide the individual with any tenure rights as an elementary teacher over nontenured persons since he had not actually served for the requisite period of time as an elementary teacher. The State Board synopsized the Commissioner's holding to be that "a tenured teacher is not entitled, as against a nontenured teacher, to any teaching assignment covered by any endorsement held without consideration of whether that individual had served under the endorsement applicable to the assignment." Id. at 4.

The State Board disagreed, reversed the Commissioner, and held that tenure protection attaches to "all endorsements upon a teacher's instructional certificate, not just those under which the individual has actually served for the requisite period of time pursuant to N.J.S.A. 18A:28-5 or 18A:28-6." Grosso, at 4-5. The State Board concluded as follows: "Since petitioner was authorized and qualified to serve as an elementary teacher by virtue of his elementary education certification . . . we

conclude that he had entitlement as a result of his tenure status to employment as an elementary teacher as against non-tenured individuals, regardless of whether he had previously served under that endorsement." Id. at 6.

With respect to whether the positions of guidance counselor and class supervisor are substantially similar, the reply briefs, not unexpectedly, took totally divergent views and they need not be repeated here. Suffice it to state that in the petitioner's view there are no meaningful distinctions between the duties and responsibilities of the two positions and the Board's effort to construct such differences was merely a sham. The Board, of course, stressed those areas where it believes there were important qualitative differences and repeated its contention that, in light of those distinctions, Dennery's service as a guidance counselor was of no moment insofar as her entitlement to a class supervisor position was concerned.

As the result of my review of all of the evidence, and in light of the pertinent case law cited and/or relied upon by counsel in their briefs, I am convinced that the Board's failure to appoint Dennery to a class supervisor position, and/or the class supervisor/director of guidance position, was proper and violated neither her tenure nor her seniority rights.

With respect to the question of tenure and seniority, one can read and reread the several cases cited in the briefs and, as did counsel, come to totally divergent conclusions regarding what they say. All are particularly fact-sensitive. Each, in its own way, is dependent upon a close scrutiny of the exquisiteness of the facts pertaining to the particular situation involved and it is difficult to attempt to generalize with respect to the impact of those cases upon any new situation.

Nevertheless, certain principles do emerge which, when applied to the facts of this case, dictate the result I have reached insofar as the tenure and seniority questions are concerned. Although actual service pursuant to a teaching certificate endorsement may not be necessary in order for one to claim tenure, in this case it was not until July 1988 that the petitioner held the supervisor's certificate at all. Thus, none of her service prior to that date can be counted toward the accrual of tenure unless (as will be discussed infra) the duties and responsibilities of the class supervisor position were substantially the same as those of guidance counselor. Putting aside that issue for the moment, it is clear that Capodilupo, Bednar, and

Grosso do not avail petitioner in this regard. Moreover, I agree with the Board that in neither Capodilupo, Bednar, nor Grosso was the issue of more than one type of certificate involved, as it is here. None of the cases relied upon by Dennery involve a situation similar to the present circumstances where her certification prior to July 1988 was distinct and limited to guidance counselor functions. Thus, Dennery has no legitimate claim by virtue of tenure and/or seniority to the class supervisor positions unless she prevails on the other prong of her case--that the class supervisor positions are not substantively or qualitatively different from that of guidance counselor.

With respect to that question, I must agree with the position articulated by the Board. First, based upon Centolanza's unrefuted testimony, there is no doubt that during the mid-1980's serious concerns arose in the school district regarding the effectiveness of the guidance services being delivered to students. There clearly was a problem and steps had to be taken to deal with it in order to maintain the confidence of the Board's constituents, including parents, students, and staff alike. Thus, the decision to create the class supervisor position was entirely appropriate. In any case, of course, it is not within the province of this tribunal to second-guess the educational judgments made by boards and their senior administrative staff, absent a showing of bad faith. In this case, no bad faith was shown.

As the superintendent also explained at the hearing, it was his intention, as recommended to the Board, to create a new administrative structure at the high school designed not only to enhance the delivery of guidance services, but to make the new positions more managerial-administrative in nature. While petitioner downplays the fact that the new position entails participation by class supervisors in the formal evaluation process, and argues that the total time devoted to that activity is minimal, the fact remains that the evaluation by supervisory staff of their instructional staff colleagues is critical to the proper carrying out of the Board's responsibilities. In my view, the evaluation function does represent a critical distinction in this case. Whether the class supervisors actually evaluate 10, 15, or 20 of their colleagues annually is essentially irrelevant. The fact is they are expected to and do go into the classroom to observe teachers and are full participants in the process whereby the performance of those teachers is measured, whether for purposes of reappointment, the grant of tenure, or the award of an increment. Guidance counselors, on the other hand, rarely, if ever, went into the classroom and I daresay their presence there in an "evaluation" mode would sorely strain the

relationship that the guidance counselor would have with that teacher. Rather, as Dennery implicitly admitted, even if she observed a teacher, it would only have been in the context of a particular problem that a student might be having. For example, a teacher might be "too good" for a particular student and the classwork too difficult for that student to handle. In that sort of context, the notion that the guidance counselor was in any fashion evaluating the teacher's performance is unacceptable. Thus, by virtue of the evaluation function alone, I believe that the class supervisor position is not one which can be tagged as "substantially similar" to that of the guidance counselor.

In addition, other meaningful differences exist. One period per day class supervisors act in the place and stead of the associate principal and truly are "in charge" of other teachers with respect to supervision of the carrying out by those others of various assignments. Guidance counselors did not act in that capacity. Also, there is a real difference in terms of their work hours, particularly in light of the "on call" nature of the class supervisor job.

Dennery's claim that during her tenure as guidance counselor she engaged in supervisory functions is not persuasive. As the Board points out, her duties with respect to "supervision" of homerooms, fire drills, halls, bus loading, and lunch room essentially concerned themselves with oversight of student behavior. Her claim that these activities involved meaningful direction of teaching personnel similar to that now exercised by class supervisors is rejected.

Although most, if not all, of the guidance counselor duties were subsumed within the class supervisor position, this mere overlap does not make the positions identical nor render whatever differences exist merely quantitative. See, Santarsiero and Jablonski. See also, Rufalo v. Board of Education of Livingston, OAL DKT. EDU 3760-85 (May 20, 1986), aff'd, Commissioner of Education (July 1, 1986). See also, Sandri v. Board of Education of Bergen County Vocational School District, OAL DKT. EDU 6737-85 (April 28, 1986), aff'd, Commissioner of Education (June 11, 1986). In Sandri, the undersigned administrative law judge held that the duties and responsibilities of the newly-created position of assistant director of special needs/student services was qualitatively different from that of supervisor of guidance/shop. I there also pointed out that some latitude must be given to a Board of Education with respect to creation of new positions as part of an administration

reorganization designed not only to enhance the delivery of services, but also to deal with financial constraints, and there must be reasonable accommodation of the development and phasing in of the new position. I believe that concept applies here as well. Creation of the class supervisor position was, after all, an experiment designed to achieve certain important purposes. The evolving nature of the position can be seen from the very differences between the first class supervisor position to which Tanis was appointed, and the subsequent positions to which Kean and Immitt were appointed. Here, as in Sandri, the newly created position was intended to and does encompass a broad range of managerial-type responsibilities, and while there certainly exist a number of areas of overlap, the positions cannot, in light of the decisional authorities mentioned, be considered "substantially similar."

Accordingly, I **CONCLUDE** that the petitioner's claim to any of the new class supervisor positions, or to the director's position, must be rejected and her petition of appeal should be **DISMISSED**.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

May 16, 1990
Date

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

5/21/90
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

5/21/90
Date

Jaynee La Vecchia, S.W.
OFFICE OF ADMINISTRATIVE LAW

amr/e

ELSA DENNERY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF PASSAIC CITY REGIONAL HIGH SCHOOL DISTRICT #1, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner advances in exceptions the premise posited before the ALJ:

> Because the position of guidance counsellor and class supervisor are substantially similar, and because, in any event, Mrs. Dennery held the supervisory certificate necessary for that limited aspect of the "class supervisor" position which arguably involved tasks beyond the guidance counsellor's historic functions, the conclusion is inescapable that the board's action in this matter was violative of petitioner's tenure rights. The ALJ's recommended decision should be rejected. (Exceptions, at pp. 9-10)

More specifically, petitioner cites "[t]hree fundamental errors and omissions*** in the ALJ's shallow analysis." (Id., at p. 3) First, she claims as a matter of law that the duties of the two positions in question, that of guidance counselor and that of class supervisor, are "substantially similar" under prior case law and the facts of this case. (Id.) Second, petitioner claims the only responsibility of a class supervisor truly requiring a supervisory certificate pursuant to N.J.A.C. 6:11-10.4(c) was the evaluation of classroom teachers, a function which she avers constituted between one percent and two percent of the class supervisor's duties. Third, petitioner avers that since she already held the supervisor certificate when her position was abolished, she must be given preference over nontenured personnel to the new position.

In the ARGUMENT section of petitioner's extensive exceptions, she posits at Point I:

> THE BOARD'S ACTION IN LAYING OFF PETITIONER VIOLATED HER TENURE RIGHTS BECAUSE THE DUTIES OF THE GUIDANCE COUNSELLOR AND CLASS SUPERVISOR POSITIONS WERE SUBSTANTIALLY THE SAME

Petitioner claims that the ALJ should have performed a close scrutiny of the Board's purposes in acting to reduce its tenured staff in this case. She cites N.J.S.A. 18A:28-9 and Vogel v. Bd. of Ed. of Ridgefield, decided by the Commissioner August 15, 1983, rev'd State Board June 7, 1985 for this proposition. She further relies on Mirandi v. Board of Education of West Orange, decided by the Commissioner September 15, 1988, aff'd State Board April 5, 1989 as an example of a decision related to the "substantially similar" concept (Exceptions, at p. 14) which demonstrate that

> ***even where a board can articulate non-discriminatory motives for its conduct, it can nevertheless be found to have acted in bad faith, as a matter of law, where the duties of the new position are substantially similar to the abolished position. School boards simply cannot rely on "educationally based reasons" defense to subvert the rights of tenured teachers. Thus, the ALJ's initial inquiry was improperly inverted. Whether the functions of class supervisors are substantially the same as those previously performed by guidance counselors, rather than whether the school board acted with personal animosity or in bad faith, is the standard by which the ALJ's analysis should be driven. (emphasis in text) (Id., at pp. 14-15)

Further, petitioner claims that while the ALJ did review the duties required of the two positions, the judge erred in basing his decision primarily on the fact that class supervisors perform evaluations of classroom teachers and participate in the process by which the performance of those teachers is measured. She contends instead that the limited evaluative responsibilities of the new position do not support a finding that the duties of the two positions are substantially different. Instead, petitioner contends that cases such as Santarsiero et al. v. Parsippany-Troy Hills Board of Education, decided by the Commissioner May 14, 1984 and John Sandri v. Bd. of Education of the Bergen County Vocational School District, decided by the Commissioner June 11, 1986 support petitioner's position that there must be some fundamental difference in responsibilities before two positions can be considered uniquely different.

Petitioner claims that the limited evaluations of teachers conducted by class supervisors serve more as an adjunct of the guidance function than as proof of a class supervisor's service in a distinctly administrative capacity. "The testimony was undisputed that these evaluations were limited to teachers whose students were assigned to the class supervisor (3T123-15 to 3T124-2)." (Exceptions, at p. 21) She further posits that the class supervisors are responsible for at most fifteen evaluations per year. "Even allowing for a few hours per evaluation (observation, write-up and meeting) the class supervisors spend at most two-three days per year out of 183 in performing this supervisory function. Performing additional responsibilities 2% of the time does not make the positions 'substantially' different." (Id.) Also, petitioner

retorts that there is no authority for the ALJ's conclusions that the ancillary functions of class supervisors are strictly supervisory or are either "qualitatively or quantitatively sufficiently distinct to constitute a 'new' position." (Id., at p. 22) Relying on Walldov v. Board of Education of East Brunswick, decided by the Commissioner May 10, 1985, for the proposition that even where a board of education acts to upgrade the qualifications of its staff, its actions must be carefully scrutinized, petitioner claims that under either a qualitative or quantitative review of the job functions of guidance counselors and class supervisors, her tenure status extends to and entitles her to the position of class supervisor.

Relying on N.J.A.C. 6:11-10.4(c) for the circumstances under which a supervisor endorsement is required for a position, petitioner further claims the instant class supervisor position is not closely related to that described in the regulation. She contends:

> ***The "class supervisors" at Passaic Valley certainly are not charged with "authority and responsibility for the continuing direction and guidance of the work of instructional personnel." To the contrary, "class supervisors" have virtually no such responsibilities. Their duties are almost exclusively concerned with students and counselling. Any involvement in the direction and guidance of teaching personnel is extraordinarily limited and specifically circumscribed. Because it has been demonstrated that the responsibilities of the position petitioner seeks are substantially similar to the position in which she acquired tenure, petitioner's tenure must extend to the new position. (emphasis in text)
>
> (Exceptions, at p. 25)

At Point II of her exceptions, petitioner states:

> UNDER THE CIRCUMSTANCES OF THIS CASE, PETITIONER'S TENURE AND POSSESSION OF THE REQUISITE CERTIFICATES ENTITLED HER TO PREFERENCE FOR THE CLASS SUPERVISOR POSITION OVER A NON-TENURED EMPLOYEE

Even assuming arguendo that there was a legitimate abolition of her guidance counselor position, petitioner claims the Board acted in contravention of her tenure rights in terminating her and refusing to appoint her to a class supervisor position. She concludes the ALJ erred in failing to apply the broad principles enunciated in Capodilupo v. Board of Education of Town of West Orange, Essex County, decided by the Commissioner May 3, 1985, aff'd/rev'd State Board September 3, 1986, aff'd N.J. Superior Court, 218 N.J. Super. 510 (App. Div. 1987), Cert. denied 109 N.J. 514 (1987); Bednar v. Board of Education of the Westwood Regional

School District, Bergen County, decided by the Commissioner May 13, 1988, aff'd State Board December 3, 1986, rev'd/rem'd to State Board by N.J. Superior Court, 221 N.J. Super. 239 (App. Div. 1989), Cert. denied 110 N.J. 512 (1988) and their progeny. She claims he should have concluded that

> ***[s]ince she was authorized and qualified to serve as a class supervisor by virtue of her student personnel and supervisor's certificate, her tenure status entitles her to employment as against non-tenured employees, regardless of their experience, when the distinction between the two positions effectively hinges on the need for the supervisor certificate.
>
> (Exceptions, at pp. 29-30)

Petitioner recognizes that the ALJ distinguished the above cases from the facts at bar because none of them involved more than one certificate. She retorts by suggesting:

> ***Because this case presents the "novel" question of whether a tenured employee who holds, but did not serve under, the certificate allegedly required to perform a limited class of functions assigned to the substantially similar new position, the ALJ timidly refrained from performing the requisite analysis under these cases. Quite simply, it neither takes a blind leap of faith nor a contortion of the above decisions to find that the tenure statutes were enacted to protect the rights of tenured employees over non-tenured ones in a case such as this.
>
> A decision upholding the board's action in this matter will signal an open-ended invitation to public employers to evade the rights of tenured employees by "abolishing" tenured positions, tacking on a new certification requirement, and effectively continuing the responsibilities of the old job. In operation, boards of education will be free to dismiss tenured staff members under the guise of reorganization, even though the only real difference in the two positions is the addition of a limited class of responsibilities arguably requiring an additional certificate which the tenured employee already possesses.
>
> Indeed, the ALJ's decision is fundamentally incompatible with the protections afforded by both the tenure laws and these cases. The ALJ concludes that the positions of guidance counselor and class supervisor are not substantially similar primarily because of the

> assignment of a small percentage of additional responsibilties to the class supervisor which allegedly require a "supervisor" certificate. In effect, the ALJ permits the additional certification requirement to control the "substantially similar" inquiry. Under the ALJ's reasoning, a new position will never be "substantially similar" to its abolished predecessor if a new certificate is required to perform those limited additional responsibilities assigned to the new job. Yet this reasoning turns the Bednar analysis on its head. It invites school boards to engraft additional certification requirements upon "new" positions, simply to create differences in theory even if none in fact exist. As demonstrated by the decisions in Capodilupo, Bednar, Mirandi and Grosso, tenured employees must be protected from this type of arbitrary gerrymandering.
> (Id., at pp. 30-31)

Petitioner seeks reversal of the initial decision and a position as class supervisor.

By way of reply to petitioner's exceptions, the Board iterates its understanding of petitioner's "substantially similar" argument by stating:

> Petitioner hopes to persuade the Commissioner, contrary to the facts, that the duties performed by the class supervisors were either nonsupervisory in nature or were duties which were performed by guidance counselors or "could" have been performed by guidance counselors (PE at 19).*** With regard to the latter contention, inasmuch as Respondent has never contended that guidance counselors were physically incapable of performing certain duties, the issue as to which tasks a guidance counselor "could" have performed is clearly irrelevant to this case. Rather, the pertinent areas of inquiry are limited to the duties which were actually performed by guidance counselors, as compared to class supervisors, and the supervisory duties which guidance counselors were proscribed from performing by virtue of their lack of qualifications and which were in fact performed by class supervisors. (emphasis in text) (Reply Exceptions, at p. 3)

The Board claims that petitioner's contention that there were few distinctions between the guidance counselor and class supervisor positions is without support in the record. It claims:

> It is evident from the testimony presented at the hearings that guidance counselors, and Petitioner in particular, did not formally or informally

> evaluate or reprimand teaching staff members, did not make oral or written recommendations with respect to teachers' promotions or salary increases, did not supervise or direct teachers, administer or oversee student discipline, did not prepare formal written recommendations with regard to curriculum modifications, or otherwise supervise school activities. (1T.96/20-97/9; 97/14-24; 132/16-133/6; 144/14-145/21; 173/17-19; 174/19-175/8; 190/24-181/23; 187/25-188/11). Neither did Petitioner have the qualifications nor the authority to do so. (Id., at p. 7)

In support of its position in this regard the Board cites the testimony of one of petitioner's witnesses, Mr. Thomas Kean, Supervisor of the Class of 1991 and former guidance counselor. Citing the transcript of his testimony, the Board avers Mr. Kean spoke of the class supervisor position as including certain distinct responsibilities which he had never assumed as a guidance counselor, including evaluating and observing teacher performance, and assuming building-wide supervisory authority as well as being on call for hours longer than those of guidance counselors. The Board distinguishes the class supervisor's role from that of a guidance counselor as requiring "***the continuing direction and guidance of instructional personnel, not simply students." (emphasis in text) (Id., at p. 9)

While petitioner's exceptions minimized the time spent by such supervisors evaluating staff, the Board emphasizes in its reply exceptions the time spent on this task and the importance of the evaluations in the teacher's professional life. In this way, the Board rebuts petitioner's argument averring that the roles of guidance counselors and class supervisors are substantially similar.

At Point I of its reply exceptions, the Board states:

> THE ADMINISTRATIVE LAW JUDGE PROPERLY DETERMINED THAT THE BOARD ACTED REASONABLY AND IN GOOD FAITH WHEN IT ABOLISHED PETITIONER'S POSITION.

The Board submits that petitioner does not contest the fact that four class supervisors are doing the work previously performed by six guidance counselors, in addition to their supervisory responsibilities, with an increase in efficiency and improvement of services offered. Thus, the Board contends that petitioner's challenge to the propriety of and good faith in the Board's decision to initiate the superintendent's recommendations concerning the creation of the class supervisor positions is devoid of merit. It cites Sandri, supra, in support of the proposition that boards must be given broad discretion with respect to creating new positions as part of an administrative reorganization, with accommodation for the development and phasing in of the new position.

As to petitioner's "substantially similar" argument concerning the duties of the two roles, the Board observes that petitioner did not except to the ALJ's finding of fact. It also

cites Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976) as the proper standard of review used by the Commissioner in reaching his decisions, that is that factual determinations made by an administrative agency will be sustained when the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. The Board claims that given this deferential standard of review, coupled with the unrefuted testimony stressing the significant additional responsibilities assumed by class supervisors as compared to guidance counselors, a different conclusion or reversal of the initial decision is not justifiable. It claims the ALJ properly determined there to be meaningful and fundamental differences between the positions and that said determination was entirely supported by the record before him.

At Point II of its reply exceptions, the Board states:

> AS A MATTER OF LAW PETITIONER IS NOT ENTITLED TO THE SEPARATELY TENURABLE POSITION OF CLASS SUPERVISOR BECAUSE SHE IS TENURED SOLELY IN THE POSITION OF GUIDANCE COUNSELOR.

The Board relies on Howley v. Bd. of Ed. of Ewing Tp., 1982 S.L.D. 1328, 1347, aff'd State Board of Education, 1983 S.L.D. 1554; Spiewak et al. v. Rutherford Bd. of Ed., 90 N.J. 63, 77 (1982); DeCarlo v. Bd. of Ed. of the Borough of South Plainfield, decided by the Commissioner August 4, 1988 and Kaprow v. Bd. of Ed. of the Tp. of Berkeley, decided by the Commissioner November 29, 1989 for the proposition expressed in Kaprow as follows:

> ***The Commissioner rejects as unfounded in law and contrary to sound educational policy the notion that tenure attaches to every endorsement on every certificate held by a teaching staff member regardless of the position in which he or she acquired tenure.*** (Slip Opinion, at p. 17)

The Board also relies on Kaprow, supra, as limiting the holding of Capodilupo, supra, and Bednar, supra, to their facts and stood solely for "the proposition that, within the scope of the position in which tenure was acquired, seniority regulations cannot be invoked to retain a nontenured teacher at the expense of a tenured one." (Reply Exceptions, at p. 21 quoting Kaprow at p. 17) The Board submits that neither Capodilupo nor Bednar dealt with holders of more than one type of certificate, nor claims to positions in more than one of the separate and distinct categories enumerated in N.J.S.A. 18A:28-5.

Applied to the instant matter, the Board claims that its having transferred the duties of the guidance counselor positions to the class supervisors, in addition to the newly assigned supervisory duties, does not warrant a finding that petitioner is entitled to any of the class supervisor positions. It cites Figurelli v. Board of Education of the City of Jersey City, Hudson County, decided by the Commissioner December 11, 1986, aff'd St. Bd. May 6, 1987,

remanded by N.J. Superior Court, Appellate Division for supplement to the record December 3, 1988, aff'd State Board April 6, 1988. In that case, the State Board denied petitioner's request to declare the Board's action violated her tenure and seniority rights when it abolished her position as director of pupil personnel services and transferred her to a position as a school psychologist. The Board avers the State Board emphasized in its decision that petitioner therein had acquired tenure in the position of director of pupil personnel services and not in the position of assistant superintendent, the position she sought. The Board herein suggests that the State Board saw no basis in Figurelli to grant petitioner's relief notwithstanding that her tenure and seniority rights acquired as director of pupil personnel services had been violated.

Additionally, the Board avows that petitioner herein tacitly concedes that the decisions in Bednar, supra, Capodilupo, supra, and Grosso, supra, are inapposite to the instant case because those decisions involved different and related endorsements on a single certificate rather than different certificates. It states:

> Petitioner implores the Commissioner to ignore this pivotal distinction and make an unprecedented extension of the law pronounced in these cases to suit the particular needs of the Petitioner. Petitioner justifies this proposition on the well-trodden basis of "job protection" for tenured employees. In essence, Petitioner seeks the Commissioner to support and implement a system by which individuals possessing no actual experience in substantively and qualitatively different areas of work are preferred as a matter of course over competent staff members with practical, hands-on experience. (emphasis in text)
>
> (Reply Exceptions, at pp. 22-23)

The Board summarizes by stating that it is uncontroverted that petitioner's service in the district was limited to that of guidance counselor under the authority of her educational services certificate. It claims that as a matter of law and sound public policy, petitioner's mere possession of a supervisor endorsement under an administrative certificate acquired in July 1988, without any service in a position pursuant to that certificate, does not confer upon her tenure or seniority rights to the position of class supervisor. The Board seeks affirmance of the initial decision.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Board's failure to appoint petitioner to a class supervisor position and/or the class supervisor/director of guidance position, was proper and violated neither her tenure nor her seniority rights.

To prevail in demonstrating entitlement to tenure, petitioner in this matter must meet the requirement of N.J.S.A. 18A:28-5, that is that she held a position "which require[ed] [her]

to hold appropriate certificate issued by the board of examiners" for the requisite period of time. As enunciated in Philip Howley and Dewey Bookholdt Jr. v. Ewing Township Board of Education, 1982 S.L.D. 1328, aff'd State Board of Education, 1983 S.L.D. 1554:

> Contrary to common usage and popular belief, the State Board of Examiners issues only three kinds of regular certificates, i.e. a certificate with lifetime validity issued to candidates who meet New Jersey standards for regular certification. Temporary certificates, provisional certificates, emergency certificates, etc. (N.J.S.A. 6:11-4.2 to 4.9) are all limited certificates issued to candidates who cannot meet the standards for regular certification. Although it is possible under some circumstances to acquire tenure without holding a regular certificate, see Anson, et al. v. Bridgeton Board of Ed., 1972 S.L.D. 638, under the tenure law, "(t)he services of any teaching staff member who is not the holder of an appropriate certificate, in full force and effect, issued by the state board of examiners under rules and regulations prescribed by the state board of education may be terminated without charge or trial..." N.J.S.A. 18A:28-14. The three regular certificates issued by the board of examiners are: a) Instructional (N.J.A.C. 6:11-6.1 et seq.); b) Administrative and Supervisory (N.J.A.C. 6:11-9.1 et seq. and 6:11-10.1 et seq.); and c) Educational Services (N.J.A.C. 6:11-11.1 et seq. and 6:11-12.1 et seq.)
>
> Endorsements
>
> All other "certificates" referred to in case law and rather carelessly in some places in the regulations*** are actually "endorsements" on one of the foregoing three certificates. The fields in which teaching endorsements may be issued on a New Jersey Instructional Certificate are listed at N.J.A.C. 6:11-6.3: (a) specific subject field, e.g. biological science, English, mathematics, etc; (b) Comprehensive subject field, e.g art, business education, music, etc.; (c) Handicapped; (d) Elementary education; and (e) Nursery school. Additional endorsements are listed under subchapter 8, New Jersey Institutional Supplement to Standards for State Approval of Teacher Education, N.J.A.C. 6:11-8.1 et seq. Pursuant to N.J.A.C. 6:11-6.2 and 6:11-8.3, each teaching endorsement is valid for all levels, except that the nursery school endorsement is valid in nursery schools and kindergartens and the elementary endorsement is valid for grades kindergarten through eight.

> Pursuant to N.J.A.C. 6:11-10.4, the following endorsements may be issued on a New Jersey Administrative and Supervisory Certificate:
>
> ***
>
> (c) Supervisor: This endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. This endorsement also authorizes appointment as an assistant superintendent in charge of curriculum and/or instruction.
>
> ***
>
> There are currently 18 separate endorsements (although most are referred to in the language of the regulations as "certificates," they are nevertheless endorsements and some are properly so designated) which may be issued on the regular New Jersey Educational Services Certificate, including; e.g., Professional Librarian, School Social Worker, Speech Correction, Director of Student Personnel Services, etc.*** (at 1332-35)

By the express terms of N.J.S.A. 18A:28-5 and pursuant to Spiewak et al. v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982), 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. Petitioner's service in respondent's district, it is uncontested, has been under a pupil personnel services endorsement under an educational services certificate. Therefore, her tenure and seniority rights extend exclusively to the services she has rendered under such certificate. The position which she seeks is one requiring a supervisor's endorsement under an administrative certificate under which she has never served. It is undisputed herein that the county superintendent of schools, in approving the unrecognized title of class supervisor, determined that the appropriate certificate and endorsement for the position of class supervisor is that of a supervisor's endorsement under an administrative certificate. Therefore, since petitioner has never actually served as a supervisor, she has no tenure or seniority claims to any position other than that of guidance counselor. The Commissioner so finds.

The Commissioner's conclusions regarding whether the duties performed by guidance counselors in respondent's district are substantially similar to that of its class supervisors comport with the ALJ's factual and legal conclusions. Neither petitioner's

exceptions nor a review of the transcript has persuaded the Commissioner to accept petitioner's proposition that the duties of the two positions are so substantially similar as to constitute the same position. See initial decision ante. As noted by the ALJ and the Board, more than mere overlap exists between the two roles, the most significant being the evaluation function of teaching staff members by the class supervisors. That said function may have been performed by the class supervisors only a limited number of times during the year or as only a limited percentage of the class supervisor's activities, such arguments are, as the ALJ pointed out, irrelevant. Evaluation of staff is a distinctly supervisory function which may not be performed by one who does not hold a supervisor's endorsement. Moreover, the type of role petitioner may have assumed under her pupil personnel services endorsement in appearing at a fellow teaching staff member's classroom, as described by petitioner's testimony, is in no manner akin to the evaluative function of teaching staff performed by the class supervisors. See initial decision ante, Findings of Fact Nos. 12, 13, 19 and at pages 19-20. Accordingly, for the reasons expressed by the ALJ as amplified herein, the Commissioner adopts as his own the findings and conclusions of the ALJ below that the newly created position of class supervisor and that of guidance counselor in respondent's district are distinctly different and do not permit petitioner's acquiring of tenure and seniority rights as a class supervisor, when she has performed only those duties described as that of a guidance counselor at Passaic County Regional High School #1.

Moreover, the Commissioner is fully in agreement with the ALJ that Capodilupo, supra, Bednar, supra, and Grosso, supra, do not serve to support petitioner's contentions herein. As noted by the ALJ and the Board, all of the cases upon which petitioner herein bases her case involve claims made pursuant to endorsements held under instructional certificates. In so stating, the Commissioner notes that persons holding instructional certificates are tenured as teachers. Therefore, any such tenured teacher with the appropriate instructional endorsement may lay claim to any position held by a nontenured teacher.

It bears emphasizing here that in this case petitioner seeks to claim a position under a certificate endorsement which she holds but under which she has never served nor acquired tenure. To carry petitioner's contention to the absurd limit, were she to hold a principal's endorsement under an administrative certificate, she would be entitled to claim a position over a nontenured principal even though her only service in the district was under an educational services certificate as a tenured guidance counselor.

Accordingly, for the reasons expressed by the ALJ below, as amplified herein, 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.

COMMISSIONER OF EDUCATION

ELSA DENNERY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, July 2, 1990

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Robert A. Fagella, Esq., of Counsel)

For the Respondent-Respondent, DeMaria, Ellis, Hunt & Salsberg (Richard H. Bauch, Esq., of Counsel)

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

October 3, 1990

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1143-90
AGENCY DKT. NO. 23-1/90

CINDY BUSCH AND THE PEMBERTON TOWNSHIP EDUCATION ASSOCIATION,
Petitioners,
v.
PEMBERTON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Kenneth I. Nowak, Esq., for petitioners (Zazzali, Zazzali, Fagella and Nowak, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: May 22, 1990 **Decided:** May 25, 1990

BEFORE **JEFF S. MASIN**, ALJ:

Petitioners, a parent of a student attending Pemberton Township Schools, and the Education Association representing the school teachers within the respondent District, bring this Petition before the Commissioner of Education pursuant to his authority under N.J.S.A. 18A:6-9 seeking to overturn a determination of the respondent Board which decided by Resolution of October 1989 that it would not make up five school days during which time the petitioner Education Association conducted an illegal strike against the School District.[1]

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[1]An additional parent, William Barksdale, who has since become a member of the respondent Board, has withdrawn as a petitioner.

The Commissioner of Education transferred the case to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Following transmittal, the respondent filed a motion for summary decision to which the petitioners filed a response. The matter was ultimately assigned for hearing to Administrative Law Judge Jeff S. Masin, who conducted an oral argument on the Motion for Summary Decision on the scheduled hearing date of May 22, 1990. After considering the arguments of counsel as set forth in their briefs and in the oral argument, Judge Masin determined to grant the motion for summary decision on behalf of the respondent and dismissed the proceedings. The reasons for this determination are set forth below.

UNDISPUTED FACTUAL CONTEXT

There is no dispute concerning the essential facts which have led to these proceedings. The Education Association ("PTEA") engaged in a strike September 11 through 15, 1989. On September 17, 1989, the parties reached a Memorandum of Agreement, which is Exhibit A attached to the Motion for Summary Decision filed by respondent. This document included language as follows:

> 3. That any of the days of September 11-15, determined not to be school days, shall be rescheduled for 10 month employees for make up, prior to June 30, 1990.

On October 24, 1989, the Board voted 6-1 to reject the recommendation of the Superintendent of Schools and to count the days from September 11 through 15 as schools days and not make them up at the end of the 1989/90 school year.

The strike which was conducted by PTEA resulted in action by the respondent Board to compel the teachers to return to work. Honorable Harold B. Wells, III, J.S.C. issued back-to-work orders on two occasions during the strike, compelling PTEA members to return to work. They did not do so and instead defied the court orders, which resulted in the filing of an Order to Show Cause seeking to hold the Association and members thereof, as well as the Pemberton Township Bus Driver's Association and its members who honored the picket line, in contempt of court. By order of November 8, 1989, Judge Wells **ORDERED** that PTEA, the New Jersey Education Association, and named individual members thereof pay to the Board legal fees and costs in connection with the Board's application for contempt. Various members of the Association pled guilty to criminal contempt.

As part of its submissions in connection with its Motion for Summary Decision, respondent has submitted documentation concerning the status of its schools during the strike, including reports on the number of teachers and students in attendance and the nature of any instruction which occurred. It is sufficient at this point to note, in accordance with respondent's counsel's own comments at the oral argument, that the level of instruction was negligible. The records also reflect the hours that the schools were open.

MOTION FOR SUMMARY DECISION

Respondent has filed a Motion for Summary Decision arguing several grounds for dismissing the petitioners' Petition. Initially, with respect to the Education Association, the respondent contends that its Petition, although filed within 90 days, was sufficiently delayed within that timeframe as to raise a defense of laches. Further, respondent asserts that the PTEA is barred from relief, pursuant to the equitable doctrine of "clean hands." In addition, the Board questions PTEA's standing to bring the action and further argues that it waived its right to contest the issue when it signed the Memorandum of Understanding giving the Board the discretionary power to determine whether or not to consider the five days of the strike as school days. With respect to the individual petitioner, the Board argues a lack of standing.

At oral argument, counsel for petitioners acknowledged that although he was not conceding that the students attending the District schools had received a thorough and efficient education in the course of the 1989/90 school year up to the present date, at the same time he had no evidence to which he could point to demonstrate that they have not received such an education as a result of the effects of the Association's strike.

THE MOTION WITH RESPECT TO PTEA

The most fundamental and telling argument raised by respondent against petitioner PTEA's position in this case is the equitable doctrine of "clean hands." There is no question whatsoever that the undisputed facts establish that the petitioner Education Association engaged in an illegal strike against the respondent Board and that it compounded the seriousness of its illegal conduct by flagrantly refusing to comply with the back-to-work orders issued by Judge Wells. The situation was apparently so outrageous as to require that Judge Wells find individual

members of the Association to be in criminal contempt of his orders and to fine the Association. There can be no question but that a public employee union which engages in a strike, which is illegal by its very nature, and which compounds its illegal conduct by contumacious defiance of the orders of the Superior Court soils its hands and places itself in a very awkward and unsympathetic position when it now comes to the Commissioner seeking relief from a situation which it caused by its own illicit actions. Bd. of Ed. of Union Beach v. New Jersey Education Association, 53 N.J. 29 (1968); Passaic Tp. Bd. of Ed. v. Ed. Ass'n, 222 N.J. Super. 298 (App. Div. 1987). The Association does not deny that its actions have in fact dirtied its hands, despite whatever justifications it may wish to present for why it found it necessary to violate the laws of this State and the orders of the Court. While a petitioner with unclean hands is not always barred from relief, in general, courts will not do equity for those who have engaged in unconscionable conduct.

The Commissioner of Education has addressed the clean hands question on prior occasions. While he does not have appeared to have considered the issue in Camden Edu. Assoc. v. Bd. of Ed. of the Cty. of Camden, 1979 S.L.D. 215, the issue was ruled upon in two subsequent opinions which were first ruled upon by Administrative Law Judge Eric Errickson. In 1981, in Trenton Ed. Assoc. v. Bd. of Ed. of the Cty. of Trenton, EDU 1605-81, the Trenton Education Association sought an order of the Commissioner directing Trenton's Board of Education to make up six days because it contended that they had failed to meet the requirement of providing a thorough and efficient education. The Board responded by arguing that the petitioners, having "actively engaged in an illegal strike" were barred from relief by the doctrine of clean hands. Judge Erickson relied upon North Bergen Federation of Teachers, et al. v. North Bergen Bd. of Ed., 1978 S.L.D. 250, where at 251, the Commissioner had stated:

> The long-established equitable principle of "clean hands" applies to administrative proceedings as well as law cases. In the courts it means that equity refuses to lend its aid in any manner to one seeking its active interposition who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief.... The same principle applies by analogy to persons applying for relief from an administrative tribunal.

Although North Bergen reflected the Supreme Court's concern that the clean hands doctrine not be applied either rigidly or construed so as to allow "unconscionable gain to the wrongdoer at the complainant's expense," A. Hollander & Son, Inc. v. Imperiale Fur Blending Corp., 2 N.J. 235, 247, the judge nevertheless determined that

under the facts of the case, the strike by a large majority of the membership of the union barred it from seeking "further participation as a party petitioner in this action. That it now seeks to remedy and make whole a disruption of the education process does not absolve petitioner of its responsibility for setting in motion the very events which caused the disruption."

Judge Errickson's decision in Trenton was affirmed and adopted by the Commissioner of Education on July 9, 1981. In a subsequent decision, Judge Errickson dealt with the same issue involving the East Brunswick Education Association, East Brunswick Ed Assoc. on behalf of 117 East Brunswick Teaching Staff Members v. Bd. of Ed. of East Brunswick Tp., 1981 S.L.D. 810. Once again, the Education Association had engaged in an illegal job action. The Board raised clean hands as a bar to relief. The petition was dismissed on the basis of the petitioners' unclean hands and the Commissioner affirmed.

The current matter is no different in its particulars from the situations addressed in Trenton and East Brunswick. Once again an education association has taken upon itself to violate the law, engage in an illegal strike and further, in contumacious conduct. It now comes forth claiming that it should be granted relief to force the Board of Education to undertake actions which it, the Association, believes are necessary to remedy the educational affects caused when it put in motion the series of events which have led to this proceeding. I CONCLUDE that once again the doctrine of clean hands bars relief.

With respect to the laches argument, there is no dispute concerning the fact that the Petition was filed on the 85th day, within the allowable 90 days. In view of this, there is no statutory bar to the Petition. The claimed inappropriate delay arises from the respondent's conception that had the matter been filed earlier in the 90-day period, it would have been easier for the matter to have been considered and disposed of and for any adjustments to be made in the school calendar which might be necessitated if the Association was successful in its bid. However, here it appears that the Association's filing was well in advance of the end of school and but for an unfortunate delay in the scheduling of the matter for hearing in the Office of Administrative Law, the matter would no doubt have been heard and disposed of long ago. Under these circumstances, there is no showing that the respondent has been prejudiced by any inappropriate delay on the part of petitioner in bringing its action, and if there is any prejudice resulting from the lateness of this proceeding, it appears that it generally is not attributable to the petitioner, albeit there may be

some question as to whether it clearly asserted a need for an expedited proceeding when it submitted the matter to the Commissioner and requested that the case be processed through the OAL.

The waiver argument arises from the conception that the petitioner Association bargained away its right to complain about the determination of the Board as to whether or not the strike days were to be considered as school days when it entered into the Memorandum of Understanding. However, a reading of that document indicates that the argument is without merit. The Association merely agreed that it would place in the hands of the Board the discretionary determination on whether or not to consider the days as school days. If the Board chose not to consider them as such, the teachers made it plain that they would work to make up the lost time. On the other hand, if the Board determined that the days were to be counted as school days, there is no implication that the teachers were consigning themselves to acceptance of that determination regardless of its unreasonableness. The discretion was left in the hands of the Board, but on its face the document does not indicate a waiver of any right to contest capricious conduct. While this subject might require further testimony as to the intent of the parties, given the disposition of this case on the basis of the clean hands argument, I **CONCLUDE** that the issue is moot.

Finally, with respect to the Association, its standing to bring the action is challenged. The Board argues that the petitioner Association is not in a position to bring the action in and of itself, that it has failed to name any of its members as petitioners, and that it cannot assert the interests of the school children. However, there is no question but that the teachers do have a role in connection with the education of students in the District. While they are not statutorily charged with the responsibility for providing a thorough and efficient education, given the fact that they entered into the Memorandum of Understanding with the Board and that there is at least an implied understanding that unreasonable and capricious decisions could not be made concerning the counting of the days, it would seem that the petitioners do have enough of a stake in the matter to bring the action.[2] Nevertheless, once again this issue is moot, in view of the fact that if standing is conceded for the purposes of the motion, the unclean hands of the Association bar it from obtaining relief anyway.

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[2]In prior matters such as Trenton, Camden and East Brunswick standing has not been the basis for denial of relief.

For the reasons expressed, I **CONCLUDE** that the petitioner Association is barred from any relief and that its Petition must be dismissed.

The individual petitioner has joined with the Association in its petition before the Commissioner. That petition asserts that she is a parent of a child enrolled in the District. After reciting facts concerning the background of the matter, the petition asserts arbitrary, capricious and unreasonable activity on the part of the Board and references this as being a contravention of fundamental principles "that the monies which are taxed for education be used to educate our students. Money saved from teachers salaries on strike days should be used to pay for teacher salaries to make up the lost educational days." The Petition then recites several citations of statute and regulation and requests relief.

The petitioner parent apparently acts on behalf of her child or children, who are unnamed in the Petition and are not asserted to be petitioners. Reading the material liberally, one can construe the parent's role as a representative of the children as well as a taxpayer. The Petition in no sense recites any claim that the children have suffered any actual harm. While there is a general reference to statute and regulation, there is no assertion that Ms. Busch's child or children have been harmed, that they have not in fact received a thorough and efficient education to this point in the school year, etc. From the standpoint of the individual petitioner, the Petition is lacking in any semblance of notice concerning the actual harm assertedly done to the children. From the standpoint of the taxpayer, the petition is perhaps more clear in asserting a purported harm.

Generally, individual taxpayers are not viewed as having a sufficient basis for bringing actions of this nature. Here, the Association appears to have sought to piggyback its position by including an individual parent who could not be tainted by the Association's wrongdoing. However, counsel for the Association, who is also counsel for Ms. Busch, conceded at oral argument that he had no evidence to present to establish any clear, direct, quantifiable, or even other than speculative concern about whether the children had actually received the same degree of thorough and efficient education that they would have received had the five days been made up. Under these circumstances, I cannot **FIND** any basis for denying a Motion for Summary Decision, where the petitioners' position at the time of the motion is not supported by any affidavit claiming any specific harm from Ms. Busch or her children (presuming that they might be of an age to make such a petition). The Petition stands as a boldfaced assertion of unspecified harm. As such, it cannot survive the motion for summary decision, which is supported by substantial prima

facie evidence that the Board in fact opened its schools, attempted to keep them open and to provide whatever minimal instruction and supervision that it could provide given the trying situation which the petitioner Association placed it in.

For the reasons expressed, I **CONCLUDE** that the individual Petition must likewise be **DISMISSED**.

CONCLUSION

It is **ORDERED** that the Petition for relief be **DISMISSED**.

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 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.

DATE

JEFF S. MASIN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

May 30, 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

jz

CINDY BUSCH, AND THE PEMBERTON TOWNSHIP EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioners' exceptions urge that the ALJ erred in invoking the doctrine of clean hands, averring that invocation of the doctrine would act to frustrate the requirement under state law that children receive a thorough and efficient education for 180 days per year. Petitioners argue that to apply the doctrine would punish the Pemberton Township Education Association (PTEA) by forcing its members to work five days fewer but in doing so the children are punished as well by depriving them of a portion of their education.

Petitioners also urge that the doctrine was not applied in Camden, supra, and in the two matters where it was, East Brunswick, supra, and Trenton, supra, distinguishable factors exist between the instant matter and them, i.e. the Memorandum of Agreement between the PTEA and the Board which agreed that days during the illegal job action determined not to be school days would be rescheduled. Nothing in that agreement barred the PTEA from contesting the Board's determination as to whether instruction occurred on those days; thus, since said agreement is valid and binding, then a controversy over the fulfillment of its terms must be adjudicated on the merits. As such, petitioners argue that the ALJ erred by not addressing the merits of the case and they aver that substantial evidence exists that the students did not receive an adequate education from September 11 to 15, 1989.

Upon review of the record and the position of the parties, the Commissioner is in full accord with the Administrative Law Judge's findings and conclusions in this matter. Further, the Commissioner emphasizes that the ALJ is absolutely correct in concluding that:

> The current matter is no different in its particulars from the situations addressed in Trenton and East Brunswick. Once again an education association has taken upon itself to violate the law, engage in an illegal strike and

> further, in contumacious conduct. It now comes forth claiming that it should be granted relief to force the Board of Education to undertake actions which it, the Association, believes are necessary to remedy the educational [effects] caused when it put in motion the series of events which have led to this proceeding. I CONCLUDE that once again the doctrine of clean hands bars relief. (emphasis supplied)
>
> (Initial Decision, at p. 5))

While the existence of the Memorandum of Agreement may be a distinguishable factor, it does not render the East Brunswick, supra, and Trenton, supra, matters inapplicable. Moreover, the fact that the doctrine of clean hands was not addressed in Camden, supra, is of no moment whatsoever.

Accordingly, the initial decision is adopted by the Commissioner as his final decision. The Petition of Appeal is, therefore, dismissed.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 9726-89
AGENCY DKT. NO. 356-11/89

RICHARD MILLER,
Petitioner,
v.
BOARD OF EDUCATION OF DEMAREST, BERGEN COUNTY,
Respondent.

Record Closed: May 17, 1990 Decided: May 17, 1990

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 **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a teacher from the decision of the Demarest Board of Education ("Board") to withhold his salary increment for the 1989-90 school year under *N.J.S.A.* 18A:29-14.

Procedural History

On December 1, 1989, petitioner Richard Miller ("Miller") filed a petition with the Commissioner of Education ("Commissioner") alleging that the decision of the board to withhold his annual salary increment was illegal, arbitrary and capricious. On December 19, 1989, the Board filed its answer denying the allegations. Subsequently, on December 26, 1989, the Commissioner transmitted the matter to the office of Administrative Law ("OAL") for determination as a contested case. The OAL held a full day of hearing on May 16, 1990. This oral decision was delivered at an open hearing on May 17, 1990.

Findings of Fact

Based on the testimony and the documentary evidence presented at the hearing, I **FIND** the following facts:

Richard Miller is an experienced teacher currently employed by the Demarest school district. His teaching career has spanned 30 years, the last 14 of which as a teacher in Demarest. During the 1988-89 school year, he was assigned as a science and social studies teacher at the Demarest Middle School. He holds an educational degree at the masters level. Since he is at the top of the salary guide, this case involves the withholding of his adjustment increment for the 1989-90 school year. The amount in controversy is $2,793. On August 29,. 1989, the Board, by majority role call vote, passed a resolution freezing Miller's salary at $43,812 for the upcoming school year. By his own admission, Miller has always had a good working relationship with his supervisors in the district - at least until recently when his building principal, Dennis McDonald, rated Miller's job performance as unsatisfactory.

The basis for the withholding of Miller's increment depends on observations and evaluations of his job performance in the 1988-89 school year. During that time period, principal McDonald conducted two formal observations of Miller's classroom performance, one on November 7, 1988 and another on January 10, 1989. On February 17, 1989, McDonald issued an interim evaluation of Miller's performance and had a conference with the teacher to discuss the results. Later, on April 24, 1989, McDonald prepared a summative evaluation of Miller's job performance, which was

furnished to the members of the Board and relied on by them in withholding petitioner's increment. In the beginning of May 1989, principal McDonald met with Miller to discuss the summative evaluation and explain the areas in which Miller was rated as unsatisfactory. Additionally, between February and June 1989, principal McDonald continued to monitor Miller's performance by reviewing his plan books and his grading methods and by making informal contacts with Miller inside and outside the classroom. McDonald also had conversations with other teachers and parents concerning Mr. Miller's job performance.

Although the Board's action rests almost entirely on the results of McDonald's observations and evaluations, the decision to recommend withholding of the increment was made by the district superintendent Paul Saxton. Before making his recommendation to the Board, Saxton met with Miller and a union teacher representative in June 1989 for a final review of the areas in which Miller had received unsatisfactory ratings. It is clear from the record that Miller had advance notice of all areas in which his supervisors felt he was deficient. For purposes of clarity, these deficiencies may be discussed under several general categories.

Preparation and Lesson Planning

One of the major areas in which McDonald rated Miller as unsatisfactory was improperly managing instructional time and planning his class sessions. For example, the observation conducted on November 7, 1988 notes that Miller had scheduled six class periods for completion of a single research project. As a professional educator, the supervisor stated that one period of research in the library might be justified, but that the remaining work on the research paper by students should have been performed out of the classroom. What was distressing to McDonald was that the students were deprived of effective instruction for so long a time period. A similar inefficient use of valuable classroom time was noted in the evaluation dated February 17, 1989. Miller had allocated 18 weeks of instruction in a sixth grade social studies class for the study of Canada. According to the supervisor, this overemphasis on a single subject area would short change the students in their coverage of other important topics such as geography skills, Africa and Latin America. Since he had been a teacher for 30 years, Miller clearly should have known how better to use his time and balance the subject matter so that the entire curriculum could be covered.

Yet another indication of poor planning on Miller's part involves his continual failure to follow the school policy of scheduling future tests and quizzes on a master calendar located in the school office. McDonald testified without contradiction that Miller hardly ever made entries in this calendar. The purpose of the calendar was to coordinate teacher activities so that students would not be overburdened by assignments from many teachers all due on the same day.

A particularly graphic illustration of this problem involved Miller's scheduling of a test at a time which would conflict with religious holidays. Two different sets of parents complained to the principal that Miller had announced to his class that a test would be administered on Thursday, April 20, a date which coincided with the passover holiday. When McDonald checked the calendar, the test had not been entered for April 20 but instead was scheduled for April 24. Originally Miller denied that he had ever told his students there would be a test on April 20. At another point, however, he altered his story and admitted that some of his students had reminded him of the Passover holiday and that he had told them "he would have to find another day." The point here is not that the test was scheduled for a religious holiday, since there is absolutely no evidence that Miller was being unfair to his students. Rather, this is one example of a scheduling problem which would have been easily avoided if Miller had availed himself of the calendaring system which the district employed

Unfortunately, this was not the only instance where Miller's failure to plan ahead caused confusion for his students. As shown in the observation of November 7, 1988, some students thought that an assignment was due on Monday November 14 whereas the paper was not due until Thursday November 17. McDonald recommended that Miller be more specific in his assignment dates to avoid confusing his students.

Teachers are responsible for maintaining a plan book and McDonald testified that he often wrote comments for suggested improvements in Miller's plan book. Despite the obvious importance of this document, the plan book for 1988-89 was missing and Miller could not give any reasonable explanation as to why it was not available. The circumstance supports the district's position that Miller experienced great problems in planning for the efficient use of classroom time.

Effective Instruction and Teaching Strategies

Another serious problem involves Miller's insensitivity to the needs of special education students and the use of derogatory comments in the classroom. Support for this charge came from several different sources. In October 1988, McDonald received complaints from several parents who claimed that their handicapped children were ridiculed in class and were not permitted to leave the classroom for special education services. Specifically, the parents reported that Miller had referred to the handicapped children as "wimps" or "losers" and had implied that his own class was the "real world" and that the special education teachers were merely "the ladies upstairs."

Confirmation of these accusations came from the two special education teachers themselves, who reported to the principal that Miller would not release his students on time to attend special education sessions. These same special education teachers also criticized Miller for not cooperating in modifying his tests to meet the learning styles of the handicapped children. Miller steadfastly denied that he had called special education children by derogatory names or that he interfered with their leaving his classroom for special services. He did admit, however, that some of his students might be embarrassed to go for remedial help and that some of their classmates may have used insulting names in his classroom. Insofar as credibility is concerned, the fact that these reports about Miller's behavior come from several separate sources and include other faculty members as well as parents makes them very believable and trustworthy. Nor did Miller really deny that some of the handicapped children in his class often arrived late for special services.

A separate, but equally disturbing, incident involved the alleged use of demeaning nicknames when speaking to children of Asian ancestry. Again the principal received several reports from parents about this occurrence. At the hearing, Miller denied making these improper remarks. However, McDonald testified that Miller had, on one occasion, promised him that he would not make such remarks "again."

Obviously, the information in support of this particular charge rests almost entirely on hearsay. McDonald candidly admitted that he had not personally

observed any of the occurrences during the 1988-89 school year and that he obtained his knowledge from speaking with parents, children and other teachers. Given the consistency and frequency of these reports, the Board was justified in crediting these complaints in only one of several areas where Miller's performance was found to be difficult.[1]

Grading Procedures

McDonald was critical of Miller's criteria for grading his students, which he described as "based more on class participation [and] not reflected in a measurable system in Mr. Miller's grade book." In particular, McDonald was disturbed by what appeared to be "inflated" grades that were unsubstantiated by a variety of tests, quizzes, reports and other long range assignments. In one particular instance, Miller had informed McDonald that a female student would receive a grade of "D" or failing on her first marking period report card. Then, however, the student's parent complained to Miller that such a low grade would prevent her child from participating on the cheerleading squad. Miller accommodated the parent's request by raising the grade to a "C." When McDonald reviewed the underlying documentation in Miller's grade book and other records, he could not find any basis for giving the higher grade. On a different occasion, Miller changed another child's

[1]Under the residuum rule, a fact finding or legal determination cannot be based upon hearsay alone. *In re Cowan*, 224 *N.J. Super.* 737 (App. Div. 1988). Applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Where several acts of wrongdoing are charged, there need not be a residuum of competent evidence to prove each act considered by the trier of fact so long as "the combined probative force of the relevant hearsay and the relevant competent evidence, sustains the ultimate finding." *Cowan*, at 750. Standing alone, the hearsay proofs concerning Miller's treatment of handicapped and Asian children would not be sufficient in itself to justify an increment withholding. Coupled with the competent proofs on other charges, such as the principal's own observations and the documentary evidence, the evidence concerning this deficiency may be considered as one factor among others in supporting the board's determination. Hence, the situation is very different from *Colavita v. Hillsboro Twp. Bd. of Ed.*, Dkt. A-4342-83T6 (*N.J.* App. Div March 28, 1985), where the board's entire case rested exclusively on hearsay evidence and there was a total absence of any legally competent evidence.

science grade from a lower grade to a "B" after her parents had challenged Miller's grading methodology. In a letter to Miller thanking him for this accommodation, the parents indicated that they still could not understand the methodology Miller used to determine the proper grade.

All teachers in the district are required to keep grade books for the entire school year. Miller, however, turned in a photocopy of a grade book which had entries only for the last marking period and not for the rest of the school year. Miller never offered any explanation as to why he did not comply with this requirement or where the necessary records were located.

Finally, the district has a policy that test papers must be sent home to parents so they would be aware of what progress their children were making. Miller admitted that he did not send papers home to parents, and told the principal that his refusal was due to his desire to use the same papers over again in future years.

Conclusions of Law

Based on the facts developed at the hearing and the applicable law, I **CONCLUDE** that the board's discretionary exercise of its statutory authority to withhold increments should not be overturned.

N.J.S.A. 18A:29-14 provides that a board of education may withhold "a teacher's salary increment for inefficiency or other good cause." Appeals from such action may be taken to the Commissioner, who may either affirm or direct that the increments be paid. A decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local school board. *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 96 *N.J.* 587 (1984). *Bernard Twp. Bd. of Ed. v. Bernard Twp. Ed. Ass'n*, 79 *N.J.* 311 (1971); *Clifton Teachers Ass'n Inc. v. Clifton Bd. of Ed.*, 136 *N.J. Super.* 336 (App. Div. 1975). When reviewing such determinations, the Commissioner is prohibited from substituting his own judgment for that of the local board. His scope of review is limited to assuring that there exist a reasonable basis for the decision.

Exercise of the discretionary powers of the local board may not be upset unless patently arbitrary, or without rational basis or induced by improper motives. *Kopera*

v. West Orange Bd. of Ed., 60 *N.J. Super.* 288 (App. Div. 1960). The burden of proving the unreasonableness rests upon the party challenging the board's action. *Kopera,* at 297. Thus, the Commissioner's scope of review is limited to determining: (a) whether the underlying facts were as those who made the evaluation claimed; and (2) whether it was reasonable for them to conclude as they did upon those facts, bearing in mind they were experts.

At the outset, petitioner attacks the withholding of his increment on a procedural technicality. *N.J.S.A.* 18A:29-14 provides that the board of education has the duty within ten days to give written notice of its action to the teacher, "together with the reasons therefor." In this case, the Board did notify Miller of its action within the ten-day period, but did not elaborate on its reasons for approving the superintendent's recommendation to withhold the salary adjustment. While this is a clear violation of the statutory language, it is not fatal to the validity of the Board's action. Recently, the Appellate Division held that the Commissioner must not take a "hyper-technical" approach, but rather should verify that "the substance of the statutory requirement has been satisfied." *Northern Highlands Reg. High Sch. Dist. v. Martin,* 1979 *S.L.D.* 852 (App. Div. 1979). In the *Martin* case, "the record disclose[d] that detailed and extensive explanations had previously been given to the petitioner as to his teaching shortcomings by his department chairman." 1979 *S.L.D.* at 852-853. Under such circumstances, the Appellate Division ruled that the failure of strict compliance with the statutory requirement was cured. Here too, the administrative staff of the district notified Miller of his deficiencies throughout the course of the school year and supplied him with written evaluations and the opportunity to confer with his evaluator. Undoubtedly, Miller was fully aware of the deficiencies which form the basis for the Board's action.

Petitioner cites a Commissioner's decision wherein the commissioner set aside an increment withholding because the record failed to sustain the underlying facts on which the board based its determination. *Yorke v. Piscataway Twp. Bd. of Ed.*, 1989 *S.L.D.* ____ (Comm'r Sept. 18, 1989). However, the *Yorke* case depends heavily on its specific facts. In *Yorke*, petitioner received ten evaluations, most of which were "glowing", "completely positive" or "fully satisfactory." Five different supervisors had evaluated Yorke's performance. Only one evaluator found fault with her performance, and there was cause to suspect the impartiality of that person. Unlike *Yorke*, here McDonald consistently rated Miller as deficient in several

different. Moreover, there is no basis on the record to impune McDonald's motives or to suspect that he harbors bias against Miller. Instead, the current case involves a judgment call by a professional educator as to the adequacy of his subordinate's performance during the school year. Whether or not Miller agrees with the views of his supervisor, it cannot be said that the principal's opinion was tainted by improper motives or was otherwise irrational and arbitrary.

In reviewing increment withholding cases, it must be kept in mind that "the purpose of the statute is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Bernards Twp.*, at 321. Thus, a local board is "making a judgment concerning the quality of the educational system." (at 321). Put another way, an annual increment is not a statutory right, but rather a reward for good performance. *North Plainfield*, 96 *N. J.* at 594. Accordingly, the petitioner here has failed to meet his burden of proving that the Board acted unreasonably when it voted to withhold his salary increment.

Order

It is **ORDERED** that the relief requested by petitioner is denied.

This oral 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 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(c).

END OF TRANSCRIPT

I, Anna M. Leggett, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Ken R. Springer's oral decision rendered in the above matter on May 17, 1990, as edited for grammer and style by Judge Springer.

May 29, 1990
Date

Anna M. Leggett
ANNA M. LEGGETT

Receipt Acknowledged:

JUN 1 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

June 4, 1990
Date

Jaynee LaVecchia/S.W.
OFFICE OF ADMINISTRATIVE LAW

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RICHARD MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST, BERGEN 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.

Petitioner's exceptions urge that the ALJ erred in relying upon Northern Highlands, supra, asserting that the decision is bad law that must be ignored since an unpublished opinion is not binding upon the Commissioner. Petitioner also urges that given the absence of a statement of reasons for the increment withholding and the ALJ's sustaining of his objection to allowing the Board to submit to the record a document allegedly providing a statement of reasons, the Commissioner has no idea why his increment was withheld.

Lastly, petitioner avers that the ALJ ignored the fact that most of the reasons for the withholding were based upon hearsay statements of parents who did not testify and that such statements are insufficient under the residuum rule to sustain the withholding. Also argued is that the ALJ misapplied Yorke, supra, in that in the instant matter petitioner was advised in the February 17, 1989 evaluation report that there would be monitoring of unsatisfactory areas during the remainder of the school year which was not done.

Upon careful review of the record in this matter, the Commissioner agrees with, and adopts as his own, the findings and conclusion of the ALJ. Petitioner's argument with respect to the applicability of Northern Highlands, supra, is deemed meritless. It is well-established in case law that failure to give a statement of reasons pursuant to N.J.S.A. 18A:29-14 is not a fatal flaw when constructive notice has been provided through the evaluation process. See Daly v. Bd. of Ed. of River Vale, Bergen County, decided March 24, 1987; Corsetto v. Bd. of Ed. of Passaic County Technical-Vocational School, Passaic County, decided June 12, 1985; Klein v. Bd. of Ed. of Cedar Grove, 1981 S.L.D. 1179.

The Commissioner likewise finds as meritless petitioner's allegation that the withholding was for the most part based on hearsay. Examination of the record demonstrates that the ALJ correctly considered the residuum rule and determined that the factual circumstances in this matter are clearly distinguishable from those in Colavita, supra. The Commissioner fully concurs with

the ALJ that standing alone the hearsay proofs would not be sufficient unto themselves to justify the withholding but given other competent proofs, such as observations of the principal and the evaluation reports, the hearsay evidence may be considered as one factor among others in support of the increment withholding. (Initial Decision, at p. 6)

Lastly, the Commissioner agrees with the ALJ that Yorke, supra, is inapplicable. Moreover, that decision was on July 5, 1990 reversed by the State Board.

Accordingly, for the reasons well-expressed in the initial decision, the Commissioner adopts the recommendation of the ALJ to dismiss the Petition of Appeal due to petitioner's failure to demonstrate that the Board's action was unreasonable and not supportable by the facts. Kopera, supra

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7138-89
AGENCY DKT. NO. 270-8/89

BERNICE REGENSTEIN,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF TEACHER CERTIFICATION,
Respondent.

Kathleen W. Hofstetter, Esq., for petitioner (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

David Earle Powers, Deputy Attorney General for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: April 27, 1990 Decided: June 1, 1990

BEFORE **RICHARD J. MURPHY,** ALJ:

Statement of the Case and Procedural History

Petitioner contends she is eligible for nursery school certification pursuant to *N.J.A.C.* 6:11-6.3. The respondent Department of Education raises by way of affirmative defense the issues of *res judicata* and/or collateral estoppel, failure to comply with requisite conditions precedent, and failure to bring the instant action within the 90-day period of limitation applicable to controversies and disputes arising out of the education laws.

Findings of Fact

On May 5, 1981, the Department of Education, Bureau of Teacher Education and Academic Credentials provided petitioner, Bernice Regenstein, with an evaluation for certification as a nursery school teacher. This evaluation indicated that to obtain her certificate she needed to take two courses or six credits in reading and perform student teaching.

On December 15, 1985, Regenstein filed a petition with the Commissioner of Education requesting certification to teach nursery school. This petition was denied and petitioner appealed. On September 25, 1986, the Commissioner of Education entered a final decision stating that petitioner lacked the necessary student teaching and required an additional reading course before certification could be granted.

In the summer of 1988, petitioner satisfied the reading course requirement. Consequently, on August 3, 1989, she filed a petition requesting certification as a nursery school teacher. On August 10, 1989, the director of the Office of Teacher Certification and Academic Credentials' Dr. Celeste M. Rorro, advised petitioner that she had completed the student teaching requirement. Also on August 10, 1989, petitioner submitted a new petition substantially similar to the August 3rd petition. In her petition, petitioner asserts that she is entitled to obtain certification as a nursery school teacher. More particularly, the petitioner asserts that the application of the provision of *N.J.A.C.* 6:11-6.3 (d) to her circumstance dictates that she be permitted to obtain that certification without taking and passing the state test.

Respondent State Department of Education denies that petitioner is or has been eligible for certification on the basis of *N.J.A.C.* 6:11-6.3 (d). In addition, respondent asserts by way of defense that petitioner's claim is estopped on the grounds of *res judicata* and/or collateral estoppel. Also, respondent asserts that petitioner has failed to bring this action within the 90-day period of limitation applicable to controversies and disputes arising under the education laws.

There is no dispute as to the above facts and I so **FIND**.

Issues

1. Whether petitioner is entitled to the endorsement of nursery school teacher by operation of *N.J.A.C.* 6:11-6.3(d)?

2. Whether petitioner's claim is barred by N.J.A.C. 6:24-1.2(b)?

3. Whether petitioner's claim is barred by the doctrines of *res judicata* or collateral estoppel?

4. Whether summary decision should be granted on any of these issues?

DISCUSSION AND CONCLUSIONS OF LAW

1. Is petitioner entitled to the endorsement of nursery school teacher by operation of *N.J.A.C.* 6:11-6.3 (d)?

In 1984, the State Board of Education ("Board") proposed amendments to its rules concerning the issuance of teacher certificates (*N.J.A.C.* 6:11-1 to 6:11-8). According to the Board, these revised rules were part of an effort to improve the quality of new teachers in the best interest of children by establishing "a more rigorous system for assuring teacher competence by requiring a state test along with the completion of either a college program or a stringent state-approved alternative program, and by drastically restricting the use of substandard certification." 16 *N.J.R.* 1647.

These amendments, which were adopted on September 5, 1984, include *N.J.A.C.* 6:11-6.3(d) which provides:

> Applicants who receive official transcript evaluations before September 1, 1985, shall be permitted to fulfill requirements by taking the college courses indicated or by taking the appropriate State test and State-approved training program where applicable. Such applicants who choose to complete college courses must do so by September 1, 1990, after which they must take the State test. No new transcript evaluations will be issued after September 1, 1985 in fields in which State-approved training programs are authorized. [Emphasis added]

In the comments published with the adoption of these rules, the Board noted that the final version of the regulations was meant to "clarify that nursery teachers are to be included in the elementary category as being required to pass a test of general knowledge for certification." 16 *N.J.R.* 2789. Thus, unless Regenstein falls

under an exception to the state test described in *N.J.A.C.* 6:11-6.3(d), she is required to pass this test prior to receiving her certification as a nursery school teacher.

Prior to the amendments there was no requirement for an individual to submit to a state test before receiving a teaching certificate. Petitioner was originally evaluated on May 5, 1981, prior to the amendments and before the September 1, 1985 deadline imposed by *N.J.A.C.* 6:11-6.3(d). Therefore, petitioner argues that she should be entitled to receive her certificate as a nursery school teacher without having to submit to the state test since she has completed the two reading courses and student teaching required in her evaluation before the September 1, 1990 deadline. Petitioner avers that when the procedure for granting certifications was changed in 1984, *N.J.A.C.* 6:11-6.3(d) was enacted to protect those individuals (such as petitioner) who had already submitted applications for evaluation of their transcript under the former provisions.

The respondent Board argues, however, that *N.J.A.C.* 6:11-6.3(d) does not apply to petitioner. The Board states that it only issues three basic certificates: (1) standard instruction certificate pursuant to *N.J.A.C.* 6:11-5.1 *et seq.*; (2) supervisory certificate pursuant to *N.J.A.C.* 6:11-9.1 *et seq.*; and (3) education services certificate pursuant to *N.J.A.C.* 6:11.1 *et seq.* In petitioner's case, the title nursery school teacher is an endorsement to the standard instructional certificate. The applicant for a standard instructional certificate must have passed a test of general knowledge (the state test) in order to obtain the nursery scxhool endorsement. *N.J.A.C.* 6:11-5.1 (a) (1). Thus, no exception should be made for the petitioner.

The Board notes in its brief that "It has long been settled that the other titles commonly erroneously referred to as certificates are actually endorsements to one of the three standard certificates." *See*, Respondent's Brief, page 3. *N.J.A.C.* 6:11-6.3 is entitled "Endorsements: requirements." Therefore, according to the respondent, the petitioner may be able to waive the state test for the nursery school endorsement, but would still need to take the test to receive the endorsement's underlying certificate.

In *Howley and Bookholdt v. Ewing Township Bd. of Ed.*, 1982 *S.L.D.* 1328 (Comm' of Education, December 20, 1982) (unreported), the initial decision by Judge M. Kathleen Duncan defined certificates and endorsements in the context of tenure law.

> Contrary to common usage and popular belief, the State Board of Examiners issues only three kinds of regular certificates, i.e. a certificate with lifetime validity issued to candidates who meet New Jersey standards for regular certification. . . . All other "certificates" referred to in case law and rather carelessly in some places in the regulations are actually "endorsements" on one of the foregoing three certificates. The fields in which teaching endorsements may be issued on a New Jersey Instructional Certificate are listed at *N.J.A.C.* 6:11-6.3: (a) specific subject field, e.g. biological science, English, mathematics, etc.; (b) Comprehensive subject field, e.g. art, business education, music, etc.; (c) Handicapped; (d) Elementary education; and (e) Nursery school.

Hence, based on the definitions articulated in *Howley*, petitioner's "certificate" for nursery school teacher is actually an "endorsement."

Petitioner counters the respondent's arguments by stating that in practice, "there is not such thing as a particular document entitled 'standard instructional certificate' without an endorsement on it. . . . There is no procedure for applying for a standard instructional certificate without a designation as to a particular teaching area." *See*, petitioner's Reply Brief, page 4. Furthermore, despite the definitions of certificate and endorsement in the *Howley* decision, there are currently numerous instances in the New Jersey Administrative Code where endorsements are still referred to as certificates. Thus, respondent's argument that *N.J.A.C.* 6:11-6.3 (d) does not apply to petitioner because it refers to endorsements and not certificates is specious.

It is well established law that the rules of an administrative agency are "subject to the same canons of construction as a statute." *Matter of N.J.A.C 14A:20-1.1*, 216 *N.J. Super.* 297, 306 (App. Div. 1987); *See, Essex County Welfare Bd. v. Klein*, 149 *N.J. Super.* 241, 247, (App. Div. 1977). Furthermore, case law has held that "if the court finds that 'the statute is clear and unambiguous on its face and admits of only one interpretation,' the sole function of the court is to enforce the statute according to its literal terms." *State v. Pleva*, 203 *N.J. Super.* 178, 188 (App. Div. 1985), certif. den. 102 *N.J.* 323.

A plain reading of *N.J.A.C.* 6:11-6.3 (d) reveals that it is a self-expiring exception enacted pursuant to the new state testing requirement. Since petitioner has fulfilled the requirements of *N.J.A.C.* 6:11-6.3 (d) (*i.e.*, she was evaluated before September 1, 1985 and she has completed her reading course requirement and the mandatory

student teaching prior to the code's deadline of September 1, 1990), petitioner is entitled to the endorsement of nursery school teacher. I so **CONCLUDE.**

Moreover, it should be noted that petitioner was told by the Board itself on many occasions, most importantly in the Commissioner's final decision on September 25, 1986 regarding her application, that she was unable to obtain certification because she had not completed the reading course and student teaching requirements. No mention of the state test was made at that time. Now that petitioner has completed the outstanding requirements, the Board is estopped from bringing up yet another requirement for petitioner to fulfill.

2. Is petitioner's claim barred by *N.J.A.C.* 6:24-1.2(b)?

N.J.A.C. 6:24-1.2 provides that petitions before the commissioner to determine controversies and disputes arising under the school laws shall be filed within 90 days after receipt of the board's action. In express terms, the code 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. The petitioner then shall file proof of service and the original of the petition with the commissioner c/o the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, 225 West State Street, CN 500, Trenton, New Jersey 08625.
>
> b. 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 courts have long supported the commissioner's right to dismiss petitions filed after the expiration of the 90-day period. *North Plainfield Education Association v. Board of Education of the Borough of North Plainfield, Somerset County,* 96 *N.J.* 587 (1984). Additionally, the clock starts to run with notification of the disputed action, and not with notification of the final decision on that action. *Riely v. Board of Education of Hunterdon Central High School,* 173 *N.J. Super.* 109 (App. Div. 1980); *Booth v. Board of Education of Salem,* OAL Dkt. No. EDU 1897-79 (February 1980), modified, Comm'r of Education (March 24, 1980) (an appeal challenging the legality of a transfer must be filed within 90 days of notice of the transfer and not its effective date).

However, in some instances a relaxation rule applies. This rule, *N.J.A.C.* 6:24-1.17 provides as follows:

> The rules herein contained shall be considered general rules of practice to govern, expedite, and effectuate the procedure before, and the actions of, the commissioner in connection with the determination of controversies and disputes under the school laws. They may be relaxed or dispensed with by the commissioner, in his or her discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

In *Miller v. Morris School District*, EDU 364-80, Comm'r of Education (February 25, 1980), the limited circumstances under which the 90-day rule will be relaxed were addressed at length. The commissioner stated:

> Enlargement of the time period is thus warranted in only three instances: where a substantial constitutional issue is presented, where judicial review is sought of an informal administrative determination and where a matter of significant public interest is involved. *Brunetti v. New Milford*, 68 *N.J.* 576, 586 (1975) . . . *Reahl v. Randolph Township Municipal Utilities Authority*, 163 *N.J. Super.* 501, 509 (App. Div. 1978) *cert. den.* 81 *N.J.* 45 (1979).

Relaxation of the school laws was permitted in *Shokey v. Board of Education of Twp. of Cinnaminson*, 1978 *S.L.D.* 919 (Comm'r of Education, November 29, 1978), affirmed by State Board of Education, 1979 *S.L.D.* 869 (unreported). In *Shokey*, although the original petition was filed more than 90 days subsequent to the board's initial refusal to grant leave, the commissioner found the continuing nature of the matter made the petition timely under the relaxed rules of *N.J.A.C.* 6:24-1.19. *Id.* at 921. To do otherwise would have, in the commissioner's estimation, placed form over substance. *Id.* at 922. In *Shokey*, the board continuously refused petitioner the use of accumulated sick leave during a maternity period, in direct contravention of established precedent.

The relaxation rule was also employed in *Smith v. Board of Education of Cinnaminson*, Comm'r of Education (April 24, 1978) where there was a continuous effort by petitioner to persuade the board to grant her leave time for maternity. Although the 90-day period ran from the time of the board's initial refusal, the circumstances of the case and petitioner's continuous pursuit of her claim prompted the application of the relaxation rule. In addition, the commissioner has declined to apply the 90-day rule where the effects of the board's action did not have a definite

termination date, *i.e.*, where the board continued to employ clerical aides to perform the duties of a school nurse. *Wyckoff Education Association v. Board of Education of Wyckoff*, OAL Dkt. EDU 901-79, (January 30, 1980), affirmed, Comm'r of Education (March 17, 1980). Absent such circumstances or good cause for relaxation of the rule, recent judicial and administrative cases indicate that petitions filed after 90 days of notice of the board's action will be dismissed.

Consequently, although case law shows that the 90-day filing requirement is strictly applied by the commissioner, the relaxation rules, *N.J.A.C.* 6:24-1.19, are applied if good cause is demonstrated. *Baley v. Board of Education of Tp. of Mansfield*, OAL Dkt. EDU 4997-79 (July 24, 1979), affirmed, (June 19, 1980), affirmed by State Board of Education (February 4, 1981).

In the present case, a finding that the 90-day period had not expired before the filing of her petition might be made if the Administrative Law Judge (ALJ) finds that petitioner's 90 day period began to run from Dr. Rorro's notice to petitioner in July 1989 advising petitioner that she was entitled to file a petition regarding the Board's continuing refusal to grant her a certificate to teach nursery school.

Notwithstanding the outcome of this factfinding, in the present matter, strict adherence to the 90-day rule would clearly result in an injustice. Like the petitioner in the *Smith* decision, Ms. Regenstein's continuous pursuit of her certificate indicates that she has not "slept on her rights." In addition, there is significant public interest involved here since other individuals may be in the same situation as the petitioner. In fact, the outcome of this case would pertain to the group of individuals who obtained an official transcript evaluation before September 1, 1985 and who can potentially complete their course requirements before September 1, 1990. Consequently, I **CONCLUDE** that petitioner's claim is not barred by *N.J.A.C.* 6:24-1.2(b).

3. Do the doctrines of *res judicata* or collateral estoppel bar petitioner's claim?

The doctrine of *res judicata* applies when there exists (1) a final judgment by a court of competent jurisdiction, (2) identity of issues, (3) identity of parties, and (4) identity of the cause of action. *T.W. v. A.W.*, 224 *N.J. Super.* 675, 682 (App. Div. 1988) citing *City of Hackensack v. Winner*, 162 *N.J. Super.* 1, 27-28 (App. Div. 1978) mod. 82 *N.J.* 1 (1980). Collateral estoppel is the branch of *res judicata* which bars

relitigating any issue of fact or law that has been actually determined on the merits in a prior proceeding; it is generally between the same parties while involving a different claim or cause of action. *Charlie Brown of Chatham v. Board of Adjustment,* 202 *N.J. Super.* 312, 327 (App. Div. 1985); *Allesandra v. Gross,* 187 *N.J. Super.* 96, 103 (App. Div. 1982). Therefore, *res judicata* applies when either party attempts to relitigate the same cause of action. Collateral estoppel applies when either party attempts to relitigate facts necessary to a prior judgment. *See, Allesandra* at 104. *See also, Restatement, Judgments* 2d, sec. 17 at 148 (1982). The principles of *res judicata* and collateral estoppel are applicable not only to the parties in courts of law, but also in administrative tribunals and agency hearings. *City of Hackensack v. Winner,* 162 *N.J. Super.* 1, 24 (app. Div. 1978); 2 *Restatement, Judgments* 2d, sec. 83(1) (1980).

Neither doctrine bars petitioner from litigating the facts involved in her present petition. As the record reveals, the four factors necessary for application of *res judicata* or its corollary, collateral estoppel, are absent. Although a final commissioner decision was rendered concerning petitioner's application for certification as a nursery school teacher in November 1986, this decision related to a different situation. In 1986, petitioner had not yet completed the reading courses and student teaching required to obtain the certificate she seeks. Additionally, although the parties involved in the present matter are the same as those involved in 1986, the issues to be decided are clearly different. The 1986 litigation involved an interpretation of whether petitioner had satisfied the criteria for a nursery school teacher certificate. In the present matter, the issue involves the interpretation of *N.J.A.C.* 6:11-6.3(d). Consequently, since the facts are different and the law involved is different in the present matter, I **CONCLUDE** that the doctrines of *res judicata* or collateral estoppel do not bar petitioner's claim.

4. Should the motion for summary decision be granted?

Motions for summary decision in administrative proceedings are governed by *N.J.A.C.* 1:1-12.5, which states in 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. 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.

This provision is substantially similar to Rule 4:46-2 of the New Jersey Court Rules and is accorded similar treatment.

The role of the judge in summary decision motions is to determine whether there is a genuine issue as to a material fact, and if the moving party is entitled to judgment as a matter of law. *Judson v. Peoples Bank & Trust Co. of Westfield,* 17 *N.J.* 67, 73 (1954). Summary decision is designed to allow the judge to quickly and inexpensively dispose of any case in which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion clearly shows no genuine issue of material fact requiring disposition at a hearing. *Judson,* 17 *N.J.* at 74.

To safeguard a litigant's right to a plenary hearing on the merits, summary judgments are granted only after a full consideration of the disputed issues. To this end, it is paramount that the moving party eliminate any "reasonable doubt as to the existence of a factual issue." *Costa v. Josey,* 83 *N.J.* 49 (1980). The Appellate Division in *Friedman v. Friendly Ice Cream Co.,* 133 *N.J. Super.* 333, 337 (1975) held: "In deciding whether a genuine issue as to any material fact exists, the moving papers and pleadings are considered most favorably for the party opposing the motion and all doubts are resolved against the movant. If there is the slightest doubt as to the facts, the motion should be denied."

Moreover, the opposing party will not succeed in defeating the summary judgment "without factual support in tendered affidavits." *U.S. Pipe and Foundry Co. v. Amer. Arbitration Assn.,* 67 *N.J. Super.* 384, 399-400 (App. Div. 1961). Affidavits are tools that the opposing party utilizes to demonstrate that material issues of fact are in dispute. According to *Judson,* if the opposing party offers no affidavits or affidavits with immaterial or unsubstantial facts, the opposing party cannot complain if the court takes "as true the statement of uncontradicted facts in the papers relied upon by the moving party" and eventually grants a summary judgment. *Judson* at 75.

In the present matter, the petitioner requested a summary decision claiming that there is no dispute regarding the facts underlying her claim to be qualified for certification as a nursery school teacher. The respondent has also moved for

summary decision. Both parties agree that there are no material issues of fact in dispute. Furthermore, a review of the relevant code sections and case law indicates that the petitioner should prevail as a matter of law. Therefore, I **CONCLUDE** that this case is appropriate for summary decision in favor of petitioner and against respondent.

ORDER

On the basis of the above findings of fact and conclusions of law, petitioner's motion for summary decision establishing her eligibility for nursing school certification is **GRANTED** and respondent's Board's motion in opposition **DENIED.**

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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 1, 1990
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

6-7-90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 0 6 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

BERNICE REGENSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF TEACHER CERTIFICATION,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The State filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner filed timely reply exceptions thereto.

The State concurs with the recitation of facts as set forth in the initial decision. It thereafter incorporates by reference the arguments set forth in its motion for summary judgment. It particularly notes in exceptions its contention that N.J.A.C. 6:11-6.3(d) was intended to apply only to additional endorsements and is not applicable to one in petitioner's situation who does not hold one of the three kinds of certificates, instructional, educational services or administrative. It excepts to the ALJ's rejection of this contention made in reliance upon two grounds: (1) There is no way to obtain a standard instructional certificate alone without an endorsement, and (2) there are many places in the Code where endorsements are referred to as certificates.

As to the ALJ's first premise, the State argues the ALJ ignores the fact that the Code sets out requirements for each of the three kinds of certificates "***independent and irrespective of the additional requirements for any given endorsement.***" (Respondent's Exceptions, at p. 2) The State contends there is no exemption from meeting the requirement as set forth at N.J.A.C. 6:11-5.1(a)(1) that a candidate for a standard instructional certificate pass a state-approved test. It submits:

> Clearly, reading N.J.A.C. 6:11-5.1(a)(1) [and such other provisions of the Code as 6:11-3.23(b)(1) and 6:11-5.2(b)] and N.J.A.C. 6:11-6.3(d) in pari materia compels the conclusion that the State Board did not intend to let anyone begin a career in education without taking the required test but was willing to make a limited exception for those already certified as to additional endorsements only. This conclusion is supported by the fact that the State Board included the exception in a section of the Code explicitly dealing with endorsements. Moreover, the fact that there are

> places in the Code where the word certificate is used inappropriately for the word endorsement does not mean either that: (1) the word endorsement therefor means certificate, or (2) that the State Board did not use the terminology correctly in this instance. (Id.)

Further, the State contends that the ALJ erred in finding that while strict application of the 90-day rule would bar the instant action, the facts in this case compel relaxation of the rule. Instead, the State submits that petitioner had all the information she needed and was apprised of the position of the Department that she was required to take the test long before she filed her petition. Further, the State argues that given the past history of this matter, petitioner cannot be found to be unaware of the procedures for bringing the matter before the Commissioner. The State avows:

> Moreover, the alleged injustice to petitioner, being required to take a test, is the result of a State Board decision -- supported by the Commissioner and the Department of Education -- made to insure the quality of the education of the applicant for certification***. Justice in the larger sense requires enforcement of the 90 day rule. (Id., at p. 3)

Accordingly, for the reasons stated above, as well as those expressed in its Motion for Summary Judgment, respondent requests the Commissioner reverse the recommendation of the ALJ.

Petitioner's reply exceptions argue that the State misconstrues the two bases upon which the ALJ concluded that N.J.A.C. 6:11-6.3(d) applies to petitioner. She claims that contrary to the State's exceptions, the ALJ's conclusions were proper and, further, that the two reasons for his conclusion were different from those suggested by the State in its exceptions. First, she avows, the ALJ was convinced that the regulation is clear and unambiguous on its face and admits of only one interpretation. That interpretation would support petitioner's argument in this case.

Petitioner further supports the second finding made by the ALJ, his determination that the New Jersey Department of Education was estopped from bringing up another requirement for petitioner to fulfill, the taking of a state test. The ALJ stated the that she had completed the outstanding requirements as set forth in the Commissioner's decision of September 25, 1986, petitioner contends and, thus, the State Board of Examiners was estopped from bringing up a subsequent requirement.

In response to the State's argument that there is a clear distinction between a certificate and an endorsement that negates petitioner's reliance on N.J.A.C. 6:11-6.3(d) because subchapter 6 is entitled "ENDORSEMENTS ON THE INSTRUCTIONAL CERTIFICATE," petitioner relies on her reply brief (Exhibit 2, at pp. 3-5) as

demonstrating that such argument must be rejected. She suggests that there is a great deal of confusion that exists between the use of these terms.

Moreover, as to how the regulation in question should be interpreted, petitioner again relies on her reply brief (Exhibit 2, at pp. 5-7), in support of her contention that for respondent's argument to be correct, subparagraph (a) referring to additional endorsements, would have to be applicable to all four subsections of N.J.A.C. 6:11-6.3. Petitioner believes if the originator had intended to organize the regulation that way, it should have so expressed its intent. Further, petitioner reiterates all those arguments pertaining to the construction of the regulation as were set forth in her reply brief.

Further, petitioner reasserts those arguments she advanced at hearing and in her briefs pertaining to the 90-day rule:

> The Initial Decision entered in this matter relating to the Petitioner being entitled to the obtaining of a certification to teach nursery school without submitting to the State test is proper and should be affirmed. There is adequate support for that determination based upon the arguments and findings made in the Initial Decision and for the reasons expressed by the Petitioner in this Reply as well as in the two prior Briefs submitted by Petitioner in this matter.
>
> The Respondent's Exception to the Administrative Law Judge's determination that N.J.A.C. 6:24-1.2(b) does not bar the instant action must be rejected. There is adequate support for the Initial Decision for the Administrative Law Judge's determination on this issue as is reflected in the Initial Decision. As was set forth by the Administrative Law Judge, it is unquestionable that strict adherence to the 90 day rule would clearly result in an injustice in this matter.
>
> In further support of the argument that the Administrative Law Judge properly determined that Petitioner's claim was not barred by N.J.A.C. 6:24-1.2(b), Petitioner would rely upon the argument contained within the prior Briefs filed in this matter: in particular, Point II of the Summary Judgment Brief (Exhibit "1") and Point II of the Reply Brief (Exhibit "2"). Even if the argument for relaxation of the 90 days requirement is rejected, the facts of this case are such that they clearly reflect that the Petitioner's claim was timely filed. The 90 days began to run from Dr. Rorro's notice to Ms. Regenstein in July of 1989. Even if that

> date is rejected, it is apparent that the May 19, 1989 notice from the Assistant Commissioner would [then] be the date from which the 90 day period began to run. Accordingly, the facts indisputably indicate that the Petitioner's claim was timely filed and should not be rejected based upon failure to comply with N.J.A.C. 6:24-1.2(b).
> (Reply Exceptions, at p. 5)

Thus, for the reasons set forth above, as well as for those reasons set forth in her briefs, petitioner requests that the Commissioner affirm the ALJ's determination as contained in the initial decision of June 1, 1990.

Upon a careful and independent review of the instant matter, the Commissioner concurs with the conclusion of the Office of Administrative Law granting petitioner's motion for summary judgment for reasons stated by the ALJ as to the application of N.J.A.C. 6:11-6.3(d). However, for the reasons which follow the Commissioner finds that the Petition of Appeal is timely filed and, therefore, he does not reach the question of relaxation of N.J.A.C. 6:24-1.2(b).

Concerning the issue of whether petitioner is entitled to the endorsement of nursery school teacher by operation of N.J.A.C. 6:11-6.3(d) the Commissioner rejects the State's contention that there is no exemption from meeting the requirement of passing a state-approved test in order to secure a standard instructional certificate pursuant to N.J.A.C. 6:11-5.1(a)(10). Rather, the Commissioner finds that a plain reading of N.J.A.C. 6:11-6.3(d) places petitioner squarely within the exception to the rule requiring a candidate for an instructional certificate to pass a state examination. For ease of understanding, the regulation in question is set forth in toto below:

> 6:11-6.3 Endorsements: requirements
>
> (a) Holders of standard instructional certificates, except as noted in (b) below shall obtain additional instructional endorsements by:
>
> 1. Presenting evidence of having acquired a baccalaureate degree at an accredited institution (except as noted in N.J.A.C. 6:11-6.3(c)1; and
>
> 2. Passing a State test in the subject field or a State test of general knowledge for an elementary or nursery endorsement. In order to be eligible to take a subject field test, the applicant must have completed at least 30 semester hours in a coherent major or five years of experience in the subject field.

(b) The following subject field endorsements, while requiring a baccalaureate degree, constitute exceptions to the requirements in (a) above (see N.J.A.C. 6:11-8.3):

1. Typewriting endorsement applicants must hold a valid New Jersey instructional endorsement in business education and demonstrate proficiency in typing.

2. Driver education endorsement candidates shall hold a New Jersey instructional endorsement in another subject field and a current New Jersey driver's license. Also required are three years of automobile driving experience and evidence of a driver education training program approved by the New Jersey State Department of Education.

3. Military science endorsement requires official evidence of 20 years of military service and recommendation by the branch of service in which the applicant served a minimum of 20 years.

(c) Exceptions to the requirements of a baccalaureate degree (see N.J.A.C. 6:11-5.1(a)1 and 2):

1. In the following endorsement areas, work experience is accepted in lieu of the baccalaureate degree in accordance with N.J.A.C. 6:11-8.3(c).

i. Agricultural occupations;
ii. Skilled trades;
iii. Personal production and service occupations;
iv. Practical nursing;
v. Technical occupations.

(d) Applicants who receive official transcript evaluations before September 1, 1985, shall be permitted to fulfill requirements by taking the college courses indicated or by taking the appropriate State test and State-approved training program where applicable. Such applicants who choose to complete college courses must do so by September 1, 1990, after which they must take the State test. No new transcript evaluations will be issued after September 1, 1985 in fields in which State-approved training programs are authorized.

Petitioner's reply brief dated April 18, 1990 succinctly sets forth why respondent's interpretation of the meaning of N.J.A.C. 6:11-6.3 must be rejected.

> Respondent states (p. 4) that it has been its position since the passage of this regulation that the initial clause of N.J.A.C. 6:11-6.3(a), "holders of standard instructional certificates... shall obtain additional endorsement by..." was intended to apply to all four subsections of N.J.A.C. 6:11-6.3. Therefore, an individual possessing a standard certificate who received an Evaluation for an additional endorsement and who completed the requirements for that additional endorsement prior to September 1990 would not have to take the appropriate test for the additional endorsement. The Respondent continues on to state that it is the Respondent's opinion that it is not illogical to say that those who had demonstrated competence by obtaining certification with an endorsement in a given area and who were actively engaged in qualifying for an additional endorsement prior to the time a test was required to permit those individuals a definite period of time to obtain the additional endorsement without taking the test. This argument must be rejected.
>
> First, it is indisputable that, as it is structured N.J.A.C. 6:11-6.3 has four subsections: (a), (b), (c) and (d). For Respondent's argument to be correct that the reference in subparagraph (a) to additional endorsements was applicable to all four subsections of N.J.A.C. 6:11-6.3, the subsection would have had to be set up differently. Indeed, subsections (b), (c) and (d) would have been subparagraphs underneath paragraph (a). There is absolutely nothing in the structure of this section to support the Respondent's contention that this was the way in which the paragraph was meant to be organized. If it was meant to be organized that way, it should have been expressly stated as such and structured accordingly.
>
> Although, N.J.A.C. 6:11-6.3 is [labeled] "Endorsements: Requirements", it is apparent from a review of those provisions that some of the provisions actually refer to the obtaining of a certificate. It is Petitioner's argument that this is true with regard to subparagraph (d). However, this is also true with regard to subparagraph (c). Furthermore, a review of the contents of subparagraph (c) shows that the Respondent's argument that all of the

subparagraphs under 6.3 refer to the obtaining of additional endorsements must be summarily rejected.

* * *

The purpose of this section [(c)] is to set forth certain certificates that do not require the obtaining of a baccalaureate degree. These are the paragraphs enumerated as i. through v. It is specifically stated in this provision that in these areas work experience is accepted in lieu of the baccalaureate degree. If this was only meant with regard to what is required to obtain an endorsement, it would still require the presence of the degree to obtain a certificate. This is obviously not the purpose of this provision. The purpose of this provision was to permit individuals to obtain a certificate to teach in these designated areas without obtaining a baccalaureate degree. If the Respondent's argument with regard to N.J.A.C. 6:11-6.3 is to be accepted, individuals would first have to obtain a baccalaureate degree in order to obtain their standard instructional certificate, but [then] would not need that degree to obtain an endorsement in the given areas set forth in subparagraph (c). This reading must be rejected.

Similarly, the Respondent's argument that all of the subparagraphs of N.J.A.C. 6:11-6.3 pertain to the acquiring of additional instructional endorsements must be rejected because a reading of subparagraph (c) clearly indicates that this would be ludicrous. For example, if this meant that an individual who was already certified to teach with an endorsement in a given area applied for an additional endorsement in the areas enumerated under subparagraph (c), they would not have to have a baccalaureate degree. This would be nonsensical because in order to obtain the original certificate and original endorsement they would need the baccalaureate degree but [then] to obtain the subsequent endorsement in these designated areas they would not need a baccalaureate degree. This is clearly a reading of the provision that cannot stand. Yet, this is the exact reading that must be accorded that provision if the Respondent's argument is correct.

It should be noted that at the time the Petitioner asserted her application for Evaluation she specifically requested [Evaluation] for certification as a nursery school teacher. The certification was, therefore, pursuant to the Respondent's language, a certification for standard instructional

> certificate with an endorsement in nursery school. If that is so, she was an applicant who had received an evaluation of her request for an endorsement.
>
> It is apparent that no one applies for a certificate without applying for an endorsement. This is so whether or not the application is interpreted to be an application to "teach in a given area" or an application for standard instructional certificate with an endorsement in a given area. Either way, no one applies for and no one obtains just a standard instructional certificate. Therefore, the provisions with regard to endorsements have to relate back and qualify the provisions with regard to the application for certification.
>
> (Petitioner's Reply Brief, at pp. 5-7)

The Commissioner concurs with the above-stated arguments and adopts them as his own. Thus, the Commissioner finds that to espouse respondent's position would require reading subsection (a) of N.J.A.C. 6:11-6.3 as applying to all four subsections of the regulations, which a plain reading of the language does not permit. It is a well- established canon of statutory construction that "[i]f the plain meaning of the language is clear and unambiguous on its face and admits of only one interpretation, then we need to explore no further." (Petitioner's Brief at p. 7, quoting State v. Valentin, 208 N.J. Super. 536, 539 (App. Div. 1986), aff'd 105 N.J. 14 (1987). See also, Myers v. Cedar Grove Tp., 36 N.J. 51, 61 (1961). Thus, the Commissioner finds and determines that N.J.A.C. 6:11-6.3(d) provides an exception for those having sought transcript review as an avenue for securing certification from the test requirement by completing coursework as an alternative by September 1, 1990.

As to the State's argument that the subsection in question pertains only to those applicants who seek additional endorsements, not certification for the first time, the Commissioner finds and determines that this argument too must fail on additional grounds. A review of the "Summary" set forth in 16 N.J.R. 1636 relating to Subchapter 6 states:

> Subchapter 6 governs issuance of endorsements to initial instructional certificates. This subchapter proposes a new rule (N.J.A.C. 6:11-6.2) which lists each endorsement available and describes the type of position which its holder is entitled to occupy. Additional amendments describe degree and professional examination requirements for endorsements and fields in which special or supplemental requirements apply. N.J.A.C. 6:11-6.3, which lists criteria to be used in the evaluation of college transcripts submitted in application for

> an endorsement, has been deleted. A new rule is proposed in N.J.A.C. 6:11-6.3 listing the new requirements for obtaining endorsements. 16 N.J.R. 1646-1647. (emphasis supplied)
> (Petitioner's Brief (Exhibit 1), at p. 6)

Said commentary was published at the time the proposed regulation was released as public information. Ultimately, said proposal became N.J.A.C. 6:11-6.3. Under the provisions in effect before the 1984 revisions, any person who sought to obtain the issuance of an initial endorsement to his or her certificate could submit a college transcript for evaluation. At the time that petitioner herein submitted her transcript for evaluation in 1981, there was no state test requirement.

The summary comments make plain that the subchapter on endorsements on instructional certificates also applied to endorsements to initial instructional certificates, not solely to additional endorsements sought following issuance of an earlier earned endorsement. Thus, the Commissioner agrees with petitioner that in 1984, when the procedure for securing an initial certification and endorsement was changed, it was accomplished so as not to penalize an applicant who had earlier submitted his or her transcript for evaluation as was permitted under the old provisions. See, N.J.A.C. 6:11-6.3(d). Accordingly, because petitioner did in fact submit her transcript for evaluation before the deadline set forth under the new provision, which was September 1, 1985, she was provided the option of choosing between taking the state test or completing the college courses indicated by the State Board of Examiners by September 1, 1990 as requisite to fulfill the certification requirements. The Commissioner so finds.

Having established the above, the only remaining question pertains to the timeliness of petitioner's most recent Petition of Appeal, which was filed on August 10, 1989. The Commissioner's review of the record leads him to the conclusion that the matter was timely filed pursuant to the provision of N.J.A.C. 6:24-1.2(b). The 90-day rule recognizes that an individual must file a petition of appeal within 90 days from the date "***of receipt of the notice of a final order, ruling or other action*** which is the subject of the requested contested case hearing." The record in this matter establishes that the Director of Controversies and Disputes addressed a letter to petitioner dated July 19, 1989 (Exhibit G) stating:

> Dear Miss Regenstein:
>
> I am in receipt of your letter of July 13, 1989. I have many times indicated to you that this office does not have the authority to grant you the certification you request. I am, by copy of this letter, requesting that Dr. Celeste Rorro provide you with a letter specifically spelling out what requirements you must meet in order to become certified. If, after you receive her letter, there are issues which were not decided

in your previous case before the Commissioner of Education, you may file a new Petition of Appeal.

Although the letter from Dr. Rorro regarding the specific requirements petitioner was required to meet in order to secure certification as a nursery school teacher is not a part of the record herein, on August 1, 1989, (Exhibit H), Dr. Weiss again directed a correspondence to Ms. Regenstein relative to whether a final order had issued from the State Board of Examiners which would trigger the 90-day rule. Therein he states:

> Dear Miss Regenstein:
>
> I am in receipt of your letter of July 22, 1989 which takes exception to the letter received from Dr. Celeste Rorro regarding the requirements you must meet in order to become certified as a nursery school teacher.
>
> I note that you continue to refer to the administrative law judge's (ALJ) recommendations, regarding the reading courses you took as if the ALJ's determination was a final one. Please recognize that an ALJ only makes a recommendation and the final decision rests with the Commissioner of Education. Therefore, there was nothing improper about the reversal of the ALJ's findings as it relates to the evaluation of your courses to meet the reading requirement.
>
> As I indicated in my last letter, I would entertain a new Petition of Appeal from you if there was any issue regarding your certification which was not settled by your previous case. Since the matter of your lack of student teaching still remains as a bar to your certification, any petition on your part as to the applicability of N.J.A.C. 6:11-6.3 to your case would not result in your achieving certification even if you prevailed. Nonetheless, If you wish to file a petition strictly limited to the question of whether N.J.A.C. 6:11-6.3 serves to exempt you from being required to pass the test of General Knowledge, you may do so.
>
> Should you file a petition, please remember that the sole basis for such a petition would be applicability of N.J.A.C. 6:11-6.3. No other issue will be considered. Consequently, you should be aware that even if you should prevail, you would still require student teaching to obtain certification.

Exhibit M, a memo from Dr. Rorro to Mr. Joseph Zach, Ocean County Superintendent of Schools, dated August 10, 1989 makes plain that by the date of Dr. Weiss' letter to Ms. Regenstein dated

August 1, 1990, petitioner had satisfied the student teaching requirement. Thus, having established by the Commissioner's decision dated September 25, 1986 relative to her first Petition of Appeal that the two requirements necessary for petitioner's satisfying all the requirements for obtaining a nursery school certification were one reading course and student teaching, it was not until Ms. Regenstein received acknowledgement from Dr. Rorro sometime toward the end of July 1989 that she was formally informed that she had satisfied both requirements. By operation of N.J.A.C. 6:11-6.3(d), which the Commissioner has herein determined is applicable to Ms. Regenstein's circumstances, it only was upon being informed by Dr. Rorro in late July 1989 that she was required to fulfill yet another requirement, that is, to pass a state test, that her cause of action arose. Having filed her petition in this matter on August 10, 1989, determining that said petition is clearly timely filed.

In so finding, the Commissioner rejects the State's contention that petitioner had notice of the test requirement as early as June 1985, as a result of correspondence from Dr. Rorro. As stated above, because petitioner sought transcript evaluation before September 1, 1985, N.J.A.C. 6:11-6.3(d) permitted her the alternative of taking course work to complete the requirements for certification as a nursery school teacher instead of taking the state test. The Commissioner so finds, adding that because the Petition of Appeal in this case is deemed timely, petitioner's argument relating to relaxation of the 90-day rule need not be addressed.

Accordingly, for the reasons expressed by the ALJ pertaining to the applicability of N.J.A.C. 6:11-6.3(d) to the instant facts, the Commissioner adopts as his own the findings and conculsions of the Office of Administrative Law. On the issue of timeliness of the instant petition, the Commissioner modfies the ALJ's conclusion that the matter is one appropriate for relaxation of the 90-day rule insofar as the Commissioner finds the case to be timely filed.

On the above findings of fact and conclusions of law, petitioner's motion for summary decision establishing her eligibility for nursery school certification is granted while respondent's motion in opposition is denied.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6381-89
AGENCY DKT. NO. 240-7/89

DINO EFTYCHIOU,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF BERGENFIELD,
BERGEN COUNTY,
Respondent,
and
LINDA QUINN,
Intervenor.

Louis P. Bucceri, Esq., for petitioner (Bucceri & Pincus, attorneys)

Sidney A. Sayovitz, Esq. for respondent (Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

Sanford R. Oxfeld, Esq., for intervenor, Linda Quinn (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: April 26, 1990 Decided May 30, 1990

scheduling is extremely difficult, and is constantly changing to fit into the student's regular class and learning requirements. This is compounded by changes in the composition of the basic skills student body during the year, and the need to keep class size small (seven or less) in order to retain individualized instruction with some semblance of grade-level grouping. If the scheduling and teaching task were to be divided between two part-time teachers, neither of whom would be available during the entire school day, the scheduling difficulties would be compounded to the point where the effectiveness and efficiency of the Basic Skills Program would necessarily suffer.

If the Board were compelled to retain two part-time teachers, one certified to teach all three subjects, but prohibited from teaching two of them, and the other certified to teach only two subjects, but not the third, such a contorted arrangement would compel the Board to engage in constant maneuvering in order to accommodate the students. Both teachers would likely work elsewhere for part of the time, and that outside work might or might not coincide with the fluctuating needs of the Basic Skills Program.

Petitioner's argument that no sound educationally based reasons or policy can justify or be used to affect the statutory tenure rights of teachers is frightening. There is no question that the tenure rights of teachers must be protected in accordance with statutory criteria. Nevertheless, the distorted arrangement sought to be forced on the Board here, in the name of teachers' rights, compels one to ask, for whose ultimate benefit do the schools and the teachers' positions exist?

Fortunately, it is not necessary in this case to make a cold choice between the statutory tenure rights of a teacher and the educational benefit of the students. It is **CONCLUDED** that because the petitioner's certification does not extend to all three subjects taught in the basic skills class, he is not entitled, by virtue of his fractional tenure rights to teach a fraction of the basic skills class. There are sound educationally justified reasons, as well as sound administrative reasons relating to scheduling, why the Board's desire to have one teacher for basic skills instruction is reasonable, and those reasons have been amply demonstrated. It is further **CONCLUDED** that the Board has reasonably exercised its managerial prerogatives when it continued the one full-time basic skills teacher in the Jefferson School. To compel the Board to do otherwise would be to force the Board to engage in reduced

teachers might be utilized, each handling a section of the class to which he or she was entitled by virtue of tenure.

In *Spiewak v. Rutherford Board of Ed.*, 90 *N.J.* 63,74 (1982), the Supreme Court held that a teacher is eligible for tenure in accordance with three basic requirements: (1) the teacher must work in a position for which a certificate is required; (2) the teacher must hold a valid certificate; and (3) the teacher must have worked the requisite number of years in the position. The position involved here is a teacher of basic skills. There is no single certification applicable to that position, but one who teaches basic skills needs to be certified in the three disciplines that comprise the basic skills subject matter, reading, language arts and mathematics. It is uncontested that Linda Quinn, holder of an elementary teacher certificate, is certified to teach all three of these subjects, whereas the petitioner is only certified to teach the two English components. That is why Mr. Eftychiou only claims a two-thirds, part-time position. This case is different from *Capodilupo, Bednar* or any of the unpublished authorities cited by the parties in support of their respective positions. None of the positions fought over by the participants in the cited cases, including *Hart*, involved partial or fractional certifications. All of those disputes involved seniority concerns between tenured teachers certified to hold the positions in issue. That is not the case here.

Spiewak said nothing about partial or fractional certifications. According to *Spiewak*, certification to teach the position is an absolute qualification. The petitioner here is not fully certified to teach all aspects of the basic skills class, only part of it. However, because of the unique division of the basic skills course into three disciplines, he seeks to compel the Board to reorganize the program and cut the position up into fractions, in order to accommodate the limits of his teaching entitlement. The same argument could be made for a one-third part-time position, if he only had a certification, and hence tenure, in one of the three disciplines.

The evidence has clearly indicated that there is a sound educational reason to have one teacher for the basic skills class in one elementary school. Children who need basic skills instruction are not likely to be in the upper strata of the learning curve. There is strong validity to the argument that having a single teacher for basic skills is important to the students, emotionally, educationally and for purposes of learning continuity. Furthermore, the evidence demonstrated that basic skills

over one who is tenured, assuming proper certification to teach the position Bednar's certification entitled him to do so, and he therefore prevailed.

In the instant matter, petitioner points to the foregoing concepts to support his claim, as a tenured teacher, to six-tenths, that portion of the Basic Skills program that he is entitled to teach, by virtue of his tenured status and certification as an English teacher.

In his brief, petitioner states: "More mportantly, as a matter of law, no educational justification can be relied upon by any board of education to defeat the statutory tenure rights asserted by petitioner in this case." This statement is seemingly directed towards the last paragraph in *Capodilupo* where the court stated that the State Board had made a finding that its obligation to consider tenure in a reduction in force could be balanced by "sound educationally based reasons for its decision to retain a nontenured teacher." *Capodilupo* at 515, 516. However, the court found it unnecessary and inappropriate to address the merits of this statement because no cross appeal was filed by one of the untenured claimants and the board had advanced no educationally based reasons to retain the other.

The petitioner argues further that an attempt to retain one full-time teacher instead of creating two part-time positions cannot be used to thwart a statutory tenure claim. He alleges that respondent's motivation is based purely on economics, and if educational justifications cannot thwart tenure, then financial concerns certainly cannot. Mr. Eftychiou cites two unpublished decisions in support of this position: *Dorothy Godwin Davis v. Ewing Twp. Bd. of Ed.*, OAL DKT.NO. EDU 6539-84 (March 14,1985) aff'd by Commissioner of Education, (April 29, 1985) and *Hart v. Bd. of Ed. of the Borough of Ridgefield*, OAL DKT.NO. EDU 9002-86 (June 25, 1987), Commissioner of Education (August 7,1987), State Bd. of Ed., June 7, 1989.

While not taking issue with the *Capodilupo* and *Bednar* decisions, respondent bases one aspect of its defense on the petitioner's attempt to disturb a long-standing practice in the district, engaged in for sound educational purposes. Respondent argues further that, if petitioner's position is to be accepted, anyone would be entitled to demand a fluctuating fraction of a position as the basic skills teaching requirements change with the flow of students, or, several part-time

would leave Linda Quinn with a part-time, one-third basic skills position, to teach only the mathematics component.

LEGAL DISCUSSION AND CONCLUSIONS

The petitioner believes that the prevailing case law supports and justifies creation of two part-time positions to teach basic skills, instead of one full-time position, because he is entitled to preference, within the area of his certification, as against the nontenured teacher. He believes that the Appellate Division holdings in *Capodilupo v. Board of Education of the Township of West Orange*, 218 *N.J. Super.* 510 (App. Div. 1987) and *Bednar v. Westwood Board of Education*, 221 *N.J. Super.* 239 (App. Div. 1987), certif. den. 110 *N.J.* 512 (1988), sustain his position.

In *Capodilupo*, the petitioner was tenured and certified in both elementary and secondary physical education. However, his teaching experience was limited to the secondary level. Another certified physical education teacher was not tenured, but had elementary experience Only one elementary physical education teacher was needed. It was held that a tenured teacher is entitled to preference, within his or her certification, over a nontenured applicant with the same certification. Seniority, which deals with the amount of time spent in specific categories, was not a factor to be considered because that concept only provides a mechanism for ranking tenured teaching staff members so that reductions in force among tenured people can be equitably measured. A teacher with experience, but without tenure, could not prevail over the inexperienced, but tenured applicant.

In *Bednar,* the petitioner had a comprehensive art instruction certification and was tenured. He had worked as a full-time elementary art teacher in the Westwood School system for 17 years and was reduced to a part-time elementary art teaching position. Another teacher, Spinella, was employed for less than two years and did not have tenure. However, he was retained as a full-time secondary level art teacher. The court held that Bednar's tenure as an art teacher gave him the right to avoid a reduction in force by claiming the secondary school position of the nontenured art teacher who had experience in the specific category of secondary art, even though Bednar was not so experienced. It was held again that the seniority concept cannot be used to create rights that justify retaining a nontenured teacher

Students are taken out of their regular classes for basic skills instruction However, they must remain in their regular classes for certain essential subjects that are related to basic skills. Those who participate in bilingual and ESL instruction have additional restrictions placed on their availability for basic skills assignment. Schedules are also adjusted from time to time during the year for required makeup time following half days and for other time out of school, for class trips and other purposes.

The ability to schedule the Basic Skills Program during the school year must remain flexible on a day-to-day, week-to-week or month-to-month basis, as well as between mornings and afternoons. The program cannot be divided and fixed neatly in place for an entire year or term so as to enable a teacher to teach one subject on a given day at a given time, to a given group of students, and similarly teach other subjects on other days. The different subjects sometimes must be taught consecutively on the same day, either in the morning or afternoon, depending on the varying availability of the students.

Each elementary school in the respondent district has one full-time basic skills teacher, who is available to schedule and to teach all students who need basic skills instruction. Because that teacher is available at all times while school is in session, he or she can adjust with the shifting schedules to accommodate the students.

The respondent district has maintained one basic skills teacher in each elementary school for the past 18 years.

Intervenor Linda Quinn is certified, by virtue of her elementary school teaching certificate, to teach all three of the basic skills subjects, reading, language arts and mathematics. She was appointed as the single full-time basic skills teacher in the Jefferson Elementary School for the 1989-90 school year. She was not tenured as of June 30, 1989.

The petitioner, Dino Eftychiou, was not reemployed for the 1989-90 school year. His certification entitles him to teach two of the three basic skills subjects, reading and language arts, but not mathematics. Petitioner claims a part-time, two-thirds basic skills teacher's position over Linda Quinn. Petitioner's claim, if sustained,

between them. He would teach two subjects, and Ms. Quinn would teach the third, in the same class, thereby satisfying his tenure and seniority rights.

Petitioner claims that such an arrangement would be feasible. He argues that schedules for two part-time teachers for the one basic skills class could be arranged on a predictable basis. However, Mr. Cirelli insisted that the needed flexibility in scheduling would be lost with such an arrangement, which he considered to be a practical impossibility and a disadvanrage for the students. For example, if both part-time teachers had other positions in the same school district, or in other districts, that required continuity of attendance; the Board would be deprived of the teacher availability that would exist with the one basic skills teacher present in the school during each entire day, so that sudden program shifts could be accommodated.

FINDINGS OF FACT

The main underlying facts have been stipulated and set forth above, and they are incorporated herein. Other facts are extracted from the testimony, as follows:

The elementary Basic Skills Program in the respondent school district includes instruction in three subjects, reading, language arts and mathematics.

All basic skill students in the class do not receive instruction in all three subjects, but many do

The elementary Basic Skills Program is not departmentalized It is maintained as a single class that, at one time or another, includes students from all elementary grades.

The scheduling of students for basic skills classes is extremely difficult because of the different needs of the students and their varying availability. Each eligible student receives instruction only in those subjects in which the student has a deficiency, and the subject mix for each student can vary from year to year. Also, the roster of students changes from time to time, often during the school year, as students move in or out of the district.

basis because of class trips, half school days and other variables. Makeup time for these variables approximates 25 days a year.

Mr. Cirelli emphasized that the basic skills teachers cannot fix the schedules and divide the instructional time neatly, so that one subject will only be taught on one day, a second subject on another day, etc. He stated that the ability to be flexible must remain available, and this flexibility must sometime vary, on short notice, as between the morning and afternoon sessions. Mr. Cirelli was certain that the Basic Skills Program could not be dealt with on a regular schedule throughout the year, because each basic skills teacher in each school must be free to vary and shift her own schedule to accommodate the needs of each student, almost on a daily basis. He stated that, because of the above needs, only one basic skills teacher, with the ability to work with flexible schedules, has been used in each elementary school for the past 18 years. That system has remained relatively unchanged during all of those years. A different system is used in the secondary school because it is departmentalized, but this dispute only involves an elementary school position.

Mr. Cirelli also testified that the Board felt it was important, emotionally and educationally, for the basic skills student to enjoy the continuity, rapport and consistency of having a single teacher each day for his or her basic skills instruction. He stated that the students would be at a disadvantage if, as suggested by petitioner, Ms. Quinn would handle one of the three subjects and then leave the room, to be replaced by another teacher for the other two subjects, which may or may not be totally disassociated from the prior instruction.

The focal point of the dispute revolves around the petitioner's certification in only two of the three basic skills subjects, as opposed to Linda Quinn's certification in all three. If the petitioner were certified to teach all three subjects, there would be no dispute, and he would have been entitled to the basic skills position, because he was tenured and Ms. Quinn was not. However, it is acknowledged that Ms. Quinn possesses an elementary school teacher certificate, entitling her to teach all three subjects, whereas petitioner is only certified as a teacher of English. Therefore, Mr. Eftychiou can only instruct the reading and language components of the basic skills course, but not mathematics. Petitioner's position is that the Board should create two part-time basic skills positions in the one elementary school, to be shared

vary for each student from year to year, depending on the success of the previous year's teaching and the student's continuing needs.

Mr. Cirelli further explained that the roster of students in the Basic Skills Program and in specific segments of the program, reading, language arts or math, varies from time to time during the school year, as students move in and out of the district and as the test results create variations among ongoing students. New students are tested immediately on arrival. He stated that the typical schedule is created by the basic skills teacher who, at the beginning of each year, interviews each eligible student to determine when the student is available for basic skills instruction, considering the required subjects that preclude a child from being taken out of his or her regular class. The instruction is given in a separate classroom, and all of the affected students must be taken out of their regular classes for this instruction. For example, an attempt is made to remove all first grade basic skills students from all first grade classes at the same time. However, this is not always possible because there is a relatively lengthy list of instructional subjects that preclude a child from being pulled out of a regular class. Some of these subjects are physical education, art, music, English as a second language (ESL) and bilingual instruction. Additionally, each student must remain in his or her regular class for standard instruction in the basic skills subject, reading, language arts and math.

According to Mr. Cirelli, after the basic skills teacher learns the daily class schedule of each child, the teacher develops the basic skills schedule for each child by blocking out available days and times.

Students in need of basic skills training are required to spend one-half hour, two days a week in reading instruction, one-half hour, two days a week in math instruction and one-half hour, one day a week for language arts instruction. It is often necessary to commingle students from different grades at the same time because of conflicts in the daily schedules of students in the same grade. Mr. Cirelli indicated that other considerations make scheduling for basic skills instruction even more difficult. For example, bilingual instruction is mandated for 90 minutes a day, and even more time is required for ESL instruction. All bilingual and ESL students are also in the Basic Skills Program. One hundred forty pupils in the district fall into this category. In addition, basic skills' schedules often must be adjusted on a day-to-day

16. The 1989-90 teaching schedule and roster of Ella Thomas is attached as R-4

17. The 1989-90 teaching schedule and roster of Jeanne Costello is attached as R-5.

18. The 1989-90 teaching schedule of T. Fodera is attached as R-6.

19. Basic skills daily records for 1989-90 completed into January, 1990 by Marion Franz are attached as Exhibits R7(a-d).

The exhibits attached to the partial stipulation of fact, as mentioned in paragraphs 2, 4, 5, 7, 8, 10, 11, 12, 14, 15, 16, 17, 18 and 19, are incorporated herein by reference.

Although the partial stipulation of fact refers to two teachers against whose positions petitioner seemingly claims precedence, John Tagliareni and Rose Quinn, it has been stipulated that the only position claimed by petitioner is the language arts and reading work performed by intervenor Linda Quinn. See petitioner's brief, pp. 3 and 4. (The other teachers, whose schedules and rosters are referred to in paragraphs 14, 15, 16, 17, 18 and 19 of the stipulations, are only included therein for comparative and reference purposes.)

Richard Cirelli, Director of Reading and Speech in the Bergenfield School District, furnished a detailed account of the Basic Skills Program maintained in the district. According to Mr. Cirelli, the purpose of the Basic Skills Program is to remediate the specific needs of children in three subject areas, reading, language and mathematics. There are five full-time elementary schools in Bergenfield. Each school has one basic skills class, and the district has five elementary basic skills teachers, one in each school. Basic skills instruction is given to children from all grades, and there is no departmentalization. However, most classes contain students from more than one grade. The needs of each student are determined by the results of a standardized test, given in the spring. All students needing some basic skills do not necessarily receive instruction in all three subjects, but only in those subjects needed to remediate specific needs. These needs are determined in late June and early July of each year, when the test results come in. The results can

4. John Tagliareni's teacher record card is attached as P-6(A) through (D) Tagliareni's only teaching certificate is attached as P-7.

5. Linda Quinn was initially employed by respondent on October 14, 1986 as a full time elementary teacher. She continued in that capacity through June 30, 1989. Intervenor Quinn's teacher record card is attached as Exhibit P-1A and P-1B. Quinn's teaching certificate is attached asP-2. Quinn's employee record card is attached as P-3.

6. Neither Eftychiou, Tagliareni nor Quinn have any active duty military experience.

7. Respondent's agent recommended that Tagliareni be retained over Eftychiou for 1989-90 for the reasons set forth in Exhibit P-5 when it was determined that a reduction in force would be implemented.

8. Petitioner Eftychiou was advised that he would not be employed for 1989-90 by letter of April 27, 1989, P-12.

9 Linda Quinn was not tenured as a teacher as of June 30, 1989.

10. Linda Quinn's 1989-90 teaching schedule as an elementary grade basic skills teacher is attached as P-4.

11. John Tagliareni's teaching schedule for 1989-90 is attached as P-8 and P-10(b).

12. Respondent's June, 1989 seniority list for English teachers is attached as P-9.

13. Petitioner Eftychiou was not employed by respondent for 1989-90.

14. The 1989-90 teaching schedule and roster of teacher J. Marcell is attached R-1.

15. The 1989-90 teaching schedule of teacher Schaeffer is attached as R-3.

hearing, but did not call any witnesses. The record closed on April 26, 1990, when petitioner and respondent filed posthearing briefs. An unsolicited reply was filed by petitioner on May 2, 1990.

ISSUES

The sole issue is whether the Board violated petitioner's tenure and/or seniority rights pursuant to *N.J.S.A.* 18A:28-5 *et seq.*, when it failed to reemploy him, either in a full-time or part-time position, for the 1989-90 school year, while retaining the employment of other teachers with less seniority and/or without tenure, in positions within the scope of petitioner's certifications. Petitioner's actual claim is for a six-tenths (.6) part-time position.

If petitioner prevails, back pay, benefits and mitigated earnings must then be determined.

THE EVIDENCE AND TESTIMONY

As stated above, petitioner rested his case after stating that he would rely on the facts set forth in Exhibit J-1, the partial stipulation of fact, for his entire direct case, without calling witnesses. Those stipulated facts are as follows:

1. Dino Eftychiou was initially employed by respondent in September 1971, as a high school English teacher and continued to serve in that capacity, full time, for each school year through June, 1989.

2. Petitioner Eftychiou achieved tenure in the district and had accrued 18 years of seniority as a secondary school teacher of English as of June, 1989. Petitioner's teaching certificate is attached hereto as Exhibit P-11.

3. John Tagliareni was initially employed by respondent in September, 1971 as a high school English teacher and continued to serve under his English certificate through June 30, 1989. As of that time Tagliareni also had 18 years of secondary school English seniority and was tenured as a teacher.

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves a claim by petitioner, Dino Eftychiou, a tenured teaching staff member in the respondent school district, who contends that the respondent (Board) violated his tenure and seniority rights by discontinuing his employment for the 1989-90 school year, while retaining teachers with less seniority, and/or without tenure, in positions within the scope of his tenure and seniority.

PROCEDURAL HISTORY

A verified petition was filed by petitioner with the Commissioner of Education on July 26, 1989. Respondent filed an answer on or about August 15, 1989, denying the substantive allegations of the petition and requesting its dismissal. The Commissioner transmitted the matter to the Office of Administrative Law on August 25, 1989, for hearing and disposition as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was held by the Office of Administrative Law on December 1, 1989. A prehearing order was filed, which defined the issues, fixed a hearing date, provided for discovery and dealt with other procedural matters related to the forthcoming hearing. Petitioner was instructed to serve notice of the pendency of this matter on all third parties over whom he claimed seniority or tenure rights, in order to give such persons the opportunity to intervene or participate pursuant to *N.J.A.C.* 1:1-16.3 or 1:1-16.6.

On March 14, 1990, Linda Quinn, an untenured teacher who was retained by the Board for the 1989-90 school year, served notice of intervention, and thereafter participated in the hearing.

The hearing was held at the Office of Administrative Law in Newark, New Jersey, on March 23, 1990. Petitioner did not testify or call witnesses in his behalf, but relied solely on the joint partial stipulation of fact (Exhibit J-1) and the exhibits attached to it to establish his claim. A list of the exhibits is annexed to this decision. One witness testified for the Board. Counsel for intervenor Linda Quinn also participated in the

flexibility and effectiveness in the Basic Skills Program. So long as petitioner's tenure rights do not entitle him to teach the basic skills class, in its entirety, the Board's position is justified.

It is therefore **CONCLUDED** that petitioner has not proved that the Board has violated his tenure and seniority rights by retaining a teacher with less seniority and without tenure, in a position within the scope of his tenure and seniority

ORDER

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

This recommended decision may be adopted, modified or rejected by **SAUL COOPERMAN, COMMISSIONER, DEPARTMENT OF EDUCATION**, 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(c).

I hereby **FILE** this initial decision with **Saul Cooperman** for consideration.

May 30, 1990
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

6/1/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 05 1990
Date

Jaynee LaVecchia S.W.
OFFICE OF ADMINISTRATIVE LAW

ms/e

DINO EFTYCHIOU, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, RESPONDENT.	:	DECISION
AND	:	
LINDA QUINN, INTERVENOR.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies by respondent were timely filed pursuant to N.J.A.C. 1:1-18.4 and summarily set forth below.

In his exceptions, petitioner first objects to the ALJ's reliance on arguments of sound educational policy and administrative ease to thwart petitioner's tenure rights. Such considerations, he argues, have been expressly rejected by both the State Board of Education and the courts in evaluating tenure claims. Spiewak, supra; Bednar, supra; Mirandi v. Bd. of Ed. of the Township of West Orange, decided by the State Board on April 5, 1989.

Petitioner also objects to the ALJ's reliance on petitioner's lack of certification in every area of the mixed-subject basic skills position, arguing that because Intervenor Quinn's schedule was divided into discrete subject periods, there is no reason why petitioner could not simply have taken her place during those subject periods for which he held appropriate certification. Indeed, this result is required by the State Board, which has recognized that partial positions must be upheld in order to accommodate seniority rights regardless of financial or scheduling hardships alleged by boards of education. Hart, supra; Davis, supra Petitioner's claim is that much greater, since it arises from statutory tenure entitlement.

In reply, the Board of Education (hereinafter "Board") argues:

> Petitioner's primary argument is that the tenure rights of a riffed, tenured teacher are so paramount that a Board of Education must take whatever steps are necessary to give a tenured teacher even the smallest fraction of a position. Petitioner requests that the

> Bergenfield Board of Education split long-standing, existing positions into fragments so that petitioner can be given a fraction of a teaching load. Petitioner seeks to expand existing case law to its most absurd limits.
>
> Petitioner asks that scheduling of classes, the needs of pupils, and the administrative requirements of a public school system be ignored simply because a [tenured] teacher is theoretically capable of teaching a fraction of a full case load. Of course, if more than one tenured teacher has a claim to partial positions, petitioner's arguments would require that the Board of Education split multiple positions into multiple fragments in order to satisfy the claims of tenured teachers. This approach goes far beyond the contemplation of the Courts in Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982) and Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987) and other related cases.
>
> It is important to recognize that petitioner's exceptions do not challenge the factual findings of Arnold J. Samuels, Administrative Law Judge. Therefore, his findings regarding the scheduling difficulties, the pupil needs and the administrative requirements may be regarded as uncontroverted. Despite these important considerations, petitioner requests that the Commissioner issue a ruling which will place the interests of riffed, tenured teachers over all other interests. Such an extreme position will undo decades of law that recognized that the New Jersey Constitution grants pupils the right to receive a thorough and efficient education and that schools will not be operated for the benefit of teachers but for the needs of the pupils.
>
> (Reply Exceptions, at pp. 1-2)

Initially, the Commissioner must observe that petitioner's only endorsement is in English, and that he has taught English exclusively since his certification in 1971 (Exhibits J-1(1) and P-11). Therefore, despite the district's apparent belief to the contrary, which was concomitantly accepted by the ALJ, petitioner is not properly certified to teach reading. N.J.A.C. 6:11-6.1(c) clearly states that "Teachers with English endorsements who taught reading prior to February, 1976, may continue to teach in such assignment. After February, 1976, teachers of reading shall hold the appropriate endorsement [i.e., the endorsement in reading as prescribed by N.J.A.C. 6:11-6.2(a)19]." Consequently, the most petitioner may attempt to claim in this proceeding is the Language Arts portion (one-third) of Intervenor Quinn's position.

Upon careful review of the issues herein, however, the Commissioner concurs with the ALJ and the Board that petitioner has no entitlement to any portion of the Elementary Basic Skills position held by Quinn, as petitioner's tenure rights do not compel the district to fragment an established multi-disciplinary position for which petitioner is only partially certified.

The Commissioner and the courts have on numerous occasions held that boards of education need not structure programs or positions solely to accommodate employee rights. In Johnson v. Bd. of Ed. of Borough of Glen Rock, Bergen County, Commissioner's decision, May 21, 1984; Bartz v. Bd. of Ed. of Green Brook Twp., Somerset County, Commissioner's decision May 24, 1985, aff'd State Board November 6, 1985, aff'd N.J. Superior Court Appellate Division January 28, 1987; Nazarechuk and Cancialosi v. Bd. of Ed. of Borough of North Caldwell, Essex County, Commissioner's decision January 30, 1990; and Hart v. Ridgefield Bd. of Ed., Bergen County, Commissioner's decision June 7, 1985, aff'd State Board December 4, 1985, aff'd N.J. Superior Court Appellate Division Nov. 7, 1986, A-2176-85T6 (unreported), Cert. denied 107 N.J. 136 (1987), for example, family life programs were not compelled to be restructured in order to permit riffed teaching staff from a particular discipline to take over from untenured or less senior staff in other areas of certification. Similarly, in Hart, supra, (State Board, June 7, 1989) both the Commissioner and the State Board denied petitioner's entitlement to a career education position because such entitlement would have compelled the Board to restructure its curriculum to accommodate her certification. In Goodwin Davis, supra, the Commissioner declined to compel the Board to rearrange existing business programs or positions to provide a position for petitioner.

Nor is this stance altered by Spiewak, Capodilupo or Bednar, which must be stretched beyond all reasonable bounds to stand for the proposition that tenured teachers are entitled by law to any fraction of any work performed by any nontenured teachers in their area(s) of certification. Rather, these cases clarified the entitlement of appropriately certified, but inexperienced, tenured teachers to positions held by nontenured staff.

It is this distinction that separates the primary case relied upon by petitioner, the State Board's June 7, 1989 ruling in Hart, supra, from the instant facts. In Hart, the State Board ordered the district to fragment a home economics position that had demonstrably been created by reducing and combining two distinct full-time teaching assignments (one elementary and the other secondary) in order to eliminate one full-time position rather than create two part-time assignments, thus, violating the seniority rights of the teacher with greater seniority on the elementary level. The Board was quite specific that, had the newly created position been shown to be a genuine district-wide K-12 one, rather than merely a juxtaposition of two existing assignments, this fragmentation would not have occurred:

> After a thorough review of the record, however, we find, for the reasons that follow, that the record does not support the conclusion that the Board, in retaining Fernhoff on a full-time basis, established a new position to which entitlement would be controlled by "district-wide seniority" acquired pursuant to N.J.A.C. 6:3-1.10 (1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii). We further find that in assigning home economics classes at the elementary level to Fernhoff in 1985-86 and 1986-87 in order to retain her on a full-time basis, while, at the same time, dismissing Petitioner, who had superior seniority in the elementary category, the Board violated Petitioner's seniority rights.***
>
> ***While the Board was not precluded from establishing a K-12 position, the factual circumstances, as established in the record, show that in assigning elementary home economics classes to Fernhoff in order to retain her on a full-time basis, the Board did not alter the basic character of her secondary assignment.
>
> Given these circumstances, the propriety of the Board's action must be judged by an evaluation of seniority accrued by these teachers in the elementary and secondary categories.***
>
> ***This decision in no way precludes the Board from establishing a K-12 position in home economics, entitlement to which would be controlled by "district-wide seniority" acquired pursuant to N.J.A.C. 6:3-1.10(1)(15)(iv) and N.J.A.C. 6:3-1.10(1)(16)(iii), so as to retain one full-time teacher rather than two part-time. (emphasis supplied)
>
> (State Board Slip Opinion, at pp. 12, 13, 17)

In the present case, notwithstanding its division into multiple subject areas, Bergenfield's Elementary Basic Skills program has been treated as a single course and taught by a single person for over fifteen years. There is no question here of juxtaposing two or three distinct assignments in order to create one full-time position; indeed, Bergenfield's program represents precisely the sort of configuration that appears to have been contemplated by the State Board in clarifying that not all teaching positions would be subject to the type of fragmentation imposed in Hart. As such, there is no basis in law for requiring the Board to restructure it to accommodate petitioner's employment rights.

Accordingly, the initial decision of the Office of Administrative Law is affirmed except as modified herein and the instant Petition of Appeal dismissed.

Further, because of indications in the record that the Bergenfield School District may be employing teachers certified only in English to teach reading contrary to N.J.A.C. 6:11-6.1(c), the Commissioner hereby directs the Bergen County Superintendent of Schools to review the certification of all pertinent staff members to ensure compliance with the provisions of law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6692-89
AGENCY DKT. NO. 253-8/89

RUTH BASKERVILLE,
Petitioner,
v.
ORANGE BOARD OF EDUCATION,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Thomas R. Ashley, Esq., for respondent
(Ashley & Charles, attorneys)

Record Closed: March 9, 1990 Decided: June 8, 1990

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is a suit by a tenured school administrator who alleges that the board of education violated her rights by assigning her to a ten-month position at the middle school rather than a twelve-month position at the high school. Petitioner alleges that her tenure or seniority rights were violated when the board abolished her

current position and failed to transfer her to the position she last held. Respondent maintains that petitioner's transfer from one position to another of equal rank was a valid exercise of its managerial powers. Additionally, respondent seeks to add a counterclaim attacking the salary it had previously contracted to pay petitioner for the 1989-90 school year.

Procedural History

On August 12, 1989, petitioner Ruth Baskerville ("Baskerville") filed her verified petition of appeal to the Commissioner of Education ("Commissioner"). Respondent Orange Board of Education ("Board") filed its answer on August 23, 1989. Although the answer contained several affirmative defenses, it did not set forth any counterclaim. Subsequently, on September 7, 1989 the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on January 10, 1990. Both parties filed briefs on February 28, 1990. In addition, petitioner filed a reply brief on March 9, 1990. Time for preparation of the initial decision has been extended to June 9, 1990.

Findings of Fact

Most of the material facts are stipulated or undisputed. I **FIND** the following facts:

Ruth Baskerville began her employment with the Board in September 1974. For her first nine years, she was a secondary school English teacher. In September 1983, she became a vice principal. As vice principal, she was assigned to the middle school for two years; and later, in September 1985, to the high school for more than three years. Vice principal of the middle school is a ten-month position, whereas vice principal of the high school is a twelve-month position.

During the 1988-89 school year, Baskerville served as director of personnel and human resources. Her annual salary for that ten-month position was $52,771. On or about June 13, 1989, the Board voted to abolish the position of director of personnel and human resources as part of a reorganization of central office staff. Initially Baskerville expected that she would revert to her last position of vice principal at the high school. But on June 30, 1989 the Board notified her in writing that she would

"assume the duties of Vice Principal at the Orange Middle School beginning September 1, 1989 at a salary of $52,779." Thus, she did not suffer any reduction in salary, and in fact received $8 more.

The parties disagree on the correct method of computing the salary that Baskerville should receive for 1989-90. According to Baskerville, the Board followed its established practice of putting terminated administrators on the step of the new salary guide which is closest to their old salary Since Baskerville earned $52,771 as a director, she was put on Step 10 of vice principal's salary guide which pays $52,779. Baskerville accepted the Board's written offer to pay her $52,779 for her current appointment as a vice principal.

Nevertheless, Baskerville now contends that amount on the guide is only the base salary for a ten-month position and that twelve-month employees receive an additional 10 percent. Consequently, Baskerville claims that as a twelve-month employee she should be entitled to $58,057. On the other hand, the Board claims it made an error when it agreed to pay Baskerville $52,779 for her ten-month service as a vice principal. Instead, it argues that Baskerville should be earning the same as other vice principals with similar assignments, educational qualifications and years of service, which would put her at Step 7 paying $49,509.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's transfer must be upheld as a valid exercise of its managerial prerogative.

A local school board must possess the flexibility to deploy personnel in the manner most likely to promote the overall goal of providing all students with a thorough and efficient education. *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 *N.J.* 144 (1978). *N.J.S.A.* 18A:25-1 expressly confers on school boards the right to transfer or reassign staff members to any position within the scope of their certification. Power to transfer staff is an inherent managerial responsibility which cannot be bargained away by the board. *Ridgefield*, at 56. However, the board's authority to transfer an employee is qualified by other statutes granting tenure and seniority rights to staff members. *Childs v. Union Twp. Bd. of Ed.*, 3 *N.J.A.R.* 163 (Comm'r 1980), aff'd 1982 *S.L. D.* 1456 (N.J. App Div., July 19, 1982)..

At the outset, petitioner urges that the board's action violated her tenure rights under *N.J.S.A.* 18A:28-6, specifically that portion of the statute which provides that a staff member who fails to obtain tenure in a new position "shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred[.]" Although Baskerville has not served the requisite time to acquire tenure in her new position of director of personnel and human resources, she had previously acquired tenure in the position of vice principal. It is well settled that tenure accrues to a "position." *Howley, v. Ewing Bd. of Ed.*, 6 *N.J.A.R.* 509 (Comm'r Dec. 20, 1982). Moreover, *N.J.S.A.* 18A:28-5 creates tenure rights in the general position of "vice principal" or "assistant principal," but does not grant any right to assignment to any particular school or grade level. See *Williams v. Plainfield Bd. of Ed.*, 176 *N.J. Super.* 154 (App. Div. 1980), *cert. den.* 87 *N.J* 300 (1981) (transfer from high school principal to elementary school principal). Accord, *Stranzl v. Paterson Bd. of Ed.*, 2 *N.J.A.R.* 16 (Comm'r April 11, 1980) Like *Stranzl*, at 20, the certification required for Baskerville to hold the position of vice principal at the elementary level is "exactly the same" as at the high school level and the duties are "of no less importance." Therefore, Baskerville has not been "dismissed" from her tenured position.

Nor has Baskerville suffered any "reduction in compensation" within the meaning of *N.J.S.A.* 18A:28-5. She is actually earning slightly more than she did as a director, and substantially more than a middle school vice principal in the district ordinarily would earn. *See Williams, supra,* holding that future salary increases are not an appropriate factor to be considered in determining the validity of a transfer. Baskerville has no right to expect a twelve months salary for only ten months work. *Sanders v. East Orange Bd. of Ed.,* 1981 *S. L.D.* 1148 (Comm'r Oct. 13, 1981).

Alternatively, Baskerville argues that the Board violated her seniority rights under *N.J.S.A.* 18A:28-9 *et seq.* and the standards for determining seniority, *N.J.A.C* 6:3-1.10. Pursuant to *N.J.S.A.* 18A:28-9, a board of education may abolish any position for change in the administrative or supervisory structure of the district. Dismissals resulting from any such reduction "shall be made on the basis of seniority according to standards established by the commissioner with the approval of the state board." *N.J.S.A.* 18A:28-10. Seniority standards adopted by regulation establish "specific categories" for seniority purposes, and include separate

categories for high school vice principal, *N.J.A.C.* 6:3-1.10(l)(13), junior high school vice principal, *N.J.A.C.* 6:3.1.10(l)(16) and elementary school vice principal, N.J.A.C. 6:3-1.10(l)(17). Whenever a person's employment is abolished in a specific category, "he or she shall revert to the category in which he or she held employment prior to his or her employment [in the abolished category]. *N.J.A.C.* 6:3-1.10(l).

While these seniority rules would govern genuine disputes over which tenured administrator should be spared from the adverse effects of a reduction in force, they do not interfere with a board's underlying authority to make a lateral transfer to positions of equivalent rank and salary expectancy. As noted in *Stranzl,* the seniority rules have no relevance "for the purpose of determining the legality of involuntary transfers." 2 *N.J.A.R.* at 20. The fundamental weakness of Baskerville's argument is exposed by her counsel's admission that the Board's action would have been legal if accomplished in two separate steps: first, the abolition of her director's position and her reversion to the position of high school vice principal; second, a lateral transfer from the high school to the middle school. Thus it appears that petitioner is primarily concerned with the form of the transaction rather than its practical outcome. Important substantive rights should not depend on such meaningless distinctions, especially when the Board's intent to reassign Baskerville from the high school to the middle school was clearly communicated to her.

Lastly, the Board's belated attempt to set aside its own salary agreement is rejected on several grounds. That issue is beyond the scope of the pleadings and the issues incorporated in the prehearing order. Although the Board's answer raises several affirmative defenses relating to excessive salary, those defenses are properly understood in the context of petitioner's claim for more money. There is nothing which might reasonably put petitioner on notice that the Board was not merely resisting her claim, but was seeking to pay her less than the salary fixed in her contract. Moreover, the Board is wrong on the law when it asserts that it cannot legally pay Baskerville more than she would have otherwise received as vice principal if her promotion to director had never occurred. While *N.J.S.A.* 18:28-6 establishes the minimum amount of compensation protected by tenure, a school board is not prohibited from voluntarily negotiating to pay more to a valued employee. In any event, the Commissioner recently ruled that a school board may not unilaterally reduce salary to correct a previous mistake, at least in the absence of fraud. *Magliozzi v. East Brunswick Bd. of Ed.*, 1989 *S.L.D.* ___(Comm'r Nov. 16, 1989).

Order

It is **ORDERED** that the relief requested by both parties is hereby denied.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

June 8, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

JUNE 8, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 1990
Date

Jayne LaVecchia, S.W.
OFFICE OF ADMINISTRATIVE LAW

al

RUTH BASKERVILLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, 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.

The exceptions submitted by petitioner contend that the initial decision is based upon the issue of a board of education's prerogative to transfer staff, N.J.S.A. 18A:25-1 and Ridgefield Park, supra, when the case in reality pertains to a reduction in force, not a transfer. She avers that the flexibility given to a board to transfer staff members is contrasted by the specific procedural rules which must be followed when a reduction in force occurs. According to petitioner, the seniority rules do not give boards of education the flexibility to reassign a teaching staff member who has been riffed to any position in which the person has served. Rather, it must be made in accordance with the individual's seniority rights which begin with the most recent former position held by the staff member.

As such, petitioner urges that the Board was required to reassign her to the position of vice principal in the category of high school vice principal. Petitioner further avers that allowing the Board to reassign her to a position and/or category other than her most immediate assignment prior to her one-year service as Director of Personnel would render as a nullity the statutory obligations for tenure and seniority found in N.J.S.A. 18A:28-6 and N.J.A.C. 6:3-1.10(i).

Upon careful examination of the record in this matter including petitioner's exceptions, the Commissioner adopts the findings and conclusions of the Administrative Law Judge but with some modification as shall be explained later.

As to petitioner's exceptions, the Commissioner does not accept her contention that her reassignment was controlled by the regulations with respect to reductions in force of tenured personnel and seniority, N.J.A.C. 6:3-1.10(i). Initially, it must be emphasized that while petitioner is a tenured teaching staff member, she was not tenured as Director of Personnel at the time that the position was abolished. Consequently, the reduction in force and

seniority statutes and regulations are not applicable under the circumstances of the matter.

N.J.A.C. 6:3-1.10 applies when a teaching staff member is removed from a tenured position as a result of a reduction in force. It reads in pertinent part:

> (i) Whenever any person's particular employment shall be abolished in a category, he or she shall be given that employment in the same category to which he or she is entitled by seniority. If he or she shall have insufficient seniority for employment in the same category, he or she shall revert to the category in which he or she held employment prior to his or her employment in the same category and shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a vacancy shall occur in such category to which his or her seniority entitled him or her. (emphasis supplied)

Inasmuch as petitioner never acquired tenure as a Director, her removal from that position did not serve to trigger any seniority rights pursuant to N.J.A.C. 6:3-1.10(i).

This is not to say, however, that petitioner was not afforded employment protection when terminated from the Director's position. N.J.S.A. 18A:28-6 is quite specific as to what a board of education must do if a teaching staff member who has been promoted or transferred does not serve a sufficient period of time to acquire tenure in the new position even when that person is tenured in the district already and not merely eligible to be tenured.

N.J.S.A. 18A:28-6 reads in pertinent part:

> Any such teaching staff member under tenure or eligible for tenure under this chapter, who is transferred or promoted with his consent to another position *** shall not obtain tenure in the new position until after*** 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)

As correctly determined by the ALJ on pages 3 and 4 of the initial decision, petitioner was returned to her former position under that statute since she was reassigned to a vice principal position. However, she had no legal entitlement to be returned to a high school vice principal position. The specific category of a vice principalship comes into play when one's tenured position has been abolished. Such is not the case herein. Further, any difference in salary that may have occurred is not tantamount to a reduction in salary. Williams, supra.

The Commissioner does not accept, however, the ALJ's analysis and conclusions of the propriety of the Board's action to place petitioner in a middle school vice principal position if N.J.S.A. 18A:28-9 et seq. and N.J.A.C. 6:3-1.10 were applicable. (Initial Decision, at pp. 4-5) Had those statutes and regulation been controlling, rather than N.J.S.A. 18A:28-6, the Board would have been required to place her in a high school vice principal position if her seniority in that category warranted. The fact that petitioner could have subsequently been transferred to a middle school vice principalship is of no moment. Nor does petitioner put form over substance as implied by the ALJ on pages 5 of the initial decision. In a reduction in force circumstance, a board of education's powers to transfer pursuant to N.J.S.A. 18A:25-1 may not interfer with a tenured staff member's rights for reassignment under N.J.S.A. 18A:28-9 et seq. and N.J.S.A. 6:3-1.10. See Cucolo v. Bd. of Ed. of the Essex County Vocational School District, Essex County, decided June 27, 1985; Merlino v. Bd. of Ed. of Pequannock Twp., Morris County, decided August 22, 1989; Fallis v. Bd. of Ed. of So. Plainfield, Middlesex County, decided March 4, 1985, aff'd State Board September 4, 1985.

Finally, the Commissioner affirms the ALJ's conclusions with respect to the Board's belated attempt to set aside its own salary agreement with petitioner.

Accordingly, the Petition of Appeal and the Board's counterclaim are hereby dismissed for the reasons stated in the initial decision except as modified herein.

COMMISSIONER OF EDUCATION

RUTH BASKERVILLE,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 23, 1990

For the Petitioner-Appellant, Lake & Schwartz
(Robert M. Schwartz, Esq., of Counsel)

For the Respondent-Respondent, Ashley & Charles
(Thomas R. Ashley, Esq., of Counsel)

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

December 5, 1990

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9261-89
AGENCY DKT. NO. 311-9/89

KRISTA U. TAMMARU,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK,
Respondent.

Arnold M. Mellk, Esq., for petitioner (Wills, O'Neill & Mellk, attorneys)

Martin R. Pachman, Esq., for respondent

Record Closed: May 14, 1990 Decided: June 12, 1990

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

Krista U. Tammaru, petitioner, alleges and the East Brunswick Board of Education (Board), respondent, denies that the Board improperly withheld her salary adjustment and annual increments for the 1989-90 school year.

The matter was opened when the petitioner filed a verified petition of appeal with the Commissioner of Education on September 28, 1989. The Board filed an answer on November 29. The Department of Education transmitted the matter to the Office of Administrative Law on December 4 pursuant to N.J.S.A. 52:14F-1 et seq. This judge

conducted a prehearing conference on February 14, 1990. The matter was heard on May 2 in the North Brunswick Municipal Court. Three witnesses were examined and 12 documents admitted in evidence. See appendix to this decision. The record closed on May 14, 1990, with receipt of memoranda from counsel.

FACTUAL BACKGROUND

Upon opening of hearing, the parties stipulated that the petitioner is a tenured science teacher who has 25 years' service in the district. By letter dated June 30, 1989, from the assistant superintendent for personnel, the petitioner was informed that the Board voted on June 29 to withhold her salary adjustment and annual increments for the 1989-90 school year (see, also, Joint exhibit 9). The reasons given were absence without approval and insubordination.

From the parol and documentary evidence I **FIND:**

1. The petitioner and her son went to Australia during the December 24, 1988 - January 2, 1989 school recess.

2. The petitioner's department chairperson received a call at his home from a relative of the petitioner on January 1, 1989. The caller said the petitioner would not return to school until the following week, the petitioner was ill and a physician would not permit her to fly, a substitute teacher had been called and the relative would deliver lesson plans to the chairperson's home.

3. The caller or some other person delivered lesson plans for the petitioner's classes for January 3-6, 1989 (J-12).

4. The chairperson relayed this information to building and district administrators on Janaury 3, the first school day following recess.

5. At the direction of the assistant superintendent for personnel, the chairperson prepared a memorandum to the petitioner directing her to provide a physician's statement certifying the reason for her absence (J-1).

6. On the next weekend, January 7 and 8, a similar sequence of events took place: the department chairperson was called and lesson plans for January 9-13 were delivered (J-12).

7. On the next weekend, January 14 and 15, a similar sequence of events again occurred and lesson plans for January 17-20 were delivered (J-12).

8. The petitioner returned to her duties on January 23, 1989 (J-2).

9. The petitioner supplied certificates of sickness from an Australian physician dated January 12 and 18, 1989 (J-2).

10. The first certificate expresses the opinion that the petitioner was suffering from sinusitis and would be unfit to work from January 3-17.

11. The second expresses the opinion that the petitioner was suffering from sinusitis and gastritis and would be unfit to work from January 18-23.

12. On February 2, the assistant superintendent for personnel advised the petitioner that until the assistant superintendent received more information from the Australian physician, the petitioner's absence was unapproved. The same letter directed the petitioner to submit her airline ticket receipt or at least identify the airline on which she traveled (J-3).

13. The assistant superintendent sent the petitioner a letter on February 28, which the petitioner received, repeating the airline ticket receipt request (J-5).

14. The petitioner admitted she did not respond to the request. The petitioner testified she thought the assistant superintendent was "playing."

15. The Australian physician required a release from the petitioner before he would supply additional information to the respondent (J-4). The petitioner authorized the release, but not until June 26 (J-8).

16. The Australian physician supplied a more detailed statement dated July 21. Among other things, the statement repeats that the physician first saw the petitioner on January 12.

17. The assistant superintendent advised the petitioner by certified mail dated June 16 that the Board would discuss her employment on June 22 or 23 or both. The petitioner was given the opportunity to request, in writing, that the discussion be held in open session as required by Rice v. Union Cty. Regional High School Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977) (J-7).

18. The petitioner never submitted her airline ticket receipt, See 14, above. On October 23, 1989, at the grievance hearing concerning docking of her pay for the 12 school days she missed in January, the petitioner gave the assistant superintendent a letter dated February 22 identifying the airline she used (J-11). The assistant superintendent immediately date stamped the letter.

JURISDICTION OVER
ANCILLARY CLAIM

The petitioner grieved docking of her pay for the 12 school days she missed while in Australia. Under the negotiated labor agreement in effect, the matter proceeded to arbitration, which the petitioner has requested be stayed pending the Commissioner's decision in the present matter. When this aspect of the case was brought up at hearing, the Board objected on the ground that docking was not expressly pled in the petition of appeal. Rather than delay progress of the hearing, I directed counsel to provide me short memoranda on the question.

The Board urges that the matter was opened before the Commissioner, transmitted for hearing to the Office of Administrative Law and, in accordance with N.J.A.C. 1:1-6.1 et seq., the specific pleading requirements are governed by N.J.A.C. 6:24-1.3. That rule requires "a statement of the specific allegation(s) and essential facts supporting them . . . ." The present petition alleges only that the withholding took place and is improper. The prehearing order, never challenged by the petitioner, states the issues as, "Was the complained of withholding arbitrary, capricious or otherwise lawfully wrong?" and, "Was the complained of withholding properly effected?" The petitioner sought to amend neither her petition nor the prehearing order. She seeks to enlarge the hearing merely on the basis of her prayer for relief that asks the Commissioner to "direct and compel such other relief as the Commissioner deems just and equitable in the circumstances."

A case must come on in a form that sufficiently delineates the allegations so as to advise all parties just what the issues are. Unless there is proper amendment, the Office of Administrative Law must deal with the case as transmitted. The present petition deals only with the propriety of the withholding. Docking was not raised and, in fact, is before an arbitrator and is separate from this proceeding. The attempt to insert the issue here through a vague, general claim for relief should not be permitted.

The petitioner counters that her petition touches the same absences that are part of the arbitration issue. She has asked the Commissioner to render judgment and relief that he deems just and equitable in the circumstances. The "new" issue is simply another facet of the increment withholding issue and the Commissioner has subject

matter jurisdiction over the withholding of increments because of absenteeism. It is within the sound discretion of the Commissioner and administrative law judge to conduct the hearing so that a just result is achieved. The principle of judicial economy dictates the same result.

The respondent is in no way prejudiced because the docking issue includes the same factual predicates as the withholding issue. Because there is no prejudice to the respondent, the principle of judicial economy dictates that a record be developed of the whole matter for the Commissioner's review.

Determination

In Riely v. Hunterdon Central High Bd. of Ed., 173 N.j. Super. 109 (App. Div. 1980), the court dismissed the petition of a teacher who grieved nonrenewal of her contract, lost, and then filed a petition with the Commissioner of Education. The court relied on N.J.A.C. 6:24-1.2 which then required that a petition 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." Although amended effective May 5, 1986, the essence of the rule is unchanged. See, 18 N.J.R. 404(b), 18 N.J.R. 976(a). The rule was and is referred to as the 90-day rule.

Here, the petitioner has pursued the grievance procedure and protected her avenue of recourse under the school laws. See, N.J.S.A. 18A:6-9. The only question is whether her pleadings are sufficient to allow this judge to entertain the docking issue.

The four numbered allegations in the petition do not address docking. The prayer for relief, however, does implicate docking because docking was part of the Board's response to the petitioner's actions. If this judge and the Commissioner are to render just and equitable relief, the docking must at least be examined. In addition, the petitioner may ask that the pleadings be deemed amended to conform to the evidence, R. 4:9-2, and the judge has both expressed and implied powers to control development of the record. N.J.A.C. 1:1-14.6.

Accordingly, I **DETERMINE** in this case that the docking is properly examined.

DISCUSSION AND CONCLUSIONS

The petitioner testified that she took her school books with her on her Australian vacation. She was thus able to dictate detailed lesson plans to her sister-in-law on January 2 (January 1 in the United States). The petitioner stated she had begun to feel unwell on December 31 and felt worse on January 1. She took antibiotics she carries with her. She then called her sister-in-law and dictated on week's plans (J-12). The petitioner did not write the lesson plans before going on vacation. She did not consult a physician until January 12. Her original tickets called for return to the United States on January 2, but the petitioner has neither copies of nor receipts for the original tickets. She did not give the assistant superintendent either ticket copies or her travel agent's name in February. She did mail a letter (J-11) to the assistant superintendent on February 22 stating that she had traveled on Qantas Airlines. She did not delay submitting airline information so that details of her ticketing would be irretrievable. She does not know why the assistant superintendent did not receive the letter, she did give a copy of the letter to the assistant superintendent on October 23 and she did not predate the letter.

This testimony, which I find largely incredible, coupled with the facts found above and all the circumstances of the matter lead to one **CONCLUSION:** the petitioner was not lawfully absent from her duties Janaury 3-20, 1989. Credibility does not depend on the number of witnesses and the finder of fact is not bound to believe any witness. In re Perrone, 5 N.J. 514 (1950). In an administrative hearing, testimony may be disbelieved, but it may not be disregarded. Middletown Tp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). The best evidence, of course, is a credible witness coupled with credible testimony. State v. Taylor, 38 N.J. Super. 6 (App. Div. 1955). Neither was present here.

The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Application of Howard Sav. Bank, 143 N.J. Super. 1 (App. Div. 1976). In the present matter, I **FIND** and **CONCLUDE** that most of the petitioner's claims defy belief.

A board may require a physician's certificate for sick leave. N.J.S.A. 18A:30-4. A board need not accept every physician's certificate presented if the surrounding circumstances cast doubt on the certificate's inherent credibility. Warren v. Brooklawn Bd. of Ed., 1976 S.L.D. 980; Dunellen Ed. Ass'n v. Dunellen Bd. of Ed., OAL DKT. NO. EDU 774-82 (Dec. 20, 1982), adopted Comm'r of Ed. (Feb. 3, 1983) aff'd St. Bd. of Ed. (Oct. 26, 1983).

By letter dated May 2, 1990, the Board's counsel represented that the petitioner's accrued sick leave was not debited the 12 school days she missed in January 1989. The petitioner's salary was docked 12 days.

I **CONCLUDE** the Board properly docked the petitioner 12 days' pay for absence without approval on 12 days in January 1989, the Board properly withheld the petitioner's salary adjustment increment and annual increment for 1989-90, and the petition of appeal therefore is without merit.

ORDER

The petition of appeal is **DISMISSED.** I so **ORDER.**

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.

12 JUNE 1990
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

6/13/90
DATE

DEPARTMENT OF EDUCATION

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Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

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KRISTA U. TAMMARU,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

The Commissioner concurs with and adopts the findings and conclusions of the ALJ with respect to petitioner's increment withholding. He does not, however, agree with the ALJ's conclusion that the issue of the docking of petitioner's pay for 12 days of unauthorized absenteeism was properly before the Commissioner. While the unauthorized absences constituted one basis for the withholding (insubordination being the other), the Petition of Appeal, which was never amended, and the pre-hearing order do not set forth in any manner whatsoever the docking of pay as an issue before the Commissioner. N.J.A.C. 6:24-1.3 requires that the petition of appeal provide a statement of the specific allegation(s) and essential facts supporting them which give rise to the dispute under school law. N.J.A.C. 1:1-13.2(a) requires that the pre-hearing order specify the nature of the proceedings and the issue(s) to be resolved. All counts of the petition and pre-hearing order relate strictly to the withholding of petitioner's increment.

The fact that petitioner's relief asked for "such other relief as the Commissioner deems just and equitable***" (Petition, at p. 2), does not cure the defect of not having set forth in the petition specific allegations with respect to the disciplinary sanction of docking of pay. Moreover, even if petitioner did intend to have the pay docking subsumed within the petition which appeals the Board's withholding sanction, petitioner, contrary to the provisions of N.J.A.C. 6:24-1.3(b), failed to inform the Commissioner that the docking sanction was the subject of an action before an arbitrator via a negotiated grievance procedure. That

failure itself could have been the basis for dismissal of the petition, if so deemed by the Commissioner, prior to transmittal to OAL. N.J.A.C. 6:24-1.3(b)

Finally, the record fails to contain sufficient information for the Commissioner to determine if he has jurisdiction over a disciplinary sanction which is currently before an arbitrator and which appears to be a contractual issue since a predominant interest determination was never made.

Accordingly, the Commissioner modifies the ALJ's recommended decision as noted above.

The Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5772-88
AGENCY DKT. NOS. 202-6/86 & 267-7/87
(CONSOLIDATED CASES OAL DKT. NOS EDU 4340-86 & EDU 5374-86, ON REMAND)

IN THE MATTER OF THE TENURE HEARING OF ALAN S. TENNEY, SCHOOL DISTRICT OF THE BOROUGH OF PALISADES PARK, BERGEN COUNTY

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

Dennis J. Oury, Esq., for respondent
(Oury, DeClemente, Mizdol & Biederman, attorneys)

Record Closed: May 2, 1990 Decided: June 6, 1990

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

This matter is pending before the Office of Administrative Law as the result of a remand by the Commissioner of Education of an initial decision-settlement which was issued by the undersigned administrative law judge on June 17, 1988. The procedural history of the case was set forth at length in respondent's posthearing brief and, with appropriate modifications, follows

Respondent, Alan S. Tenney (hereinafter "Tenney") is a tenured teaching staff member employed by the Palisades Park Board (hereinafter "Board") and during the 1985-86 school year he was assigned to teach science at the Lindbergh School.

On March 12, 1986, the Board received a Statement of Charges and a Written Statement of Evidence from its superintendent, George Fasciano, charging Tenney with inefficiency under N.J.S.A. 18A:6-10 and N.J.S.A. 18A:6-11. Specifically, Tenney was charged with:

(a) Ongoing and continuing problems with students;
(b) Unsatisfactory classroom performance; and
(c) Failure to comply with administrative directives concerning classroom organization, study hall supervision, proper disciplinary procedures and planning implementation of classroom instruction.

The charges were served upon Tenney on March 14, 1986 and he was advised that, pursuant to N.J.S.A. 18A:6-11, he had 90 days within which to demonstrate improvement. Thereafter, Tenney was absent from work due to illness for 22 of the 58 school days which were available during the 90-day calendar period, March 24 27, 1986, and April 23-May 16, 1986. Doctors' certificates to support the absences were provided by Tenney to the superintendent of schools.

In early July 1986 Tenney was advised that the 90-day period to demonstrate improvement had expired on June 14, 1986, and on July 23, 1986, the Board certified charges of inefficiency to the Commissioner in accordance with N.J.S.A. 18A:6-10 et seq. The resolution also suspended Tenney without pay, pursuant to N.J.S.A. 18A:6-14. Following certification of the inefficiency charges, an answer was filed by Tenney, which included several affirmative defenses alleging, inter alia, the Board's failure to comply with the procedural requirements of N.J.S.A. 18A.6-11 and N.J.A.C. 6:24-5.1 et seq. The matter thereafter was transmitted by the Commissioner to the Office of Administrative Law for hearing in accordance with N.J.S.A. 52 14B 1 et seq and N.J.S.A. 52 14F-1 et seq. and assigned OAL Docket No. EDU 5374-86

Previously, on April 23, 1986, the Board had received a separate Statement of Charges and Written Statement of Evidence charging Tenney with a single incident of conduct unbecoming a teacher--allegedly using physical force to discipline a student, one "R. K.," on March 18, 1986. That charge was served upon Tenney by official resolution of the Board, adopted June 3, 1986, and was certified to the

Commissioner the following day in accordance with N.J.S.A. 18A:6-10 et seq. Thereafter, Tenney filed an answer and the matter was transmitted by the Commissioner to the Office of Administrative Law for hearing and assigned OAL Docket No. EDU 4340-86.

A prehearing conference in the unbecoming conduct case was held by Judge Ken R. Springer on August 7, 1986, and a prehearing order was entered by him establishing hearing dates of October 22, 27 and 28, 1986. However, issues concerning the scope of discovery thereafter arose, which resulted in an interlocutory appeal to the Commissioner who, in a decision dated October 28, 1986, determined, inter alia, that Tenney could depose R. K. The Commissioner also determined that the unbecoming conduct charge should be consolidated with the later filed inefficiency charges in order to foster efficiency and economy and to accommodate Tenney's discovery rights. Thus, a second prehearing conference was held by Judge Springer on October 29, 1986, and a prehearing order was entered establishing hearing dates of February 17-20, and February 23-27, 1987. Shortly thereafter, the undersigned administrative law judge was assigned to hear and determine the consolidated cases in place of Judge Springer At that time there was pending a motion by Tenney to dismiss the inefficiency charges on procedural grounds. On February 9, 1987, I denied the motion.

Shortly before the commencement of the scheduled February 1987 hearings, the parties informed me that they had arrived at at tentative settlement of both charges. I directed that a stipulation of settlement be drafted and submitted for my review. Although various problems then ensued with respect to finalization of the language and all the details of a mutually satisfactory settlement, agreement eventually was reached.

On June 17, 1988, I issued my initial decision-settlement recommending approval to the Commissioner. However, in a decision dated August 2, 1988, the Commissioner rejected the settlement and remanded the matter to the Office of Administrative Law for hearing. The remand was assigned OAL Docket No EDU 5772-88. Consequently, beginning on January 30, 1989, and continuing from time to time until January 5, 1990, thirteen (13) days of hearings were held Posthearing settlement efforts thereafter took place, without success. Accordingly, proposed

findings of fact and conclusions of law were submitted to me and the record closed on May 2, 1990.

THE INEFFICIENCY CHARGES

As noted, this case is a consolidation of two entirely disparate sets of tenure charges, one alleging unbecoming conduct and the other alleging inefficiency. For purposes of convenience, and in light of my determination to recommend dismissal of the inefficiency charges on procedural grounds, I will address that part of the case first.

As noted in the procedural history, when I assumed responsibility for this matter there was then pending a motion by Tenney to dismiss the inefficiency charges. One of the grounds for that motion was his contention that in processing the charges the Board had failed to comply with the requirements of N.J.S.A. 18A:6-11, and the corresponding regulations, N.J.A.C. 6:24-5.1 et seq., by failing to provide him with the full 90-day correction period due to his absences for 22 of the 58 school days available in that 90-day period. Although I determined to deny the motion, my letter opinion pointed to the fact that there had not been an adequate factual predicate presented for me to reach a conclusion, as urged by Tenney, that the total number of school days that he was absent between March 14, 1986 and June 14, 1986, were so substantial that they deprived him of his statutory and/or regulatory entitlements. Thus, I observed that this issue was, "one which must await a full development of the facts on the record since there does not appear to be any specific decision which would support his [Tenney's] claim that 22 days absence due to legitimate sick leave precludes a Board from having had a full opportunity to determine whether his performance in the areas of alleged inefficiency had been sufficiently improved." See, Letter Opinion attached to Order Denying Motion to Dismiss Tenure Charges of Inefficiency, February 9, 1987.

It is clear that boards of education must provide a teacher served with charges of inefficiency a 90-day correction period within which to demonstrate improvement, and during that 90-day period it is incumbent upon the members of the Board's administrative/supervisory staff to make, "reasonable efforts to provide assistance to the teaching staff member to overcome the specific inefficiencies." See, Guidelines for Implementation of the Tenure Employees Hearing Law,

Department of Education, Division of Controversies and Disputes (May 3, 1977), quoted in Rowley v. Board of Ed. of Manalapan-Englishtown, 205 N.J. Super. 65, 72 (App. Div. 1985). In Rowley, the Appellate Division also cited two previous administrative decisions, one by the Commissioner and the other by the State Board of Education, which focused on this obligation placed on the senior administrative staff. Thus, in the case of In the Matter of the Tenure Hearing of Ethel P. Hogue v. Teaneck School Dist. (January 13, 1983), the Commissioner observed that, "the administration bears the heavy responsibility [during the 90-day period] to render positive assistance to the teacher in an effort to overcome his inefficiencies." Rowley, at 72. So too, the Rowley court noted that in the case of In the Matter of the Tenure Hearing of Franklin Johnson, Sch. Dist. of the Tp. of Cherry Hill, 1981 S.L.D. 239 (July 2, 1981), the State Board specifically observed that boards are, "duty bound to assist a tenured teaching staff member, against whom it has filed charges of inefficiency, in improving his teaching performance before removing him from his teaching position," and that the only meaningful way a teacher subject to the 90-day notice effectively can demonstrate his or her capabilities is not only to clearly understand the basis for the criticism supporting the allegations, but also to be, "offered constructive advice as to how he might restore his teaching skills." Rowley, at 73. Thus, in such cases there must be a "synthesis of observations," by which is meant the obligation to make a cohesive effort both before and after the filing of the charges during which time a teacher's improvement, if any, can meaningfully be gauged. The facts in this case reveal to me that Tenney was not given this meaningful opportunity as the result of a combination of both the number of days of his legitimate absences and by the abrogation by the senior administrative staff of its own obligations during this period.

The charges of inefficiency, as noted, were served on Tenney on March 14, 1986. However, during the entire 90-day "improvement period" which followed, although Tenney was present on 36 school days out of a possible total of 58, his actual classroom performance was observed only three times, once on May 28, 1986 and twice on June 2, 1986. On both those days, since it was late in the school year, Tenney was involved in preparing his class for the final examination Why neither Superintendent Fasciano nor his senior staff members failed to visit Tenney's classroom on any of the 34 other school days that Tenney was present and providing classroom instruction escapes me, for there was ample time for them to have done so despite his absences

The activities of Fasciano and his senior staff, who were responsible for Tenney's observations during the correction period, are inexplicable insofar as justification for their failure to visit Tenney's classes other than on the three occasions mentioned above is concerned. In fact, on March 14, 1986, the day the 90-day notice was served on Tenney (Exhibit P-2), Fasciano sent a confidential memorandum to his senior administrators specifically advising them that the Board had just provided Tenney with a 90-day period within which to improve his performance and, therefore, it had become their "collective responsibility" to undertake to evaluate him during that time. Just four days later, in a memorandum dated March 18, 1986 to Superintendent Fasciano, one of the senior administrators, Robert Meyer, Director of Instruction, memorialized that a meeting had been held on March 17, 1986, in Fasciano's office and that a schedule of classroom visits had been established which was, "designed to assist Mr. Tenney in the improvement of his classroom instruction" (Exhibit R-19). That memorandum anticipated that during the weeks of March 17, April 7, April 14 and April 21, 1986, classroom observations would be conducted by the principal, Mr. DeRoberto, by Mr. Meyer, by Mr. Triggiano, the vice-principal, and by Mr. Lesko, the Supervisor of Instruction. respectively. The week of April 28 was left "open" with the suggestion that during that week either Fasciano or one of the other individuals possibly would observe Tenney again.

Despite the written plan, and in total disregard of the schedule established in Meyer's memorandum, it turned out that not a single formal classroom observation of Tenney's performance was conducted during the period between March 17 and May 28, 1986, even though respondent was present on many school days during that period. Indded, during the six-week period from Monday, March 17, 1986, to Friday, April 25, 1986, there were 29 school days and Tenney was present and teaching on 21 of those days.* Indeed, even though respondent returned from sick leave on Monday, May 19, 1986, it was not until Wednesday, May 28, 1986, the seventh school day after his return, that he was observed for the first time. Even this observation

*The week of March 17 was a full five-day week, the week of March 24 was a four-day week, and the weeks of April 7, 14 and 21 were all five-day weeks (Exhibit R-5).

took place nearly one week after Fasciano reminded both DeRoberto and Triggiano that it was imperative that those two, together with Lesko, observe Tenney's class before June 2, 1986 (Exhibit R-21). In fact, in that very same memorandum, Fasciano noted that he himself would be visiting Tenney's class "at the first opportunity." He did not do so until June 2, the same day as Meyer. Neither Triggiano or Lesko ever observed respondent.

While it is true that Tenney attended the March 17, 1986 meeting with DeRoberto, Triggiano and Lesko concerning the 90-day notice and was alerted to the fact that he would have to demonstrate improvement in the areas of management, teacher performance, teacher-pupil relationships and compliance with administrative directives and procedures (Exhibit P-19), an unacceptably inordinate amount of time elapsed before the administration even bothered to go into Tenney's classroom to see if such improvement even took place and to offer help if it did not. Incredibly, as noted, neither Lesko nor Triggiano ever observed Tenney during the entire period, and DeRoberto did not make his observation until May 28. DeRoberto's report of that visit (Exhibit P-23) reveals that on that day respondent was involved in a review with his pupils in preparation for the final exam. So too, in the annual performance report for 1985-86 prepared by DeRoberto, in which he determined not to recommend respondent for continued employment, the principal conceded that in light of Tenney's absences from school, the process of evaluation was "hindered" (Exhibit R-22).

By June 2, 1986, the day when both Fasciano and Meyer observed Tenney for the very first time, the class periods during which they were present again involved review for the final examination. At no time during the previous several weeks when Tenney was present did either of them, or any other evaluator, observe his classroom performance other than during a review.

It was regrettable, as I pointed out in my February 9, 1987 decision denying Tenney's motion to dismiss, that he was absent for such a substantial percentage of the time during the 90-day period in question. Nevertheless, standing alone, that deficiency could have been overcome had the administration followed its mandate to closely scrutinize and monitor the teacher's classroom activities, and to make constructive suggestions as the time proceeded. This simply did not occur. Thus, to hold that under these circumstances Tenney was the recipient of the kind of

requirements mandated in Rowley, would make a mockery of the statutory and regulatory provisions dealing with inefficiency charges. Here, as in Rowley, there appears to have been little effort, if any, by Tenney's supervisors to work with and assist him during the improvement period. Indeed, in Rowley, there were five evaluations during the 90-day period, whereas in the present case there were only three, two of them occurring on the very same day very late in the school year. Even Meyer opined that this doubling-up was inappropriate. Because of the extent of Tenney's absences during the 90-day period, there unquestionably was difficulty insofar as efforts to assist Tenney was concerned. But that does not excuse the fact that in large part the Board and its senior administrators simply ignored that obligation altogether. Those individuals seem to me to have assumed that nothing they could say to Tenney, or show him, would be of any use because respondent historically was "set in his ways" and unwilling to follow up on recommendations, no less accept constructive criticism. Having had the opportunity to observe Tenney over the lengthy period of time this case was tried, I agree that he is an individual who does not always display a sense of graciousness and/or cooperation with regard to efforts to help him.

Nevertheless, the Board must take Tenney as it finds him, and it does not appear that it would have taken any great effort specifically to have attempted to work with him with regard to improvement. Perhaps Fasciano, as superintendent, was a busy man. But the principal, DeRoberto, the assistant principal, Triggiano, and the two senior administrators, Lesko and Meyer, surely were available from time to time during the many days that Tenney was present and they failed, for whatever reason, to fulfill their responsibilities. Accordingly, there clearly is lacking in this case the kind of proof necessary to demonstrate that the Board and its senior administrative staff carried out their "heavy responsibility to render positive assistance" to Tenney. See, In the Matter of the Tenure Hearing of Ethel P. Hoque. While it is true that during the 90-day correction period Tenney was present on only 36 out of 58 available school days, his reviewers nevertheless found time to observe him on only two of those 36 days, and even those two days were atypical in that they were devoted to examination review. Thus, while I reiterate my earlier finding that the number of days Tenney was absent did not deprive him of any statutory or regulatory rights in the inefficiency context, the fact is that the time that he was there simply was not devoted by the Board to the carrying out of the requirements imposed upon it. For whatever reasons, Fasciano, DeRoberto, Triggiano, Lesko and

Meyer were engaged in other activities. While I do not fault them for that, they did, as a result, fail to provide Tenney with the kind of monitoring and constructive advice that the law anticipates should have been done.*

Therefore, in light of the testimony and documentary evidence pertinent to the inefficiency charges, I make the following findings of fact.

1. On March 14, 1986, respondent was officially notified by the superintendent that in light of Tenney's past performance, the Board had determined to file tenure charges of inefficiency against him for unsatisfactory classroom performance and failure to comply with administrative directives.

2. The superintendent further advised Tenney that during the next 90 days he would be expected to demonstrate improvement in the following areas: Classroom management, teacher performance, teacher-pupil relationships and compliance with administrative directives and procedures.

3. On March 14, 1986, Superintendent Fasciano dispatched a confidential memorandum to the principal of the Lindbergh School, Gerard DeRoberto, to the assistant principal, Emmanuel Triggiano, and to two senior administrators, Robert Meyer and John Lesko (Exhibit R-18). This memorandum informed the four administrators that they had a "collective responsibility" to evaluate Tenney over the next 90 days.

4. On March 18, 1986, Meyer dispatched a memorandum to Fasciano advising that pursuant to a meeting held in Fasciano's office the previous

*Compare with the case of In the Matter of Tenure Hearing of Fodor, OAL Docket Nos. EDU 8407-83 and EDU 7187-83 (consolidated), decided by the Commissioner (March 2, 1984), affirmed State Board of Education (July 13, 1984). Although in Fodor there were no formal classroom observations during the 90-day correction period, the teacher was the recipient of several memoranda detailing specific incidents, written advice was given to him and a number of informal conversations with the principal took place.

day, a "schedule of activities designed to assist Mr. Tenney in the improvement of his classroom instruction" had been developed. That memorandum anticipated that classroom observations of Tenney would be made by DeRoberto during the week of March 17, 1986, by Meyer during the week of April 7, 1986, by Triggiano during the week of April 14, 1986, by Lesko during the week of April 21, 1986, and that during the week of April 28, 1986, there possibly would be an observation by Fasciano or any one of the other senior administrators.

5. Despite the anticipated schedule as set forth above, no classroom observations were conducted by Fasciano, DeRoberto, Triggiano, Meyer or Lesko during the entire period between Monday, March 17, 1986, and Tuesday, May 27, 1986, despite the fact that although respondent was absent because of illness 22 days during that period, there were, nevertheless, 27 days during that same period when Tenney was present for work and could and should have been observed by any one or more of the senior administrators.

6. It is the obligation of the Board's senior administrators with respect to review of a teacher's performance during the 90-day evaluation period closely to monitor the teacher's activities and, more importantly, to provide assistance to the teacher with respect to helping him overcome alleged deficiencies.

7. The first classroom observation conducted of Tenney during the 90-day evaluation period in this case was made by DeRoberto on May 28, 1986. That took place during the next to last week of school at a time when the pupils were reviewing for the final exam.

8. The last two observations of Tenney during the 90-day period both took place on June 2, 1986, and were conducted by Meyer and Fasciano. Both of those observations were limited to their observing Tenney's review of activities for the final examination.

9. Neither Triggiano nor Lesko ever conducted a formal classroom observation of Tenney during the entire 90-day period.

10. In his annual evaluation of Tenney for 1985-86, DeRoberto noted that in light of Tenney's absences there was not a sufficient amount of time properly to evaluate the teacher's performance and that the process therefore was "hindered."

11. Meyer agreed that conducting two observations on Tenney on the same day, June 2, 1986, was not appropriate.

12. By observing Tenney on May 28, 1986 and June 2, 1986, when the school year essentially was almost over and the exam week was starting, there was inadequate time for the administration, even if they wished, to have provided Tenney with meaningful recommendations for improvement.

Therefore, in light of the foregoing discussion and findings of fact, I **CONCLUDE** that the Board failed to comply with the requirements of N.J.S.A. 18A:6-11 and N.J.A.C. 6:24-5.1(c) et seq. in that the respondent was not provided by the Board or its senior administrative supervisory staff with the sort of assistance and constructive advice designed to overcome deficiencies that the statute, the regulations and interpretive case law demand. Accordingly, the tenure charges of inefficiency in OAL Docket Number EDU 5374-86 are **DISMISSED**.

THE CHARGE OF UNBECOMING CONDUCT

The original tenure charge filed with the Commissioner in June 1986 against Tenney involved the incident wherein he is alleged to have used inappropriate physical force to discipline a seventh grade student, R. K., in violation of N.J.S.A. 18A:6-1. Testimony with respect to this charge was received from a variety of persons including, on the Board's behalf, DeRoberto, Triggiano, R. K., J. S. (R. K.'s mother), a fellow teacher (Ann Caruso) and the school nurse, Doris Gandolpho.

As counsel for Tenney aptly points out in the posthearing brief, the Commissioner on several occasions has observed with respect, in particular, to allegations of corporal punishment, that the testimony of minors "must be examined with great care." See, e.g., In re Tenure Hearing of Joseph N. Cortese, 1972 S.L.D. 109, 118 (March 20, 1972); see also, Palmer v. Board of Education of

Audobon, 1939-49 S.L.D. 183. This caution has been given special attention by me with regard to the testimony of R. K.

The first witness called by the Board with respect to this incident was J. S., the mother of R. K. She has remarried and her present husband is R. K.'s stepfather. During the 1985-86 school year, the family lived in Palisades Park. R. K. was then in the seventh grade, weighed approximately 130 pounds and was about five feet four inches tall. At approximately 1 p.m. on the afternoon of March 18, 1986, J. S. received a telephone call at her home from R. K. who, she said, sounded very upset and was crying. According to J. S., her son asked her to come to the school and "... get me out of here. I have to get out of here. Come and get me." She continued that her son related that he [respondent] hurt my neck and my back hurts," and that "he like went off on me ... and threw me down ...." As a result of that phone call J. S. said she became panicky and told her son that she would take care of it. While talking to him on the phone, she also heard a man's voice yelling in the background and when she asked R. K. who that was, her son told her, "that's Mr. Tenney. He's yelling at me--"who am I on the phone with? Who am I talking to?."

J. S. could not recall whether she then went to the Lindbergh School to get her son, or if he actually came home himself that day. In any event, later that same day R. K. told her that Tenney had become angry at him in study hall and told him to go to the office. When R. K. insisted he had done nothing wrong and challenged Tenney to explain why he should have to go to the office when there was no reason to do so, Tenney, he claimed, grabbed his neck and pulled him up out of his seat. Further, according to J. S., her son told her that Tenney "pushed me up the aisle" and "grabbed me by the neck outside ... My feet weren't touching the floor and he pinched my neck and that's when I started to cry ... Then we got up there and he like pushed me from the back of the neck and I landed beside the desk onto the floor ... and I put my arm up onto the desk to try to get my balance ... My back hurt really bad and my neck because he grabbed me by the neck and I was so scared."

J. S. further noted that her son displayed a scrape on the top of one of his hands and that R. K. told her the nurse had put something on it and it had stopped bleeding by the time he arrived home.

The next day, J. S. met at the Lindbergh School with either Triggiano or DeRoberto, together with her son, her husband and the respondent in order to discuss the incident. Tenney, she said, remained very quiet during the hour and one-quarter meeting. Her son reviewed the episode and repeated that Tenney grabbed him, pushed him up the auditorium aisle and then threw him down.

On cross-examination, J. S. conceded she had received various "progress reports" from school regarding her son but could not remember whether he had ever been removed from class for disciplinary purposes. She also agreed that there had been some disciplinary problems concerning R. K. which related to his failure either to do his homework or to bring his books to school with him. She also remembered that on the day of the incident the first telephone call to her house from R. K. actually was taken by a young woman who was staying with her. R. K. later told J. S. that he had called earlier and spoken to the young lady. Again, J. S. could not recall specifically whether she had picked up her son from school directly that day or whether he came home on his own. J. S. also explained that she did not seek medical attention for her son's injuries because she learned that the nurse had taken care of the scratch on his hand.

The Board's next witness was R. K., who at the time he testified was 15 years old and in the 10th grade. During 1986 he was a seventh grader at the Lindbergh School and Tenney was his science teacher.

On the day the incident occurred, R. K. had science class in the morning and went to study hall in the school auditorium right after lunch, which was proctored by Tenney. R. K. said he entered the auditorium with fellow students and went to his seat in the front row and sat down. For some reason, he said, Tenney told him to get up and leave, whereupon Tenney proceeded up the aisle and out the door. When R. K. did not follow him, Tenney returned, grabbed R. K. by the arm and yanked him out of the chair. R. K. said he pulled his arm away from Tenney, but claimed that while the two were then proceeding up the aisle toward the door to the corridor, respondent pushed him seven or eight times in the back. Once out in the hallway Tenney, according to R. K., grabbed him and threw him down on his knees by a desk that was located nearby. Tenney then grabbed R. K. by the neck again and directed him to Triggiano's office, where the student was told to sit in a chair. R. K then went to call his mother from a pay phone. The first time he called, he spoke to

someone else at the house (the young lady, named Debbie) and told her what had happened. R. K. then returned to where he previously had been sitting and DeRoberto then came by and they discussed what had happened. The principal told R. K. to go see the nurse so that she could treat his hand which the witness claimed had been scratched when he pulled his arm away from Tenney's grasp.

On cross-examination, R. K. explained that study hall usually took place during the sixth period and he did not recall whether respondent had ever complained to him about his behavior there. On the day in question, R. K. had a science class with Tenney, but he could not recall whether there was any incident whereby Tenney told him to go to the office because of poor behavior.

When he entered the study hall, R. K. said he sat in the seat assigned to him. Although he was carrying a basketball, he denied dribbling it in the auditorium, although he agreed it fell off his seat at one point. Then, while talking to another student on his right, Tenney came up to R. K. and told him to "come with me." Tenney then walked up the aisle and out of the auditorium. R. K. did not follow him and remained seated. According to R. K., he did not feel that he had done anything wrong which would have required him to leave the study hall. When Tenney returned, R. K. said that respondent grabbed the ball and the notebook from him and said, "come on, we're going to the office." When R. K. again resisted and challenged Tenney to tell him what he had done wrong, the respondent, he claimed, grabbed his left forearm to lift him from the seat. Although R. K. believed that is when the scratch on his hand occurred, he did not notice it until DeRoberto pointed it out to him later.

After Tenney grabbed R. K.'s arm, the student said he pulled it away, whereupon Tenney pulled him up out of the chair and began pushing him up the aisle. R. K. did not recall Tenney saying anything to him as they were proceeding out of the auditorium into the hallway. Once there, Tenney, he said, grabbed his neck and pushed him to his knees. As soon as R. K. got up, Tenney, he said, again grabbed him by the neck and turned him around and directed him toward Triggiano's office

The next witness with respect to the R. K. incident was DeRoberto. He first became aware of the incident when he saw R. K. seated in a portico outside of Triggiano's office with his head bowed down. When the principal went over to R. K.

and asked him what was happening, the student told him that he had been "pushed and touched" by Tenney. According to DeRoberto, the student appeared to him to be a "shaky young man." Upon learning of the alleged incident, DeRoberto asked R. K. to come into his office, where he again asked him what had happened, and R. K. again told him he had been pushed by Tenney and that Tenney had placed his hand on the student's neck. At that point DeRoberto said he saw a scratch on the student's right hand and told him to go to the nurse. DeRoberto then spoke with Triggiano, who said that he knew about the incident and that R. K. also told him that respondent had put his hands around his neck and scratched him. DeRoberto asked Triggiano to set up a meeting with R. K.'s parents the following day, which meeting occurred.

On cross-examination, DeRoberto repeated that R. K. clearly told him that Tenney had grabbed him about the neck and forcibly pushed him up the auditorium to the hallway. At the meeting the following day, R. K. essentially repeated the same version of the incident, although the principal could not recall whether R. K. related having been thrown to the ground or against a desk.

On redirect-examination, DeRoberto maintained that Tenney did admit taking R. K. by the arm that day, although he denied the balance of the allegations.

The Board's next witness was the school nurse, Doris Gandolpho. At approximately 1:15 p.m. on March 18, 1986, R. K. came to her office and asked to use the telephone in order to call his mother. This was not unusual since there was a public phone nearby. Gandolpho said he could use the phone, which he did. According to the witness, R. K. was not crying.

About five minutes later R. K. returned to the nurse's office and asked for a band-aid. He told Gandolpho that Tenney had scratched him and there was a scratch on top of the student's right hand with some blood appearing. Gandolpho cleaned the area, put a band-aid on it and told the student to see DeRoberto. R. K. never returned that day, nor did he complain of any other pain or injury.

Testimony on behalf of Tenney with respect to the incident in question was offered by respondent himself and by another teacher, Ann Caruso Caruso's testimony with respect to the R. K. incident essentially was as follows. The witness

knew R. K. as a "difficult student" who did not have a "positive attitude" toward school. Once during the 1985-86 school year (she could not recall precisely when), R. K. asked if he could go to the nurse. He claimed that he had hurt his hand in class on a chair. She could not recall which hand it was and it did appear as if there had been a scab which was scratched off. Caruso could not even recall whether she gave R. K. permission to go to the nurse on that occasion.

The major defense testimony with respect to the R. K. incident was offered by Tenney. According to the respondent, R. K. was in his science class on the day in question and had been chastised for turning around and bothering another student behind him, although Tenney felt both were at fault. He recalled sending the two of them to Triggiano's office and later was told by Mrs. Caruso that the two students were seen sitting in the auditorium.

After lunch Tenney was in charge of the study hall and R. K. arrived about five minutes late bouncing a basketball. Tenney said he told the student to stop that activity and to sit down in his assigned seat, which he did. Tenney then proceeded to the back of the auditorium and soon noticed R. K. out in the hallway. Respondent told him to sit down again and R. K. complied. Tenney then said he walked to the front of the auditorium and noted that R. K. now was sitting in a different seat. When Tenney told him to move to his regularly assigned seat, the student refused and said to respondent, "I've had enough of you today." Tenney then proceeded out of the auditorium to report the incident to Triggiano. He found the vice principal on the telephone and therefore returned to the auditorium and gestured to R. K. to come with him. The student remained in the seat, whereupon Tenney said he reached over and put his right hand under R. K.'s left arm. The student then got up. Tenney said he then picked up R. K.'s coat and the basketball and carried them himself. It was his intention to proceed with R. K. to Triggiano's office. R. K. was walking in front of Tenney all the way up the aisle to the back of the auditorium. Tenney testified that at no time did he ever touch R. K.--the student was complying with instructions. The only physical contact that took place, according to Tenney, was when he put his right hand under R. K.'s left elbow to assist him up out of the seat.

Once out in the hallway, Tenney turned right but R. K. kept going straight towards DeRoberto's office. Tenney told the student not to go in that direction and

then reached out with his left arm and gently took hold of R. K.'s right arm. At that point, according to Tenney, the student jerked his arm away and said "get the fuck off me." When R. K. then again moved toward DeRoberto's office, Tenney reached forward and took him by the arm. R. K. did not fall nor, said Tenney, did he grab R K. by the neck or scratch him.

Once at Triggiano's office, R. K. was directed by Tenney to sit down and told to wait for the vice principal. Tenney then went back to the study hall, and when he later came out he saw R. K. on the telephone and asked who he was speaking to. According to Tenney, R. K. said he was talking to a woman who lived at their house. Tenney vehemently denied scratching R. K. or doing anything else to cause him pain or injury.

The following day Tenney met in DeRoberto's office with Triggiano, R. K., R. K.'s mother, R. K.'s stepfather and DeRoberto. At that time the stepfather chastised R. K. for using bad language toward a teacher. Tenney said that he explained that he did nothing to hurt the boy and at the end of the conference felt that the "problem" had been resolved.

According to Tenney, at no time on March 18, 1986, did anyone tell him about any scratch that R. K. had suffered or otherwise confront him about any incident. Further, at the conference held the following day, Tenney maintained that at no time did R. K. ever say that he was thrown down, that he struck any furniture or that Tenney had lifted him off the ground.

On cross-examination, Tenney insisted that he never harmed R. K., although he agreed he did lift him under the elbow in order to assist him out of the seat in the auditorium. However, Tenney maintained that there was no resistance from R. K.-- the only time this occurred was in the hallway when he was continuing toward DeRoberto's office even though he was supposed to go to Triggiano's office.

Tenney repeated that he simply walked up the aisle behind R. K. and out into the hallway carrying the boy's coat and basketball. When the student went directly across the corridor toward's the principal's office, Tenney reached out, touched R. K. gently with his hand, and said not to go that way. Tenney specifically explained that all he did was touch the boy on his right arm above the elbow with his left hand. At

that point the student jerked away from him and Tenney reached out again and said "let's go this way." That is the point at which R. K. allegedly swore at him.

FINDINGS OF FACT

In light of the testimony and documentary evidence pertaining to the charge of unbecoming conduct involving the incident with R. K., I herewith make the following findings of fact:

1. On March 18, 1986, one of Tenney's seventh grade science students was a young man named R. K., who then was 11 years old.

2. On that date Tenney also was in charge of a study hall after lunch and R. K. was assigned to that study hall.

3. On the day R. K. arrived in study hall about five minutes late and was bouncing a basketball when he entered. Tenney directed him to stop bouncing the ball and told him to sit in his assigned seat.

4. Soon thereafter, Tenney observed that R. K., without permission, had left his seat and had proceeded to the hallway outside the auditorium. When Tenney directed R. K. to take his assigned seat, the student did not do so and Tenney then left the auditorium to report the matter to the vice principal, Triggiano.

5. Since Triggiano was otherwise occupied on the telephone, Tenney returned to the study hall and found R. K. sitting in a seat other than his assigned seat. Tenney gestured to R. K. that the student should follow him, but R. K. remained seated.

6. Tenney then reached down with his right hand, grasped R. K.'s left arm above the elbow and said "let's go."

7. Tenney then forcibly pulled R. K. up from his seat and proceeded up the auditorium aisle toward the rear where the entrance to the hallway is located.

8. While proceeding up the aisle, Tenney was walking behind R. K. and pushed the student on more than one occasion while behind him.

9 Once out in the hallway, R. K. proceeded to go directly across the corridor toward the principal's office. Since Tenney wanted R. K. to go to the vice principal's office, he told the student not to go in that direction and, at the same time, grabbed R. K. by the right arm.

10. R. K. jerked his arm away from Tenney and told him that he should "get the fuck off me" and the student continued to walk towards DeRoberto's office.

11. Tenney again reached forward with his left arm and grabbed R. K.'s right arm in the biceps area and told him that they were to go to the vice principal's office and not to the principal's office.

12. Tenney then proceeded to walk with R. K. to the vice principal's office where the student was instructed to sit down and wait to speak to Triggiano.

13. At no time during the entire incident did Tenney grab R. K. by the neck and pinch and/or squeeze R. K.'s neck. Neither at any time was R. K. pushed or thrown by Tenney to the ground against a desk or any other piece of furniture.

14. While waiting outside of Triggiano's office, the principal, DeRoberto, came by and saw that R. K. had a cut on top of his right hand which appeared to be bleeding. He instructed the pupil to go to the nurse's office so that it could be treated. The scratch or cut was not caused by any physical act on Tenney's part.

15. After the pushing and grabbing incident occurred, R. K. did call his home on two occasions. The first time he spoke to a young lady who was staying there, and on the second occasion he did speak with his mother. At the time he spoke with his mother, R. K. was distressed and "shaky."

16. On the day following the incident, a conference was conducted including DeRoberto, Triggiano, Tenney, R. K. and R. K.'s parents who discussed the incident. On that occasion Tenney admitted to DeRoberto that he had grabbed R. K.'s arm on the previous day. R. K. on that same occasion also indicated that he had been grabbed and pushed by Tenney.

Based upon the foregoing discussion and findings of fact, there is no doubt that Tenney, on more than one occasion during the incident in question, forcibly grabbed and/or pushed R. K. I believe the boy's testimony with respect to having been grabbed by the arm and essentially pulled up out of the chair in the auditorium, and having been pushed from behind up the auditorium aisle out into the hallway. I also believe Tenney then grabbed him by the arm while in the hallway and directed him towards Triggiano's office rather than to DeRoberto's office. Although Tenney denied most of those incidents, I believe R. K.'s testimony to be entirely credible with respect, at least, to those portions of the incident. On the other hand, I believe R. K. embellished the incident when he also claimed having been grabbed by the neck and pushed to the floor into a desk while in the hallway outside DeRoberto's office. Also, I find the evidence insufficient to demonstrate that the scratch which R. K. displayed on the top of his right hand while at the nurse's office was occasioned by Tenney. It is entirely possible that it was self-inflicted.

Nevertheless, on balance, by virtue of his conduct involving the grabbing and pushing of the student, Tenney unquestionably did engage in the sort of conduct precluded by N.J.S.A. 18A:6-1. While the testimony of R. K.'s mother was, at times, both inconsistent and confusing, there is no doubt she was called by her son on the day in question and I believe that he did complain to her about the incident essentially as she described it. The fact that the "injuries" were of a minor nature is not relevant to proof of the violation itself.

Neither do I believe that the circumstances under which the grabbing and pushing occurred involved any of the statutory exceptions which would excuse such conduct. While I agree with Tenney's counsel that the Board has the burden of proving each and every one of the elements to establish corporal punishment, including a showing of wrongful intent, this was done here. Although R. K. may very well have been challenging Tenney's authority with respect to his direction that he

proceed to the vice principal's office, there is no excuse for what followed, particularly the pushing from behind which clearly occurred. That is more than a mere incidental touching--it is under the statute and the case law, corporal punishment which cannot be condoned.

Neither do I need to consider that if Tenney had been charged with the offense of "simple assault," there would come into play what his counsel describes as, "a full panoply of principles of justification . . . as affirmative defenses." This case is not a criminal or quasi-criminal proceeding--it is an administrative hearing which involves a charge of an unlawful touching. Under all the circumstances, I find, therefore, that Tenney's behavior toward R. K. as set forth in my findings of fact was improper and in violation of N.J.S.A. 18A:6-1.

PENALTY

Having dismissed the charges of inefficiency, but having found that corporal punishment as alleged in the first certified charge did occur, there remains for consideration the question of what penalty is appropriate for the misconduct which I have found to have occurred. There are, of course, many cases involving corporal punishment committed by teaching staff members against students, ranging from a minor touching to major assaults. The facts in this case fall somewhere in the middle. No teacher should, as Tenney did here, grab an 11-year-old, seventh grade pupil by the arm, lift him forcibly up out of his seat and then push him from behind up an auditorium aisle into a hallway where the teacher again grabs the student's arm and pulls him in a particular direction. Teachers are expected to find alternative methods to deal with recalcitrant pupils and not to resort to physical force to compel obedience. Self-restraint and controlled behavior is not a suggestion, it is a minimal requirement for the position. Since Tenney failed to do so, and acted in an inappropriate way, he must be sanctioned for it.

On the other hand, while there was no acceptable justification for his conduct, there is no doubt that Tenney was provoked. The student in this case came late to study hall bouncing a basketball, sat in an unassigned seat and then disregarded the teacher's directions. Although Tenney, as a teacher of many years standing, should have known better, it is not entirely beyond comprehension that in response he instinctively grabbed and pushed the boy. Thus, in light of all of the circumstances,

the most severe sanction of removal is not, in light of all of the testimony, warranted. Rather, by virtue of his violation of the provisions of N.J.S.A. 18A.6-1, Tenney should be suspended, without pay, for a period of 120 days.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

June 6, 1990
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

JUNE 11, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 12 1990
Date

OFFICE OF ADMINISTRATIVE LAW

amr/e

IN THE MATTER OF THE TENURE	:	
HEARING OF ALAN S. TENNEY, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION ON REMAND
PALISADES PARK, BERGEN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board's exceptions, however, were untimely filed. Accordingly, respondent's reply exceptions thereto are not considered in the disposition of this matter.

Preliminarily, the Commissioner notes for the record the observation made by Mr. Pincus, counsel for respondent, that counsel designations on the first page of the initial decision are reversed. Mr. Oury represents the Board of Education of the Borough of Palisades Park, while Mr. Sheldon Pincus of the law firm of Bucceri and Pincus represents Respondent Tenney in this matter.

Concerning the merits of the case and the charge of conduct unbecoming a teaching staff member, respondent excepts to Findings of Fact Nos. 7, 8, 9, 11, 15 and 16 of the initial decision, as well as the ALJ's conclusion that respondent committed a single act of corporal punishment on March 18, 1986. The exact findings of fact to which respondent excepts follow:

> 7. Tenney then forcibly pulled R.K. up from his seat***.
>
> 8. While proceeding up the aisle, Tenney*** pushed the student on more than one occasion while behind him.
>
> 9. Since Tenney wanted R.K. to go to the vice principal's office, he told the student not to go in that direction and, at the same time, grabbed R.K. by the right arm. (Emphasis added.)
>
> 11. Tenney again reached forward with his left arm and grabbed R.K.'s right arm in the biceps area***. (Emphasis added.)
>
> 15. ***At the time he spoke with his mother, R.K. was distressed and "shaky."
>
> 16. ***On that occasion, Tenney admitted to DeRoberto that he had grabbed R.K.'s arm on the previous day. (Emphasis added.)
>
> (Respondent's Exceptions, at p. 2)

The legal conclusion to which respondent excepts is "***that Tenney, on more than one occasion during the incident in question, forcibly grabbed and/or pushed R.K." (Id., paraphrasing Initial Decision at p. 20)

Citing case law establishing that where allegations of corporal punishment are concerned, the testimony of children must be examined with great care, respondent excepts to the above findings, and more particularly to the ALJ's statement, "***I believe R.K.'s testimony to be credible with respect, at least, to those portions of the incident." (Initial Decision, at p. 20) Respondent avers that the weight of the substantial, credible evidence was to the contrary.

Citing from the transcript, respondent claims he reached down with his open right hand and placed it on R.K.'s left arm above the elbow, thereafter stating "'Let's go' and R.K. voluntarily got up from his seat, offering no resistance***". (emphasis in text) (Exceptions, at p. 4, quoting Tr. 11-107, and Tr. 11-109)

Respondent goes on to explain that as R.K. and he proceeded up the aisle and out of the auditorium, at no time did he touch R.K. (Tr. 11-108-109) As they proceeded to Mr. Triggiano's office, respondent claims he gently reached out with his left arm seeking to take hold of R.K.'s right arm in the bicep area. (Tr. 11-110) Following R.K.'s having

> jerked his arm away from Tenney stating "Get the fuck off me," and continuing to walk toward DeRoberto's office [Tr. 11-110-111], Tenney then reached forward with his left arm, taking hold of R.K.'s right arm (in the bicep area) and stating "Let's go to Triggiano's office," and proceeded to walk there with R.K. No resistance was offered and no complaint of pain or injury was stated to Tenney by R.K. [Tr. 11-111] (emphasis in text) (Exceptions, at pp. 4-5)

Respondent further contends that after school on March 18, 1986, he was advised that a parental conference had been scheduled with R.K.'s parents for the next morning. He claims that at no time before that conference did either the principal or Mr. Triggiano seek respondent's account of what had occurred. (Tr. 11-120) Neither was he asked whether he could account for a scratch on the thumb side of R.K.'s hand. (Tr. 11-123) Respondent urges that at the parental conference, he denied hurting R.K. (Tr. 11-119) He further argues that he denied grabbing R.K. and so stated in a subsequent letter to the principal, citing R-40 in evidence. Respondent claims he left the conference with the belief that the matter had been resolved.

Respondent submits that despite his recollection of the incident, the ALJ chose to rely on "some of the shaky and ersatz testimony provided by the Board" in the matter. (Exceptions, at p. 6) Referring to R.K.'s testimony, respondent points out what he

avers are more than a dozen inconsistencies in R.K.'s testimony. Respondent claims that his version of the facts and statements adduced from R.K.'s testimony call into question the student's credibility "***as to not even make it a close question whether he told the truth at hearing. Clearly he did not!" (emphasis in text) (Exceptions, at p. 7)

Moreover, respondent suggests that the testimony of the principal, Mr. DeRoberto, was found to be lacking, although respondent admits that the principal's testimony "went far to unraveling R.K.'s web." (Id., at p. 10) Citing the transcript, respondent claims that DeRoberto's testimony suggests that no one asked respondent for his version of the facts that day in study hall. "***[O]f the 70 students in the study hall, one might have been able to corroborate R.K.'s version of what occurred. None were called." (emphasis in text) (Id., at pp. 10-11) He claims that DeRoberto could not recall speaking to any of the other students in the study hall to compare what they saw. Respondent queries whether the failure on the part of the administration to discuss with him or others what happened on the day it occurred indicated they were "more oriented toward generating another memo as opposed to determining what had occurred or being supportive of a staff member who had to deal with a student all knew to be a recidivist discipline problem." (Id., at p. 10)

Respondent's exceptions then analyze R.K.'s mother's, Mrs. S.'s, testimony, citing some eight observations adduced from the transcript. From his review of Mrs. S.'s testimony, respondent submits that his own testimony was credible when he stated he was not in any way responsible for the scratch which appeared on R.K.'s right hand. He further suggests that there was a serious question as to whether the scratch was self-inflicted by R.K., citing the testimony from the transcript suggesting he had done something similar on another occasion while in Ms. Ann Caruso's classroom. Respondent further avers that at no time did he grab R.K. by the neck or lift R.K. off the ground while holding his neck. Neither was R.K. thrown to the floor, respondent claims. Instead, respondent requests that the Commissioner reject the excepted findings of fact, and conclude there was no corporal punishment visited upon R.K. in this case. Thus, respondent seeks dismissal of the unbecoming conduct charge.

In the event, however, that the Commissioner affirms the findings and conclusions of the ALJ, respondent submits that the penalty of suspension and/or forfeiture of 120 days' salary dating back to the certification of the Board's charge against him is too harsh under the circumstances. First, he notes that he was suspended without pay, and that said suspension emanated from the Board's certification of the inefficiency charges, not the conduct unbecoming charges. He notes that the Board's certification of probable cause in the unbecoming conduct case preceded the certification of the determination on the inefficiency charge. He avers the Board concluded that suspension was not warranted under the facts then presented.

Further, relying on In the Tenure Matter of Victor Lomakin, School District of South Orange-Maplewood, 1971 S.L.D. 331, respondent submits that the facts do not demonstrate any conscious, premeditated intent on his part to inflict pain or suffering, although he admits to some physical contact with R.K. He claims that any such contact did not rise to the level of an intent to commit corporal punishment. Respondent contends for all of the foregoing reasons that the Commissioner should affirm the ALJ's dismissal of the inefficiency charges and should reverse those findings and conclusions referred to above regarding the corporal punishment charge. He would further ask that the Commissioner find he did not commit corporal punishment, as alleged, and dismiss the charge of unbecoming conduct a teacher. Lastly, he would ask to be reinstated together with 120 days' pay withheld during his suspension pursuant to N.J.S.A. 18A:6-14.

Upon a careful and independent review of the record of this matter, the Commissioner affirms the findings and conclusions of the Office of Administrative Law for the reasons expressed by the Honorable Stephen G. Weiss, ALJ. The Commissioner adds the following.

Pertaining to the charge of inefficiency, the Commissioner fully concurs with the ALJ's reliance on Rowley v. Board of Education of Manalapan-Englishtown, 205 N.J. Super. 65, 72 (App. Div. 1985) as instructive on the responsibility the Board of Education shoulders during the minimum 90-day period of improvement required by N.J.S.A. 18A:6-11, when the Board filed charges of inefficiency against one of its tenured teaching staff members. It bears repeating that the Court in Rowley, quoting The State Board decision in Rowley, 1984 S.L.D. 2006, 2007, stated:

> ***a teacher whose teaching effectiveness is called into question after years of meritorious service in a school district should, in recognition of that contribution, be afforded an opportunity to demonstrate he is still capable of effective teaching. He can only avail himself of the opportunity if he understands clearly the basis for the criticism supporting the allegations of inefficiency and is offered constructive advice as to how he might restore his teaching skills.

If, as in the instant matter, a period of legitimate absences interrupts the 90-day period, the Board must carefully evaluate whether extending the period would advance the Board's purpose of affording assistance and constructive advice for the teacher whose efforts are directed toward "restoring his teaching skills." Because the statute speaks to a minimum of 90 days for such improvement period, see, N.J.S.A. 18A:6-11, nothing compels the Board to extend said time period. However, it would be advantageous to both parties to consider lengthening the probationary period, where good cause is demonstrated, to ensure satisfaction of the statutory mandate.

In Rowley, the Appellate Division went on to say:

> As the State Board concluded, what is required is "a cohesiveness of effort before and after the filing of charges that enables the Board ultimately to measure a teacher's improvement by a synthesis of observations."
> (205 N.J. Super. at 73)

A synthesis of observations is clearly lacking in the instant matter. The sheer number of observations conducted of Mr. Tenney is not so critical a factor in the Commissioner's finding that the Board failed in its responsibilities during the improvement period provided respondent herein, as is the absence of indicia of affording assistance and an opportunity for respondent to take advantage of such assistance. The record reveals that while three observations were conducted of respondent's classes, two were made on the same day. The Board concedes the inappropriateness of this action. (Tr. 6-181-182) Moreover, said observations were conducted at the last possible point before the expiration of the 90-day period. Respondent could hardly have been expected to gain helpful assistance on ways to improve his teaching so close to the year's end, particularly since the classes he was teaching were engaged in review.

It is obvious from the record that notwithstanding the memo from the superintendent (Exhibit R-21) directing respondent's administrators to be sure to conduct their evaluations of him before June 2, when the year-end review period began, two of five evaluators never did perform an evaluation, and the other three did so on May 21 and June 2. The belated scheduling of said evaluations, coupled with the scattered contact and limited follow-up on the plan designed by the superintendent for Mr. Tenney's improvement plan, leads the Commissioner to the conclusion that the Board's efforts were perfunctory, intended not as a means of supporting Respondent's task of improving his performance as a teacher but, rather, executed to satisfy with the least possible effort, the legal requirement of N.J.S.A. 18A:6-11. Notwithstanding respondent's bona fide absences, such paltry efforts cannot be found to be sufficient to sustain the Board's burden in filing charges of inefficiency under statute and case law. Accordingly, for the reasons expressed by the ALJ as supplemented herein, the tenure charges of inefficiency in OAL Docket Number EDU 5374-86 are dismissed with prejudice.

Similarly, the Commissioner is in accord with the ALJ's conclusions and findings of fact concerning the charge of corporal punishment that grew out of the events of March 18, 1986.

The Commissioner's independent review of the record of this charge, including a careful perusal of the transcripts and exhibits, comports with the conclusions arrived at by ALJ Weiss. Applying the standard of judicial review of the factual determinations made by an administrative agency as set forth in Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976), i.e., whether the findings could reasonably have been reached on sufficient credible evidence present

in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility, the Commissioner finds and determines that respondent herein at more than one point during the incident in question forcibly grabbed and/or pushed R.K., in an attempt to remove him from the auditorium and into Mr. Triggiano's office. While the record is peppered with inconsistencies and conflicting testimony from virtually every witness brought by both parties concerning this episode, the Commissioner's consideration of the evidence reveals no basis upon which to overturn the ultimate factual findings and conclusions of the ALJ who was a witness to the thirteen days of hearing in this matter. Those arguments posited by respondent in his exceptions bring no new testimony or evidence to the record. The Commissioner finds that in reviewing such exceptions, the ALJ fully and fairly disposed of said arguments in his consideration of the post-hearing submissions and other evidence before him.

Consequently, the Commissioner finds and determines that respondent's grabbing and pushing of R.K. on March 18, 1986 constitutes corporal punishment precluded by N.J.S.A. 18A:6-1. Having herein dismissed the charge of inefficiency filed against respondent earlier in this decision, the Commissioner considers the penalty in this case solely on the issue of respondent's misconduct in meting corporal punishment upon R.K. The Commissioner agrees with the ALJ that "***while there was no acceptable justification for [Tenney's] conduct, there is no doubt that Tenney was provoked." (Initial Decision, at p. 21) For the reasons expressed by the ALJ, and taking into account all of the circumstances, the Commissioner determines that removal of respondent from his tenured teaching employment is not warranted under the facts of this case. Instead, the Commissioner deems the appropriate penalty to be imposed for respondent's unbecoming conduct is the loss of salary for 120 days. In so finding, the Commissioner has considered such cases as In the Matter of the Tenure Hearing of Robert E. Doyle, School District of the Township of Pemberton, 1984 S.L.D. 350, rev'd State Board 383, aff'd in part/vacated/dismissed/rem'd to State Board by Superior Court May 14, 1985, decision on remand aff'd/mod. State Board June 4, 1986, remanded to State Board by Superior Court November 13, 1986, decision on remand State Board January 7, 1987, aff'd Superior Court June 3, 1987, Cert. den. 109 N.J. 55 (1987). This determination takes into account such factors as the nature and gravity of the offense, the fact that it was an isolated incident, and any injurious effect on the maintenance of discipline and proper administration of the district. In assessing this penalty, the Commissioner emphasizes that he does not in any manner condone the lack of self-restraint exhibited by respondent in this matter, nor his resort to physical contact by a teacher in carrying out his duties to maintain discipline. In accord with In re Nickerson, 1965 S.L.D. 130, it bears reinforcing that students "***not only [have] a right to freedom from bodily harm or infliction of pain by another but also a right to freedom from offensive bodily touching even if no actual physical harm results." (Doyle, supra, at 382, quoting Nickerson, supra) See also In the Matter of the Tenure Hearing of Fredrick L. Ostergren, 1966 S.L.D. 185, 156 and In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967)

Accordingly, for the reasons expressed by the ALJ, as supplemented herein, the Commissioner adopts as his own the recommendation of the Office of Administrative Law dismissing the charges of inefficiency levied against respondent but finding respondent guilty of conduct unbecoming. Because of his violation of the provisions of N.J.S.A. 18A:6-1 the Commissioner directs that the appropriate penalty shall consist of the loss of 120 days of salary, whatever that salary shall be upon his restoration. The Commissioner modifies the penalty assessed by the ALJ, however, by eliminating the ALJ's recommendation that such loss of pay be accompanied by suspension. Instead, petitioner is to be restored to his teaching duties and is to serve without pay for 120 days. Such dollar amount of 120 days loss of salary shall be mitigated by the dollar amounts already withheld from petitioner upon his suspension without pay.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4007-90
AGENCY DKT. NO. 133-5/90

WILLIAMS MOBILE OFFICES,
Petitioner,
v.
BOARD OF EDUCATION OF LOGAN, GLOUCESTER COUNTY,
Respondent.

Gary J. Zangerle, Esq., for petitioners (Parker, McCay & Criscuolo, attorneys)

Raymond J. Zane, Esq., for respondent (Zane, Lozuke & Albano, attorneys)

Record Closed: June 11, 1990 Decided: June 14, 1990

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

Williams Mobile Offices, a bidder seeking to supply mobile classrooms to the Board of Education of Logan (Board) in April (the second set of bids) sought an emergent relief order to bar the Board from awarding a contract to a bidder in June (the third set of bids). On May 22, 1990, the Department of Education transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A hearing was held on June 11, 1990 in Mercerville. Testimony of the Board's Director of Special Services, John R. Herbst, was taken in lieu of the Board's filing an answering affidavit. My operative findings are as follows:

1. The Board attempted to lease "mobile" classrooms in the fall of 1989, but the proposal was disapproved by the Commissioner because the plans did not include a lavatory in each unit.

2. The Board asked for bids in April but its notice to bidders did not include a prequalification requirement pursuant to *N.J.S.A.* 18A:18A-26 *et seq.* Upon advice of counsel and in accordance with a reservation of the right to do so included in the notice (item A), the Board rejected all bids.

3. Petitioner filed for relief before the Commissioner to bar new bids claiming to be low bidder. Another entity which bid low in April had not prequalified and did not subsequently achieve qualification.

4. As a result of the suit, Director of Special Services Herbst reviewed the prior bids in depth and concluded the specifications were ambiguous and he was not even sure that petitioner was the lowest qualified bidder. The bid forms seeking dollar amounts did not include such items as canopies which appeared on the architectural drawings.

5. The Board readvertized for bids and a contract was to be awarded within a day of the hearing date herein. The new notice included the prequalification provision and the form for the dollar prices on the bids was refined to remove ambiguities.

6. Petitioner was the low bidder, but Director Herbst raised a question about the calculation; petitioner discovered it had miscalculated its bid by $6,000 and asked to withdraw the low bid. The Board stood ready to accept the bid but allowed withdrawal.

Conclusion and Disposition

There is no question that the statutory prequalification requirement is significant and that bidders must be given clear notice of it. In fact, a low bidder in April was not prequalified and did not achieve qualification. That fact demonstrates the problem. Petitioner argues that since the requirement is statutory, the Board did not need to give notice of it. The law requires a level playing field for bidders so that "all bidders bid on the same thing" and bidders cannot supplement the bids by private understandings. *Belousofsky v. Bd. of Ed. of Linden,* 54 *N.J. Super.* 219, 223

(App. Div. 1959). All bidders must be made acquainted with the specifications in their entirety.

The Board's rejection of all the April bids was not arbitrary. I **CONCLUDE** that it was reasonable, based on the above law and was well advised based on the lack of an essential provision in the specifications. Rebidding appeared doubly necessary after the Board realized that the specifications were unclear. The above findings and conclusions determine the entire controversy as well as the emergent relief motion.

It is therefore **ORDERED** that the emergent relief request be **DENIED** and the petition **DISMISSED.**

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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 14, 1990
DATE

NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 19 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

WILLIAMS MOBILE OFFICES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LOGAN, GLOUCESTER 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 agrees with the ALJ's findings and conclusions with respect to the denial of emergent relief and dismissal of the Petition of Appeal as the disposition of the emergent relief request has precluded the need for any further hearing of the matter.

Accordingly, the request for emergent relief is denied and the Petition of Appeal dismissed.

COMMISSIONER OF EDUCATION

DOROTHY KLETZKIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

For Petitioner, Stephen B. Hunter, Esq., (Klausner, Hunter and Oxfeld)

For Respondent, Philip H. Shore, Esq., (Shore & Zahn)

For Participant New Jersey School Boards Association, Donna M. Kaye, Esq., (Francis J. Campbell, Esq., General Counsel)

This matter, which concerns a dispute regarding petitioner's acquisition of tenure, was originally opened before the Commissioner of Education as a Petition of Appeal on May 4, 1989. Following receipt of a timely Answer from the Board of Education, on June 2, 1989 the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14f-1 et seq. A telephone prehearing conference was conducted by Administrative Law Judge Beatrice S. Tylutki on August 16, 1989, wherein the parties advised that they believed this matter to be amenable to summary judgment based on a stipulation of facts. However, they were unable to comply with the schedule set for proceeding in this manner and petitioner's motion for summary judgment and supporting brief were not filed until April 19, 1990, at which time a stipulation of facts had still not been submitted to the ALJ.

On May 8, 1990, with petitioner's consent, respondent requested that the Commissioner seek return of this matter from the Office of Administrative Law so that the Commissioner could decide it directly pursuant to N.J.A.C. 6:24-1.15. On May 17, 1990 the Commissioner so requested and on June 4, 1990 the file was returned by OAL.

On June 13, 1990 the Commissioner set a briefing schedule, committed to writing his expectation that a stipulation of facts would be forthcoming and granted the May 18, 1990 application of the New Jersey School Boards Association for leave to participate in this matter. Accordingly, on June 18, 1990, respondent filed a cross-motion for summary judgment and supporting brief and Participant New Jersey School Boards Association submitted a brief in support of respondent's position. As no reply briefs were

received within the designated time after filing of respondent's brief, the record is deemed to have closed on June 19, 1990 with the parties' submission of a fully executed stipulation of facts.

ISSUES TO BE RESOLVED

As established in the prehearing order of ALJ Tylutki, the issues to be resolved in this matter are:

1. Whether petitioner acquired tenure in the position of school psychologist and/or learning disabilities teacher consultant (LDTC).

2. Whether a leave of absence at the end of petitioner's probationary period extended her probationary period for an equivalent time period.

3. Whether petitioner should be reinstated and, if so, to what position.

FINDINGS OF FACT

Based on the joint stipulation of the parties, the facts of this matter are found to be as follows:

1. Petitioner possessed New Jersey Certifications or Endorsements in the following areas: Elementary Education, Secondary Education: English and Social Studies, Reading Teacher, Reading Specialist, Learning Disabilities Teacher Consultant, Supervisor, Principal, and School Psychologist.

2. Petitioner was first employed by the Respondent Spotswood Board of Education as an LDTC for the period from January 13 through June 30, 1986.

3. Petitioner was employed, at a stipend, for 16 days during the Summer of 1986 as an LDTC. Petitioner also interned as a Psychologist in the Spotswood School District at the same time that she was working as an LDTC.

4. Petitioner executed an employment contract on May 6, 1986, employing her as an LDTC for the period between September 1, 1986 through June 30, 1987.

5. Petitioner was reclassified on October 22, 1986 as a School Psychologist, effective September 22, 1986, and performed the duties

of a School Psychologist within the Spotswood School District for the period between October 22, 1986 and June 30, 1987.

6. Petitioner executed an employment contract on June 10, 1987 employing her as a School Psychologist for the period between September 1, 1987 and June 30, 1988.

7. Petitioner also performed the functions of an LDTC at various times from February to June 1988.

8. Petitioner accepted an appointment as a School Psychologist on May 29, 1988 for the period beginning September 1, 1988 through June 30, 1989.

9. Petitioner also worked, on a per diem basis, four days during the Summer of 1988 as an LDTC.

10. On November 17, 1988 petitioner was injured on the job and took an involuntary leave. She received benefits pursuant to N.J.S.A. 18A:30-2.1. She was terminated on April 11, 1989.

11. Petitioner maintains that she acquired tenure as both a School Psychologist and LDTC pursuant to N.J.S.A. 18A:28-5 as of January 14, 1989, and further maintains that her termination by the Spotswood Board of Education, effective April 11, 1989, was in violation of her tenure rights.

12. The Board of Education maintains that petitioner did not acquire tenure in any educational services capacity and asserts that the period of time in which Dr. Kletzkin received her salary pursuant to N.J.S.A. 18A:30-2.1 was not creditable towards the acquisition of tenure.

13. The Board of Education has employed a nontenured LDTC within the Spotswood School District for the 1989-1990 school year.

PETITIONER'S ARGUMENT

Petitioner relies on numerous Commissioner of Education decisions which she believes mandate the conclusion that her paid disability leave was fully creditable for tenure acquisition purposes. In Gussie Goebel v. Board of Education of the Borough of Maywood, Bergen County, 1984 S.L.D. 1638, affirmed State Board March 6, 1985, petitioner notes, Goebel had been granted three separate leaves of absence totaling 90 days, which the Board argued

were not creditable for tenure acquisition purposes. The ALJ and Commissioner distinguished Stachelski v. Oakland Board of Education (App. Div. Docket No. A-1144-79, decided April 10, 1981, on which the Board relied, and concluded that a case dealing with a voluntary, year-long period of non-employment due to maternity leave was not applicable to the facts in Goebel, wherein petitioner had been employed for each of the years in question and simply taken a leave of absence during some portion of each year.

In Joan Nadler v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County, decided by the Commissioner September 26, 1980, Nadler claimed that the Board had granted her a de facto leave of absence during which time she obtained tenure. Petitioner contends that, rather than reject Nadler's claim on the grounds that a leave of absence was not creditable, which he could have done had he so believed, the Commissioner rejected her claim solely on the basis of his conclusion that she had resigned her employment and, thus, effected a break in service.

In Sheri Zorfass v. Board of Education of the Township of Cherry Hill, Camden County, (App. Div. Docket No. A-322-84T6, decided October 30, 1985), the Appellate Division affirmed the Commissioner and State Board in holding that a board-approved unpaid medical leave was fully creditable for seniority purposes despite the Board's contention that this leave did not constitute "employment" for seniority purposes. Petitioner contends that since Zorfass was decided two years after passage of N.J.A.C. 6:3-1.10(b), which states that periods of unpaid absence not exceeding 30 aggregate calendar days per year are creditable for seniority purposes, the court intended to clarify that medical leaves are to receive full credit without regard to the otherwise applicable 30-day limitation. More generally, petitioner claims that Zorfass and the cases cited therein stand for the proposition that unpaid leaves of absence are viewed as being a continuation of the individual's employment status within the meaning of pertinent tenure and seniority laws, so that her entitlement under a paid leave must be viewed as even more compelling.

Finally, petitioner cites extensively from the Commissioner's recent decision in Linda Maloney v. Board of Education of the Ocean County Vocational School District, Ocean County, decided by the Commissioner October 19, 1989, wherein the Commissioner held that Maloney's six-week unpaid leave of absence at the beginning of the 1986-87 school year did constitute employment within the meaning of N.J.S.A. 18A:28-5 and therefore counted for tenure acquisition purposes; this despite a contract clause to the contrary, which the Commissioner declared moot on the grounds that no district contract provision may contravene or supersede State statute or regulation.

To establish that she is tenured as both an LDTC and a school psychologist, petitioner next turns to Norbert Walliczek v. Board of Education of the Township of Holmdel, Monmouth County, decided by the Commissioner June 7, 1985. In Walliczek, which arose under current seniority regulations, the Commissioner held that petitioner's tenure subsumed positions as both Teacher of Spanish

and Teacher of German because he actually served for a brief period under his Spanish endorsement prior to acquiring tenure as Teacher of German. Petitioner herein contends that her far more extensive service in the dual areas of her certification makes it "plain as a pikestaff" that she is tenured in both positions.

Having thus claimed tenure entitlement, petitioner maintains that the Board's action to terminate her employment violated the clear provisions of N.J.S.A. 18A:6-10 et seq. prohibiting dismissal of tenured staff except through filing of tenure charges, and that the Board's appointment of a nontenured LDTC for the 1989-90 school year violated her tenure rights under the recent body of case law establishing the unequivocal entitlement of tenured staff over nontenured to the positions in which their tenure was acquired (Philip Capodilupo v. Board of Education of the Town of West Orange, 218 N.J. Super. 510, 528, A.2d 73 (1987), Bednar v. Westwood Board of Education, 221 N.J. Super. 239, 534, A.2d 93 (1987) and their progeny).

RESPONDENT'S ARGUMENT

In reply, respondent (hereinafter "the Board") challenges petitioner's reliance on Goebel, supra, and Maloney, supra, and proposes instead that Stachelski, supra, being the only Appellate ruling to squarely address main issue herein, is the controlling case in this matter. Stachelski, the Board argues, stands for the clear proposition that tenure may only be acquired by strict compliance with the conditions legislatively imposed, that employment status exists only where the teacher is actually working and subject to the employer's scrutiny during the probationary period, and that the statute's use of the word "consecutive" precludes interruption of the probationary period by a leave of absence. In the words of the court:

> ...[T]here is no logical way to interpret N.J.S.A. 18A:28-5(c) as permitting a tacking together of two years of employment which precede a leave of absence to a year of employment which follows such leave. Where the legislature uses a quite ordinary word such as "consecutive" to denote, in common parlance, an uninterrupted succession of years, there is no reasonable way one can look to years interrupted by a leave of absence and hold them to be seamless. The Commissioner of Education, the State Board of Education and this court are bound by the clear language of the act. It is not our function to substitute our judgment for that of the Legislature ... Nor may we apply a meaning we believe to be more equitable or fair... [citations omitted]... The decision entered below is clearly a misinterpretation of the statute and as such has no persuasive weight. [citations omitted; emphasis added]
>
> (Respondent's Brief, at p. 3)

The Board argues that the only factual distinctions between Stachelski, supra, and the instant matter are the length of the

disputed leave (a year in Stachelski's case and approximately two months herein) and the fact that Stachelski's leave was unpaid while petitioner's was paid as required by N.J.S.A. 18A:30-2.1. On the issue of duration, the Board contends that there is no basis for differentiating a short leave from a longer one, as both violate the essential purpose of the tenure statute as set forth in Zimmerman, infra:

> The crucial test of [the employee's] fitness is how he fares on the job from day to day when suddenly confronted by situations demanding a breadth of resources and diplomacy. Many intangible qualities must be taken into account, and, since the lack of them may not constitute good cause for dismissal under a tenure statute, the [employer] *** is entitled to a period of preliminary scrutiny, during which the protection of tenure does not apply, in order that it may make pragmatically informed and unrestricted decisions as to an applicant's suitability. Zimmerman v. Board of Education of City of Newark, 38 N.J. 65 at 73.
>
> (Respondent's Brief, at p. 4)

Any lessening of the probation period provided by statute would confer an unfair advantage on petitioner over other teachers seeking tenure and deprive the Board of its opportunity to make a fully informed decision about granting an essentially permanent contract to someone who will presumable continue to teach for many years. Moreover, if the Commissioner chooses to dispense with the statutory requirement, both he and local districts will be called upon to distinguish between cases of, say, a teacher who is two months short and one who lacks the requisite time by two weeks or even two days. This result would both create an "impossible administrative burden" and violate the reasonable expectation of tenure candidates that they will all be treated alike. Further, the decision as to when a teacher acquires tenure is a legislative one, not to be undercut by ad hoc determinations relating to whether a leave of absence is creditable or not. Under petitioner's view, a teacher who actually worked for only part of each of four consecutive academic years could conceivably obtain tenure after far less than the statutory 30 months, a result surely not intended by the Legislature.

Neither, alleges the Board, does the fact that petitioner's absence was paid have any relevance to her tenure acquisition claim, as it has no bearing on her fitness to teach, which can only be assessed while she is present and working on the job. Moreover, petitioner's compensation was not voluntarily granted by the Board, but was mandated by statute for service-connected disability.

The Board distinguishes Goebel on the grounds that it arose under a different statute (N.J.S.A. 18A:17-2) and involved the tenure claim of a secretary, a far less sensitive position than that of a teaching staff member. Further, the Board claims, the passages relied on by petitioner (those distinguishing Stachelski) were dicta and hence of no binding effect.

Maloney, on the other hand, is viewed as insupportable because it inappropriately distinguishes leaves of absence by length (see argument above) and altogether fails to consider the requirements of N.J.S.A. 18A:27-3.1 for multiple evaluations of nontenured teachers. Such evaluations, the Board argues, would be rendered meaningless if compressed into an unreasonably short period of time as a result of one or more leaves of absence. Finally, arguments of the type petitioner raises based on Zorfass were explicitly rejected by the Commissioner in Maloney and petitioner gives no good reason why they should be reconsidered herein.

Similar arguments are offered by Participant New Jersey School Boards Association, which elaborates on the significance of the grant of tenure, the obligations of the Board under the laws mandating evaluation of nontenured teachers and hiring of staff and the important educational policy considerations inherent in the present matter. Like the Board, the Association argues that Stachelski should control in this matter and, further, asks that the Commissioner expressly limit application of Goebel to 12-month secretarial and business employees under N.J.S.A. 18A:17-2. The Association also takes issue with Maloney for the reasons expressed by the Board, as well as for what it views as the erroneous equation of "employment" under the sick leave statute with "employment" under the altogether different intendment of the tenure statute. Similarly, Nadler and Zorfass are discounted as inappropriate and inapplicable, Nadler because the Commissioner's silence on the question of leave is meaningless given that the issue was not raised therein, and Zorfass because (as the Commissioner correctly ruled in Maloney) seniority arguments are inapposite to matters of tenure acquisition.

The Association also raises the issue of the crucial placement of petitioner's leave, in that it occurred precisely at the time when the Board would have had its final opportunity to evaluate her for purposes of tenure acquisition -- unlike the situation in Maloney, where the disputed leave occurred at the beginning of the teacher's first year, and in Goebel, where the 90-day leave period was spread out over three years. Finally, the Association asks that care be taken not to interpret Maloney and Goebel as standing for the proposition that any leave of absence less than a full year is creditable for tenure purposes, as this would significantly compromise boards' ability to conduct uniform, meaningful evaluations and work against teachers whom boards would be more likely to dismiss than to grant tenure in the face of even minimal reservations. Moreover, the Association argues, if the Commissioner determines that petitioner's leave is creditable herein, his decision should be expressly limited to the specific facts of this case.

ANALYSIS AND CONCLUSIONS

Upon careful review of the facts in this matter and the arguments of the parties and NJSBA, for the reasons which follow the Commissioner determines that petitioner's leave is creditable for tenure purposes and that she has acquired tenure as both a school psychologist and an LDTC.

Initially, the Commissioner notes that petitioner's reclassification to school psychologist on October 22, 1986 constituted a voluntary transfer from one separately tenurable position (LDTC) to another, so that petitioner's tenure as a psychologist is to be reckoned according to N.J.S.A. 18A:28-6 rather than N.J.S.A. 18A:28-5. That statute states in pertinent part:

> 18A:28-6. 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 this chapter on or after July 1, 1962, shall not obtain tenure in the new position until after:
>
> (a) the expiration of a period of employment of two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose; or
>
> (b) employment for two academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year; or
>
> (c) employment in the new position within a period of any three consecutive academic years, for the equivalent of more than two academic years***. (emphasis supplied)

Petitioner is plainly a "teaching staff member under tenure or eligible to obtain tenure" within the intendment of this statute, and the Commissioner has explicitly held that, because of the distinctly different duties authorized thereby, each endorsement under an educational services certificate represents a separately tenurable position, Barbara Ellicott v. Board of Education of the Township of Frankford, Sussex County, decided by the Commissioner August 17, 1989. Thus, in order to have obtained tenure as a school psychologist, petitioner must have served in that position for 20 months and 1 day within any three consecutive academic years. As the stipulated facts show, even without crediting the leave controverted herein, petitioner has met the requirements of N.J.S.A. 18A:28-6(c) through the following undisputed record of service:*

---

* It is well-established that per diem summer service will not count toward acquisition of tenure, so that petitioner's undisputed summer service of 20 days aggregate is not included in the calculations herein. Dorothy Reeves v. Board of Education of the Westwood Regional School District, Bergen County, 1981 S.L.D. 1051, Claude Moses v. Board of Education of the City of Newark, Essex County, decided by the Commissioner October 13, 1981. Also, because it is unnecessary to resolve the issues herein, the Commissioner does not reach to whether petitioner's service as a school psychologist began retroactive to September 22, 1986, the effective date of her October 22, 1986 reclassification.

October 22, 1986 - June 30, 1987	8 mo. 10 days
September 1, 1987 - June 30, 1988	10 mo. --
September 1, 1988 - November 17, 1988	2 mo. 17 days

In this case, as in Alan R. Sitek v. Board of Education of the Southern Regional High School District, Ocean County, decided by the Commissioner November 15, 1988, affirmed State Board March 1, 1989, and the precedents cited therein, petitioner's service as a school psychologist also counts toward her acquisition of tenure as an LDTC. In order to obtain tenure as an LDTC, however, petitioner must meet the requirements of N.J.S.A. 18A:28-5, which state in pertinent part:

> 18A:28-5. 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 ***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*** after employment in such district or by such board for:
>
> (a) three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) the equivalent of more than three academic years within a period of any four consecutive academic years***. (emphasis supplied)

Thus, petitioner must have served 30 months and 1 day over the course of four consecutive years to have obtained tenure in her earlier position, and her undisputed period of service totals only 28 months and 4 days, a shortage of slightly less than two months. Here, then, is where the question of the controverted leave must be addressed.

Initially, the Commissioner dismisses petitioner's arguments based on Nadler and Zorfass, in the former instance because the Commissioner's silence on the question of leave was in no way a tacit accreditation of the leave, the matter not having arisen in resolving the dispute; and in the latter for the reasons explicitly set forth in Maloney, supra, at pp. 3-4.

Upon review of Goebel, Stachelski and Maloney, however, the Commissioner concludes that these cases neither conflict with one another nor set up absolute standards for crediting of leave; rather, they stand for the proposition that each individual case

must be judged on its specific factual circumstances, and that factors to be considered include the length, placement and nature of the disputed leave, its concomitent impact on the district's ability to evaluate the affected staff member and the type of position from which the leave was taken. In Stachelski,* petitioner was voluntarily absent for an entire year, clearly breaking the "consecutive years" link of statutory language, depriving the Board of any opportunity whatsoever to evaluate her teaching performance during that period, and excepting the right to return to her previous position at the end of the leave, being unemployed for all intents and purposes. Goebel and Maloney, on the other hand, exemplify instances where absences were of such length and placement as not to be deemed significant breaks in service, nor to have materially interfered with the district's obligation to evaluate. They certainly do not stand for the outright proposition that any leave of less than a year, or any absence due to illness or injury, is automatically creditable for tenure acquisition purposes.

In the present case, petitioner's leave was an involuntary one, undisputedly due to a service-connected injury, and granted with full pay in accordance with the requirements of N.J.S.A. 18A:30-2.1. Although her absence came at the precise point at which she would have obtained tenure as an LDTC, she had already met the requirements for tenure under N.J.S.A. 18A:28-6(c) as a result of her 1986 transfer to the position of school psychologist. However, even if this had not been the case, the Board had had ample opportunity to evaluate her over the past three years, and it is difficult to conceive that much would have changed if the Board had been able to conduct one last evaluation just prior to the tenure acquisition date. Indeed, had it had any reservations about her continued employment, the Board could have acted to terminate petitioner before she was eligible to obtain tenure in any capacity rather than contracting her for the full year in which her tenure acquisition dates would pass as a matter of course before the year was half over.

Moreover, in deciding petitioner's case in this manner, the Commissioner need not and, indeed, does not, automatically equate "employment" for purposes of N.J.S.A. 18A:30-2.1 with "employment" for tenure acquisition purposes; rather, he makes a judgment that under the particular circumstances of this case, the employee protection envisioned by N.J.S.A. 18A:30-2.1 would be rendered meaningless if petitioner's leave were permitted to deny her tenure acquisition.

Neither does the Commissioner accept that deciding in favor of petitioner in this instance would generally permit candidates with minimal service to obtain tenure, or that expecting boards to exercise reasonable discretion in determining whether to credit leaves would result in administrative quagmires. Far more

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* As in Maloney, supra, at pp. 9-10, the Commissioner rejects the Board's argument that Goebel's comments on Stachelski are mere dicta, as the Commissioner examined and endorsed those comments in his review of Goebel.

unreasonable, in the Commissioner's view, would be arbitrary "cut-offs" or absolute directives with regard to any particular length or type of leave, regardless of whether the directive was to include or exclude the leave. Nor does leaving the matter to case-by-case determination constitute ad hoc violation of N.J.S.A. 18A:28-5, as this statute like all others must be read in conjunction with other applicable law (which the Board itself has done in applying N.J.S.A. 18A:27-3.1 to argue that petitioner was not "employed" while on leave).

Accordingly, the Commissioner concludes that petitioner was improperly terminated by the Board on April 11, 198, as she had obtained tenure as both a School Psychologist and LDTC by that date and could only be dismissed in accordance with N.J.S.A. 18A:6-10 et seq. Petitioner's Motion for Summary Judgment is granted and the Spotswood Board of Education is directed to reinstate her, retroactive to April 11, 1989, to any School Psychologist or LDTC position held by a nontenured or less senior staff member, together with all salary, benefits and emoluments owing her, including pension and seniority, less mitigation of any monies earned during her period of unlawful termination and any workmen's compensation award deductable pursuant to N.J.S.A. 18A:30-2.1.

Further, because the record before the Commissioner establishes only that the Board has employed a nontenured LDTC for 1989-90, any dispute about petitioner's entitlement to other position(s) or the amount of retroactive pay and benefits due her shall be deemed a new cause of action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending STate Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 101-89
AGENCY DKT. NO. 372-11/88

MIDDLESEX COUNTY VOCATIONAL-TECHNICAL HIGH SCHOOL TEACHERS ASSOCIATION,
Petitioner,
v.
THE BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF MIDDLESEX COUNTY,
Respondent.

Francis M. Merritt, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Anthony E. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: June 20, 1989 Decided: June 19, 1990

BEFORE **RICHARD J. MURPHY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Middlesex County Vocational-Technical High School Teachers' Association, representing federally funded (Chapter "Title I") teachers, claims that the respondent Board of Education of the Vocational Schools of Middlesex County (Board) is contrary to a collective bargaining agreements and law by refusing to assign Title I teachers to uncompensated homeroom duties, which are assigned to regular teaching staff members. The question presented is whether the actions of the respondent board in declining to

assign these homeroom duties to Title I teachers is contrary to N.J.S.A. 18A:1-1 et seq., and the provisions governing federally funded Title I teachers as set forth in 34 C.F.R. §204.22. Cross-motions for summary decision have been filed and, for the reasons set forth below, summary decision is **GRANTED** for the respondent Board and **DENIED** to the petitioners.*

FINDINGS OF FACT

There is no disputes as to the facts, and this matter is appropriate for summary decision as to the question of law, as discussed and disposed of below. The parties agree that the Chapter I basic skill improvement teachers within the vocational school district have not been permitted to perform regular supervision of homerooms and have not been included in the "pool" of regular teaching staff members who have been permitted to do so. There is also no dispute, based on a certification submtited by the President of the Middlesex County Vocational Education Association, Frank G. Zaremba, that assignment of a teaching staff member to homeroom duty is an unpaid teaching assignment involving no additional compensation and I so FIND. (P-1).

The parties do not dispute the facts and, I adopt their respective statements of fact and include both, to be complete at the risk of being somewhat repetitive. The petitioner's statement of the fact is as follows:

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*As to the procedural history, the verified petition was filed on November 30, 1988, by the Association with the Commissioner of Education seeking his review of the board's policies. The Bureau of Controversies and Disputes of the Department of Education filed this matter on January 9, 1989, with the Office of Administrative Law for hearing as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 21, 1989, with prehearing order issued on February 22, 1989. An amended verified petition was filed on April 4, 1989, which focused the issues on homeroom duties, and deleted in earlier reference to substitute teaching responsibilities. At the prehearing hearing it was agreed that petitioner would file a notice of motion for summary decision, which was submitted at the end of April. Further information as to whether homeroom duty was paid or unpaid was requested by order of May 30, 1989, and responses were received by June 20, 1989. Prior to the closing of the record on the motion, respondent filed its notice of cross-motion for dismissal, which will be treated as a motion for summary decision. The record in this matter closed on June 20, 1989, but the due date for the Initial Decision was extended on several occasions for a number of reasons not relevant to this case. I very much regret any hardship or inconvenience that this unavoidable delay may have caused the parties.

[t]he Middlesex County Vocational and Technical High School Teachers' Association is the certified representative for all day school teachers wthin respondent district. These include "Chapter I" Basic Skills Improvement ("BSI") teachers. See Article I of Agreement between Board of Education of Vocational Schools in the County of Middlesex, New Jersey and Middlesex County Vocational Education Association covering the period July 1, 1987 through June 30, 1990, attached hereto as Exhibit A. Article VI (G) of the Agreement provides, in pertinent part, that:

> The regular annual salary for a teacher is to be considered full remuneration for a "normal load". A normal load is defined as a full-time teaching assignment with the non-classroom obligations normally associated with such an assignment; including special duties as assigned by the principal . . .

Furthermore, Article VII(P)(7) and (8) of the Agreement provides, in pertinent part, that:

> 7. The adoption of this policy would in no way change our present policy that a teacher's normal load includes certain unpaid non-teaching duties assigned by the principal, equally distributed among the faculty on a fair and impartial basis . . .
>
> 8. Rotation of assignments is at the discretion of the principal.

Among the non-teaching duties to be assigned by the principal on a "fair and impartial basis" is the assignment to regular homeroom supervision when the need arises. Respondent, by its own admission, refuses to allow "Chapter I" teaching staff members to be assigned to regular supervision of a homeroom on the same basis as other teaching staff members as required its Agreement with petitioner (See paragraph 2 and 4 of respondent's Answer to the Petition). Resporent has refused and continues to refuse to assign "Chapter I" teaching staff members to regular supervision of homerooms on the same basis as other teaching staff members, based on its interpretation of Guidelines for Development of Application for Basic Skills Improvement as adopted by the New Jersey State Department of Education. (See respondent's Second Separate Defense to the Answer to the Petitioner and Schedule "A" annexed hereto).

The collective bargaining agreement makes no provision requiring BSI teachers to be treated differently with respect to assignments to regular homeroom supervision. . . . (Petitioner's breif at 1 thorugh 3.) (emphasis added)

Respondent advances the following statement of the matter presented, which does not differ substantially from the petitioner's, but has different emphasis reflecting the board's view of the matter:

[t] he Middlesex County Vocational and Technical High School Teachers' Association is the certified representative for the teaching staff within the respodnent school district. There is in existence a current collective bargaining agreement between the petitioner and respondent covering the time period from July 1, 1987 throguh June 30, 1990, annexed to the petitioner's brief as Exhibit "A". The petitioner asserts that the conduct of the respondent in refusing to assign Chapter I "Basic Skills Improvement" instructors to homeroom assignments constitutes a violation of Article VI(G) and Article VVI (P)(7) and (8) of the collective bargaining agreement.

The Guidelines for Development of Application of Basic Skills Improvement Programs for the fiscal year 1988 specifically provide "that basic kills improvement staff may not be assigned substitute teaching in a non-BSI classroom, nor may BSI staff be assigned regular supervisions of a homeroom (see Schedule "B" annexed hereto, at page 75). (emphasis added). The failure to comply with these guidelines will result in a forfeiture of funding now avaialble to the respondent for BSI teaching staff members. Due to the clear language of the above guidelines the respondent has not made assignments of BSI teaching staff members for the regular supervision of homerooms. The issue then before the Court is the propriety of such action. . . . (Respondent's brief at 1 through 2.) (emphasis added).

There is no dispute as to the above facts as set forth above and I so **FIND.**

ISSUE

The question presented is whether summary decision should be granted for the petitioner association or respondent Board as to whether Chapter I federally funded teachers should be assigned to unpaid homeroom duties under the collective bargaining agreement in effect, and consistent with the New Jersey law and Federal Regulations as set forth in 34 C.F.R. §204.22.

ARGUMENTS AND CONCLUSIONS OF LAW

Summary decision in an administrative hearing is governed by N.J.A.C. 1:1-12.5 which states that summary decision is appropriate when the papers and affidavits filed show no genuine issue of material fact. Generally, summary decisions are considered to be analagous to summary judgments and are judged by the same standards. Summary judgment is a well-established procedural mechanism which allows for efficient resolution of legal issues when there is no genuine issue of material fact. Monmouth Lumber Co. v. Indemnity Ins. Co. of N. America, 21 N.J. 439, 448 (1956). The burden of

proof is on the party moving for summary judgment, Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 70 (1954). In this case, both parties seek summary decision.

Before granting a summary judgment in favor of a moving party, the court must draw all inference of doubt against the movant. Schwartz v. Leasametric Inc., 224 N.J. Super. 21, 32 (App. Div. 1988). The judge does not serve as a trier of fact in determining a summary judgment motion, Judson, 17 N.J. at 75, as a result, the moving party is required to eliminate any reasonable doubt as to the existence of a factual issue. Costa v. Josey, 83 N.J. 49.53 (1980).

In the present case no facts are in dispute: both parties agree that the Chapter I Basic Skills Improvement teachers with the school district have not been assigned to regular supervision of homerooms, while other teaching staff members have been. No other conduct by the school board is at issue other than the board's failure to permit the Chapter I teacher to participate as regular homeroom supervisors. Thus, no dispute of material fact exists in this case which would preclude summary decision.

Where the parties to this matter differ is with respect to the legality and justification for this action on the part of the board. Petitioner relies on to Spiewak v. Rutherford Board of Education, 90 N.J. 63, 84 (1982), which noted that the teacher's collective bargaining agreement required the assignment of regular homeroom supervision to Chapter I teachers. Respondent, on the other hand, contends that the guidelines for Development of Application for Basic Skills Improvement Programs for the fiscal year 1988 specifically provide that Chapter I teachers may not be assigned substitute teaching in non-basic skills classes nor regular supervision of a homeroom. The Board states that its refusal to make these assignments stems from fear of possible loss of federal funding that might result from violation of these guidelines. Respondent further states that, as required by Spiewak, Chapter I teachers do receive the same benefits as all other teachers.

Chapter I teachers' salaries are paid by federal funds, and therefore federal statutory and regulatory provisions governing these school employees. Where the terms of the collective bargaining agreement are contrary to federal law, the agreement would of necessity give way to the federal law. Article VI(G) and Article VII(P)(7) and (8) provide that, in addition to a full-time teaching assignment, a normal load

for a teacher includes certain unpaid duties assigned by the principal, to be equally distributed among the faculty on a fair and impartial basis. While Spiewak states that non-statutory teachers' benefits are a matter of contract, there are two reasons why the Spiewak decision is not applicable. first, because the duties in question are not employee "benefits", but rather job responsibilities. Second, the federal regulations speak directly to the matter presently in dispute. 34 C.F.R. §204.22, which became effective July 1, 1987, provides in part as follows:

> (a) An agency that receives Chapter I funds may use those funds only to meet the cost of project activities that—
> (1) Are designed to meet the special educational needs of the children eligible to be served under the applicable Chapter I program;
> (2) Are included in an approved application; and
> (3) Comply with all requirements applicable to Chapter I programs.
>
> (d) An agency that receives Chapter I funds may assign personnel paid entirely with Chapter I funds to supervisory duties that provide some benefits to children not participating in the Chapter I project, if—
> (1) These duties are limited, rotating, and supervisory;
> (2) Personnel with functions similar to those of the Chapter I personnel, but who are not paid with Chapter I funds are assigned to these duties at the same school site;
> (3) These duties do not include substitute teaching of a non-Chapter I class or regular supervision of a homeroom;
> (4) The Chapter I personnel do not perform any duties for pay that non-Chapter I personnel perform without pay;
>
> . . . .
>
> (emphasis added)

In a prior dispute between these parties, Middlesex County Vocational and Technical High School Teachers' Association v. Board of Education of the Middlesex County Vocational and Technical High School, OAL DKT. NO. EDU 5357-85 (April 2, 1986), adopted, Comm'r of Educ. (May 16, 1986), an Administrative Law Judge found that the federal regulation in effect at that time[1] did not prohibit Chapter 1 teachers from being paid with local funds for the same time spent serving as substitute teachers. 34 C.F.R. §204.22, in its presently-adopted form, had been proposed but not adopted at the time of the Administrative Law Judge's decision in Middlesex County.

[1] Since amended.

The Administrative Law Judge stated that the following with respect to substitute teaching duties for Chapter I teachers:

> [t]he proposed regulation, 34 C.F.R. 204.22, may also be open to some interpretation, as petitioner suggests, as to whether it precludes Chapter I teachers from substitute teaching if they are compensated by local funds, provided that the purposes of the Chapter I program are not undercut by teachers being assigned substitute duties.
> Middlesex County, Id. at 8, n.2.

The Administrative Law Judge's comments to 34 C.F.R. 204.22 deal solely with substitute teaching, a responsibility which is a paid task, such that the days spent on a substitute teaching assignment by a Chapter I teacher could be compenstated with local, instead of federal funds. This would avoid the proscription against using Chapter I teaches as substitutes in regular, non-Chapter I classrooms. In contrast, the task of regular supervision of a homeroom is a paid task. If paid, it theoretically would be amenable to separate, local funding. However, such a compensation procedure may be administratively unfeasible. In addition, the collective bargaining agreement provisions relied on by petitioner in its brief to support its argument for Chapter I teachers' homeroom assignments specifically uses the word "unpaid" before non-teaching duties[2]. Since homeroom supervision is a compensated job duty, the solution utilized in the Middlesex County case of using local funds would not be possible, since that solution is prohibited by 34 C.F.R. 204.22(d)(4). The comments to that rule proposal state:

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2. Article Vii(P)(7) and (8) of the Agreement provides, in pertinent part, that:

> 7. The adoption of this policy would in no way change our preesnt policy that a teacher's normal local incldues certain unpaid non-teaching duties assigned by the principal, equally distributed among the faculty on a fair and impartial basis. . .
>
> 8. Rotation of assignments is at the discretion of the principal.
>
> (emphasis added)

> [t]he secretary cannot prohibit personnel paid, in part, from Chapter I funds from also being assigned non-Chapter I activities. The amount of time spent on Chapter I activities by these personnel, however, must be adequately documented. 51 Fed. Reg. 18404-01.

Accordingly, since the homeroom duties are unpaid duties, they are not permitted under the regulation either with or without separate local funding and summary decision is appropriate for the respondent school board. I so **CONCLUDE.** If homeroom was a paid duty, separate funding might be permissible under the regulation (if it was administratively feasible), but this is not the case.

ORDER

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that the petitioner's motion for summary decision is **DENIED** and the respondent's motion to dismiss, which is treated as a motion for summary decision, is **GRANTED** and the respondent board of education's policy of not assigning uncompenstated homeroom duty to Chapter I teachers is **AFFIRMED.**

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.

June 19, 1990
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

6/22/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUN 27 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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MIDDLESEX COUNTY VOCATIONAL-TECHNICAL HIGH SCHOOL TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VOCATIONAL SCHOOLS OF MIDDLESEX 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.

Initially, the Commissioner emphasizes that the November 30, 1988 Petition of Appeal in this matter had no allegations, either explicitly stated or implied, of a violation of a collective bargaining agreement; thus, it was transmitted to the Office of Administrative Law on January 5, 1989 for hearing. Further, the amended petition of March 30, 1989 did not contain any such allegation(s) either. This omission is significant because the Commissioner of Education does not have jurisdiction to decide matters alleging violation of a negotiated contract provision and he would not have entertained the petition had such a violation been set forth. Thus, to that extent, the Commissioner corrects any impression contained within pages 1-3 of the initial decision that the decision in this matter is in any manner related to the interpretation of a contract provision.

The Commissioner therefore emphasizes that the issue in this matter is incorrectly set forth by the ALJ on page 4 of the initial decision when he goes beyond the issues contained in the petition, the amended petition and pre-hearing order to include adjudication of an issue arising under the collective bargaining agreement. A review of the record indicates that the issue of the negotiated contract was part of a March 27, 1989 letter brief submitted in support of petitioner's motion for summary decision.

Notwithstanding the above, the ALJ did correctly decide the issue in this matter which was appropriately before the Commissioner, i.e., whether the action of the Board in declining to assign homeroom duties to Chapter I teachers is contrary to N.J.S.A. 18A:1-1 et seq. and the provisions governing Chapter I projects as set forth in 34 C.F.R. Sec. 204.22. (See Pre-hearing Order of February 22, 1989.) Consequently, the Commissioner affirms the initial decision insofar as it relates to this issue.

It is undisputed that the ALJ correctly set forth 34 C.F.R. Sec. 204.22 which became effective July 1, 1987. That regulation bears repeating here:

> (a) An agency that received Chapter I funds may use those funds only to meet the cost of project activities that --
>
> (1) Are designed to meet the special educational needs of the children eligible to be served under the applicable Chapter I program;
>
> (2) Are included in an approved application; and
>
> (3) Comply with all requirements applicable to Chapter I programs.
>
> (d) An agency that receives Chapter I funds may assign personnel paid entirely with Chapter I funds to supervisory duties that provide some benefits to children not participating in the Chapter I project, if --
>
> (1) These duties are limited, rotating, and supervisory;
>
> (2) Personnel with functions similar to those of the Chapter I personnel, but who are not paid with Chapter I funds are assigned to these duties at the same school site;
>
> (3) These duties do not include substitute teaching of a non-Chapter I class or regular supervision of a homeroom;
>
> (4) The Chapter I personnel do not perform any duties for pay that non-Chapter I personnel perform without pay***. (emphasis added by ALJ)
>
> (Initial Decision, at p. 6)

Accordingly, the Commissioner adopts as his own the conclusion of the ALJ that Summary Decision be granted to the Board and that the Board's action of not assigning uncompensated homeroom duty to Chapter I teachers be affirmed.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1123-89
AGENCY DKT. NO. 17-1/89

ROBERT MC CRACKEN,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF MIDDLETOWN,
MONMOUTH COUNTY,
Respondent.

Mark J. Blunda, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Howard Newman, Esq., for respondent (Kalac, Newman & Lavender, attorney)

Record Closed: June 14, 1989 Decided: June 19, 1990

BEFORE RICHARD J. MURPHY, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Robert Cracken contests the action of the Board of Education of the Township of Middletown (respondent or Board) in withholding his increment for 1989-90 school year pursuant to N.J.S.A. 18A:29-14 because of two incidents involving what the Board concluded were inappropriate statements to students. Petitioner seeks to have the

Commissioner of Education declare as null and void respondent's withholding of his increments, to compel respondent to immediately restore him to his proper salary, placement, and to award him compensatory damages, attorneys fees, and costs of suit. For the reasons set forth below the action of the Board in withholding petitioner's increment is affirmed. Robert McCraken filed this petition with the Commissioner on January 25, 1989 and the matter was filed with the Office of Administrative Law on February 15, 1989 for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing was held on May 16, 1989 with a prehearing order issued the next day. The hearing was held in Hazlet, New Jersey on June 14, 1989 and the record was closed on that day. The due date for submission of the initial decision in this matter was extended on several occasions and finally extended until June 29, 1990 because of various problems not related to this case. I very much regret any hardship or inconvenience this unavoidable delay may have caused the parties. The parties were advised of the conclusion of this decision at the hearing on respondent's motion to dismiss but no oral opinion was given at that time pursuant to N.J.A.C. 1:1-18.2.

FINDINGS OF FACT

The parties stipulate that the Board withheld petitioner's increment because of his statement to students and parents, which the Board deemed unbecoming and inappropriate. That conduct is alleged by the Board, and stipulated by the petitioner, to have included the following statements:

(1) during a parent-teacher conference, with a student present, the petitioner asked the student "why do you act like a dirt-bag";

(2) that petitioner made a similar comment regarding a student in class; and

(3) that, when a student complained to petitioner that another student had given him "the finger", petitioner stated that he "would have done the same thing;"

Petitioner does not dispute making those statements, but offered some background and explanations to support his contention that he was merely trying to deal with difficult students in language that they commonly use and thus would understand.

McCracken testified that he has taught at the Thorne Middle School since September of 1963 and is nearing eligibility for retirement. His salary is $40,200, the withheld increment amounted to approximately $3,000 for the 1989-90 year, and he estimates that the impact of the withholding of that increment might be as much as $100,000 to $110,000 in terms of his retirement pay. These statements are not relevant to the issue, but are included to complete the record.

In October of 1988, petitioner was teaching typing to sixth and seventh graders, and experienced behavior difficulties with two students in the seventh class: N.B. and D.E. He stated that the students came in with a nonchalant attitude, dismissing typing as unimportant, and acting in a rude and obnoxious manner to teachers, generally. N.B. also harassed and caused problems with other students, by interferring with their typing and generally "making everyone miserable." Mr. McCracken stated that N.B. treated him like "dirt - a common laborer" he stated that he spoke to N.B. on a daily basis, requesting that he do his work and show respect to teachers and students, and frequently referred him to the principal's office for discipline. On or about October 5, 1988, petitioner was helping another student with his back to N.B., when N.B. said that another student had given him "the finger." McCracken responded to N.B., (he claims in a "low-key" voice and in a "witty" and not "mean or harsh" manner) that "I would have done the same thing." Other students were present in the class at this time.

The second incident or allegedly inappropriate comments by petitioner involved student D.E., whom petitioner described as "an unpleasant experience", whose idea of fun was to harass teachers and students. McCracken alerted D.E.'s mother who was a single parent, and she came into school for a conference to discuss D.E.'s use of obscene language in class. That conference was also attended by Marshall Culver, Assistant Principal. D.E. had prevously been suspended for three days for using obscene language in class and had attended the Alternative School Program (ASP) in lieu of class. Petitioner stated that D.E.'s mother was a "nice women" and "single parent under stress" who was not happy about her son's performance. During the course of the conference, petitioner stated to D.E. "why do you have to act as a dirtbag?" and suggested that he abused himself, his parents, his teachers, and his peers. McCracken told D.E.'s mother that she had his complete sympathy, and she did not deny that her child was a problem at school or that she was concerned about his attitude towards school work. Petitioner stated that he used the phrase "dirtbag" to the students in front of his mother "to get through to him", and help him stop hurting himself, his mother, and the petitioner.

Later that same day, at the beginning of class with other students in the room, petitioner stated to D.E. "don't act like a dirtbag". Again, petitioner said his intent was "to get through to" D.E. by using language that was in the students' vernacular. McCracken felt that the term "dirtbag" was not obscene and paled in comparison to other obscene terms in vogue among the students and at the school. See, e.g. "2 Live Crew".

On cross-examination, petitioner stated that he understood that part of his function as a teacher was to serve as role model to students, although he felt that nobody was perfect in this regard. He stated that his use of the term "dirtbag" (which he had sometimes been called by students) was proper and acceptable provided it was for a "positive motive", such as controlling discipline and effectively communicating with difficult students. He felt that all of his statements had been "low—keyed", and does'nt understand why such a "big deal" has been made of this. He further stated that since the incidents, student behavior has further deteriorated, and N.B. and D.E., among others, have subjected other students and him to further abuse.

There is no dispute to the above facts and I so **FIND.**

The respondent Board did not present any testimony but rested on the exhibits submitted (R-1 through R-19), as well as petitioner's testimony and stipulations. The documentary evidence corroborates the testimony given as to the undisputed facts, but also states that the Board previously withheld petitioner's increment for the 1977-78 school year for inappropriate comments made to students, although the increment was restored to McCracken in February of 1985. (R-17 to R-19). The earlier withholding of an increment was admitted into evidence, as relevant to the issue of whether the petitioner was on notice as to the acceptable standards of verbal conduct toward students. The respondent made a motion to dismiss at the close of petitioner's case, which was granted on the record, as discussed below.

ISSUE

The question presented is whether the Commission of Education should confirm or reverse the action of the Board of Education of the Townhip of Middletown in withholding petitioner Robert McCracken's salary increment for the 1989-90 shcool year under N.J.S.A. 18A:29-14 because of the incidents in October of 1980 involving inappropriate statments made by him to students and parents as found above and stipulated by the parties.

ARGUMENTS AND CONCLUSIONS OF LAW

Boards of Education are empowered to withhold increments under certain circumstances:

> [a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education . . . The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. . . . [N.J.S.A. 18A:29-14; emphasis added]

Annual increments are "in the nature of a reward for meritorious service to the school district" and are a management prerogative that serves the purposes of "affording teachers economic security and of encouraging quality in performance." See, North Plainfield Education Assoc. v. Bd. of Ed. of North Plainfield, 96 N.J. 587, 593 (1984); see, also, Bernards Township Board of Education v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). The purpose of the Commissioner's review on appeals of withheld increments is to determine whether the Board had a reasonable basis for its conclusion, and not to substitute his judgment for that of the Board or redetermine for himself whether a teacher's performance had in fact been unsatisfactory. See, Kopera v. Bd. of Ed. of Town of W. Orange, 60 N.J. Super. 288 (App. Div. 1960).

Lack of knowledge on the part of teachers and principals as to the criteria used by a school superintendent to make a recommendation of withholding of an increment can render that action arbitrary, especially where based on only one criterion of evaluation. See, Basile v. Bd. of Ed., 2 N.J.A.R. 199 (1980). However, a single incident alone, if intentional and sufficiently serious, can provide a basis for withholding an increment. See, Smilon v. Mahwah Bd. of Ed., OAL DKT. EDU 6441-87, aff'd N.J. Comm. of Ed. (May 13, 1988), reversed N.J. State Board (January 4, 1989).

Petitioner McCracken's statements to students and parents as stipulated, may have been understandable in human terms given the aggravations, pressures, (and abuse) to which classroom teachers are daily subjected, but it is evident that petitioner viewed his statements, not as momentary losses of temper or lapses in judgment, but rather as

an appropriate means of instruction and discipline positively intended to get through to and control difficult students. He thus defends, as good educational practice, his statements that he would have given the "the finger" to a student, and that a student was acting as a "dirt bag." The terms "dirtbag" and giving "the finger" are not defined in most dictionaries despite their common use by students but the New Dictionary of Slang, Harper & Row, 1987, offers the following definitions:

> dirtbag ... 2 n phr A despicable person; filthy lout; = crud; scumbag.
>
> the finger ... 2 n phr A lewd insulting gesture made by holding up the middle finger with the others folded down, and meaning "fuck you" or "up yours"; = the bird ...

I take judical notice of these all too commonly accepted and understood meanings. See, Rule 9, New Jersey Rules of Evidence; Egg Harbor City v. Colasvonno, 182 N.J. Super 110 (CH. Div. 1981); New Jersey Practice, Administrative Law and Practice, §206 Lefelt (1988).

While petitioner's statements may have been well intended, (and there is no evidence that they were not,) they were not appropriate, given a teacher's responsibility to set a good example, and I **CONCLUDE**, for that reason, the action of the Board of Education in withholding his increment was for good cause under N.J.S.A. 18A:29-14 and should be affirmed by the Commissioner of Education. I might have come to a different conclusion if the petitioner had lashed out with his tongue at disruptive students in a burst of rage or exasperation, but this, by his own admission, was not the case. Teachers are not expected to be saints, but they may reasonably be expected to keep deliberate dialogue with students and parents out of the gutter, even if that parlance is also in wide use on the school ground. Inappropriate words such as "dirtbag", which might understandably be uttered by a teacher pressed by unruly students to the limits of patience and prudence, are not acceptable when used deliberately to facilitate or emphasize communication by a teacher to students or parents, as petitioner did in this case.

ORDER

On the basis of the above findings of fact and conclusions of law, I **ORDER** that the action of the respondent, Board of Education of the Township of Middletown in withholding petitioner, Robert McCracken's increment for 1989-90 is affirmed under N.J.S.A. 18A:29-14, as resting on good cause.

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.

DATE 6.19.90 — **RICHARD J. MURPHY, ALJ**

Receipt Acknowledged:

DATE JUN 21 1990 — DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE JUN 22 1990 — OFFICE OF ADMINISTRATIVE LAW

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ROBERT MC CRACKEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review of the record, the Commissioner agrees with and adopts as his own the findings and conclusions of the ALJ. It is clear from the record that petitioner failed in his burden to demonstrate that the Board's action to withhold his salary increments was arbitrary, capricious or without reasonable basis or induced by improper motives. (Kopera, supra) As dictated by Kopera, petitioner has the burden of proving that the unreasonableness of the Board's action, while the Commissioner's scope of review is limited to determining:

(a) whether the underlying facts were as those claimed by petitioner's evaluators; and

(b) whether it was reasonable for them to conclude as they did based upon those facts.

The record amply supports that the Board had a reasonable basis for withholding petitioner's increments as set forth by the ALJ in the initial decision.

Accordingly, the Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION ON MOTION
OAL DKT. NO. EDU 6690-89
AGENCY DKT. NO. 274-8/89

PAMELA BOSCO,
Petitioner,
v.
NORTHERN HIGHLANDS REGIONAL BOARD OF EDUCATION,
Respondent,
MARY CUSACK,
Intervenor.

Louis P. Bucceri, Esq. for petitioner, Pamela Bosco, (Bucceri and Pincus, attorneys)

Frank N. D'Ambra, Esq. and **James L. Plosia**, Jr., Esq. for respondent, Northern Highlands Regional Board of Education, (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein and Gross, attorneys)

Sanford R. Oxfeld, Esq. for intervenor, Mary Cusack, (Balk, Oxfeld, Mandell and Cohen, attorneys)

Decided: June 15, 1990

BEFORE **JAYNEE LaVECCHIA**, CHIEF ALJ

This matter was transmitted to the Office of Administrative Law by the Commissioner of the Department of Education pursuant to *N.J.S.A.* 52:14F-1 *et seq.* In this matter, petitioner Pamela Bosco (Bosco), challenges the action of the Northern Highlands Regional Board of Education (Board) taken in the spring of 1989

when her employment was terminated pursuant to a reduction in force occasioned by declining enrollment and budgetary considerations. In this action, petitioner contends that the Board's action in terminating her employment was invalid because it continued to employ individuals for the 1989-90 school year who were nontenured and/or have less seniority than she in positions for which she is qualified. Specifically, petitioner claims seniority rights to the position of teacher of the course entitled Developmental Reading. Respondent denies this allegation and has moved for summary decision dismissing this action pursuant to *N.J.A.C.* 1:1-12.5(a). For the reasons set forth herein, the motion for summary decision is granted and this action is **DISMISSED**.

STANDARD FOR SUMMARY DECISION MOTION

N.J.A.C. 1:1-12.5(a) permits a party to move for summary decision upon any or all the substantive issues in the case at any time after the matter is determined to be contested. Provided no genuine issue as to any challenged material fact exists, summary decision will be granted if the movant is entitled to prevail under the law. *N.J.A.C.* 1:1-12.5(b).

The standard to be applied in reviewing motions for summary decision was articulated in *Judson v. People Bank and Trust Company of Westfield*, 17 *N.J.* 67 (1954). In *Judson*, the New Jersey Supreme Court made clear that it is the movant's burden to exclude any reasonable doubt as to the existence of a genuine issue of material fact. *Id.* at 74. All inferences of doubt are drawn against the movant and in determining whether a genuine issue exists, the incredibility of the evidence opposing the claimed fact could not be used to determine that no genuine issue of a material fact exists. *Id.* at 75.

This stringent test was underscored by the Appellate Division in its decision in *Shanley and Fisher, P.C. v. Sisselman*, 215 *N.J. Super.* 200 (App. Div. 1987), when the Appellate Division emphasized that a summary judgment proceeding is not meant to be a trial by affidavit on issues of fact. It is not a substitute for a full plenary hearing. *Id.* at 211-212. I find the stringent analysis mandated by *Judson* and *Sisselman* to be met here.

FACTUAL DISCUSSION

The essential facts upon which this matter turns are not in dispute. Petitioner did not possess a teaching certificate issued by the Department of Education for either elementary education or English until October, 1989. *See,* attachments P-21 and P-22 attached to Certification In Lieu of Affidavit of Pamela Bosco, dated March 14, 1990. She did hold certificates issued by the New Jersey Department of Education as a Teacher of Reading (issued December, 1978) and Reading Specialist (issued October, 1981). *See,* Exhibits R-2 and R-3 attached to the Affidavit of John W. Mintzer, dated February 27, 1990. It is not disputed that in the 1988-89 school year, there were two basic skills instructors, petitioner and Jacqueline Moore. In the spring of 1989, the Board voted to abolish one of the full-time basic skills positions due to declining enrollment and the necessity of eliminating certain positions because of fiscal considerations. The abolishment of a basic skills position resulted in petitioner being RIFFed from her position with the Board.

Also undisputed is that Mary Cusack currently teaches the class denoted Developmental Reading and has done so throughout the 1989-90 school year. Ms. Cusack is the holder of the following teaching certificates issued by the New Jersey Department of Education: Elementary School Teacher (issued October 1977), Reading Specialist (issued March 1982), Teacher of English (issued November 1981) and was the holder of a Teacher of English as a Second Language certificate (issued March 1989 and expired July 1989). *See,* Exhibits R-9, R-10, R-11 and R-12 in evidence.

I **FIND** the above to be undisputed and, therefore, **FOUND** as fact. In addition to the above, I also find as fact that the Developmental Reading Program consists of instruction to all ninth grade students for a four-week period as part of their freshman English program. *See,* Certification In Lieu of Affidavit of Pamela Bosco, paragraphs 5 and 6.

LEGAL ANALYSIS

It is well-established that in order to obtain the statutory protection of tenure, an individual must comply with the precise requirements for tenure accrual. *Zimmerman v. Newark Board of Education,* 38 *N.J.* 65, 72 (1962). One of the conditions for tenure accrual is that the individual possess a teaching certificate in full force and effect. *N.J.S.A.* 18A:28-5. This basic principle has been applied by the Commissioner of Education and State Board of Education to defeat claims of seniority to a particular position even where an individual served in the position sought for many years more than the incumbent holding the challenged position, but the challenger to the position had spent those years serving in the position without a validly issued certificate. See *Blitz and Marshal v. Bridgeton Board of Education*, 1980 *S.L.D.* 825, aff'd State Board of Education, 1981 *S.L.D.* 1394 (even excusing the individuals' failure to obtain certification, the individuals could not acquire tenure or seniority credit until each had obtained and served under the certificate).

Petitioner relies upon a line of cases which she asserts stand for the proposition that eligibility for, and not actual possession of, a certificate is sufficient for an individual to accrue seniority credit. See *Kane v. Hoboken Board of Education,* 1975 *S.L.D.* 12; *Fulton v. Long Branch Board of Education,* Agency Dkt. No. 83-2/78 (August 29, 1980), adopted by the Commissioner of the Department of Education (October 17, 1980) aff'd by State Board (February 9, 1981)(unpublished); and *Saad v. Dumont Board of Education,* 1982 *S.L.D.* 440. The Commissioner's reasoning in these earlier cases reflects a sympathy for not elevating form over substance since in each instance the applicant's eligibility was not in question and demonstration of the regulatory requirements for certification was never contested. Importantly, these cases preceded the Department of Education's efforts to make the certification process more stringent by including, among other things, a testing requirement. *See, N.J.A.C.* 6:11-5.1(a)3. *See also, N.J.A.C.* 6:11-5.2(b) (also requiring completion of a State test of subject matter knowledge for fields of teaching specialization for individuals who are currently holders of standard endorsements and who seek additional standard endorsements).

With the advent of a testing requirement in order to obtain certification and the benefits which flow from teaching with a valid certification, it is no longer possible to divine who is eligible for a teaching certificate before one has actually been issued the certificate. Reviews of academic pursuits, including course work studied and degrees awarded, are no longer sufficient standing alone to guarantee certification. Accordingly, I decline to follow the *Kane* and other decisions cited by petitioner and agree with respondent that a certification in hand is necessary to claim seniority rights in the context of a reduction in force.

In the instant controversy, petitioner claims rights to the Developmental Reading position currently filled by Ms. Cusack, the holder of valid certificates under which she has been teaching Developmental Reading and other courses in the English curriculum at the Northern Highlands Regional High School. The Developmental Reading course is part of the regular ninth grade English curriculum at Northern Highlands Regional High School. A teacher must have a certification in English to teach the course. *N.J.A.C.* 6:11-6.2(a)7. There are circumstances where a teacher with certifications other than English may teach communication/reading, such as when the course is remedial and does not award credit or go toward credit for graduation. I take judicial notice of the certification requirements established by the Department of Education in this general area by way of the December 31, 1985 directive to Chief School Administrators (Exhibit R-8 attached to affidavit of John W. Mintzer). If the remedial course does not go toward the awarding of credit, or the awarding of credit toward graduation, a communication/reading course may be taught by persons with an elementary, a reading, or an English/reading certificate. However, the Developmental Reading course Ms. Bosco seeks to teach is not remedial; it is part of the regular ninth grade curriculum. It is required for all students and it counts toward fulfilling graduation requirements. Ms. Bosco's affidavit and the affidavit of others which she has submitted in support of her position, clearly demonstrate an understanding that the Developmental Reading program is part of the regular English curriculum provided to all freshman in this school district. Therefore, Ms. Bosco's certifications held at the time she was terminated were not sufficient for the course because she did not have an English certificate.

In conclusion I **FIND** there to be no material dispute as to the salient issue in this case, namely whether petitioner held the appropriate certificate to teach Developmental Reading as of the time of the reduction in force which resulted in her losing her employment with the Board. I **FIND** that she did not meet the certification requirements to teach Developmental Reading. Furthermore, for the reasons expressed above, I decline to find that an alleged eligibility for the certification existed or that eligibility alone is sufficient to accrue seniority credit. Accordingly, I **FIND** the Board's action in appointing Ms. Cusack to the position of Development Reading during the 1989-90 school year to be correct. This petition is **DISMISSED**.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

June 15, 1990
Date

Jaynee LaVecchia
JAYNEE LaVECCHIA, CHIEF ALJ

Receipt Acknowledged:

6/19/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 22 1990
Date

Jaynee LaVecchia/RS.
OFFICE OF ADMINISTRATIVE LAW

PAMELA BOSCO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE NORTHERN HIGHLANDS REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
MARY CUSACK,	:	
INTERVENOR.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner submits that the ALJ's analysis of this case, which found that an English endorsement is required by State guidelines to teach Developmental Reading and further found that petitioner can make no claim to said position because her English endorsement was not issued until after her termination, is contrary to the long line of cases on eligibility. She further claims the initial decision clearly places form over substance by requiring an English endorsement to teach a reading course simply because it is a subsection of the freshman English program.

At Exception I, petitioner relies on the certifications of Petitioner Bosco, Mr. Hopkins, Mr. Ryan, and Ms. Brodow to establish that she actually taught the Developmental Reading course from 1977 to 1984. She claims at that time she was not required to have an English endorsement. She further contends that no evidence has been presented that the position of Developmental Reading has ever been submitted to the County Superintendent for review as to certification pursuant to N.J.A.C. 6:11-3.6. Neither, she claims, is there any evidence of a Board resolution specifying any particular certification.*

Petitioner also submits that the Board's reliance on Exhibit R-8, an excerpt from a Department of Education memo, as

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* The Commissioner notes that in summarizing the exceptions he utilizes the term certification as contained within petitioner's exceptions and in other places herein. The proper term should be endorsement.

evidence that English certification is required to teach said course, does not address the facts at hand and, further, is not a regulation. Petitioner avers the memo is designed to differentiate between remedial course work that can be taught at the secondary level by elementary teachers and graduation credit courses which must be taught by subject certified teachers.

It is petitioner's position that the case at bar presents a unique situation not contemplated by the Commissioner's memo. Because the Board has carved out four weeks from every freshmen's English class to teach reading, petitioner submits, it assumes this is proper for high school English graduation credit, although they have never sought an opinion under the regulations. Assuming this plan is valid, petitioner argues, the issue of certification is not addressed by Exhibit R-8 because Intervenor Cusack is not teaching English, she's teaching reading. Thus, petitioner argues that since the duties are exclusively in reading, the instructor only needs Reading certification to teach it. She claims it is the substance of what is taught that defines the certificate required.

Petitioner cites Exhibits R-13 and P-1 as support for what is taught in Developmental Reading. She claims that both documents require the conclusion that reading is being taught. She submits that to say such course requires an English certificate, a certificate which does not allow one to teach reading skills, is absurd.

As to seniority question, petitioner argues:

> Assuming, without conceding, that petitioner always taught Remedial Reading (as respondent falsely alleges) and assuming, without conceding, that petitioner's creditable service began only as of December, 1978 when her reading certificate issued, then petitioner would have achieved tenure as of December, 1981 pursuant to N.J.S.A. 18A:28-5(c). In that month she would have served for more than 30 months (three academic year) within four consecutive years. As of November 7, 1984, petitioner would have served (under respondent's allegations of fact) for 5.9 years under her Reading certificate. Pursuant to N.J.A.C. 6:3-1.10(B) all period of paid leave would be credited, as well as 30 days of each unpaid leave. Cohen v. Emerson Bd. of Ed., 225 N.J. Super. 324 (App. Div. 1988), certif. denied 114 N.J. 488 (1989).
>
> Thus, as of June 30, 1984, petitioner would have 6.2 years of Reading seniority. She was half-time for 1985-86, bringing her total as of June 30, 1986 to 6.7 years. Finally giving full credit for her 1988-89 paid leave she would have 9.7 years of Reading seniority as of June 30, 1989, even under respondent's allegations of fact.
>
> (Exceptions, at pp. 3-4)

Petitioner then compares her seniority, as she calculates it, to intervenor's, suggesting that if Ms. Cusack were tenured, which petitioner denies, she would have only 3.76 years seniority as of June 30, 1989. However, petitioner reiterates her contention that said seniority figure incorrectly counts intervenor's first partial year of service as a substitute hired on November 11, 1985, citing P-25 as support for this point. Yet, petitioner avers, even counting the substitute time and giving intervenor tenure, Ms. Cusack has less Reading seniority than she.

Petitioner summarizes her Exception I by stating that if Developmental Reading requires only a Reading certificate she must prevail even under the Board's presentation of facts. She urges that by regulatory definition the subject matter of the course does not require English certification. She cites N.J.A.C. 6:11-6.2(a)(7) and N.J.A.C. 6:11-6.2(a)(20) (sic), in support of her claim.

At Exception II, petitioner avers that even if it is determined that dual certification is required to teach Developmental Reading, she is still entitled to the position. She relies on her having been eligible for both Elementary and English endorsements as early as the date of her hire in 1977 on making this claim. Thus, she avows, she could have had said certifications by merely applying for them, and would have received them at any time until September 1985, even without taking the State test that became mandatory after 1985.

She further claims that her certification and documents establish that she taught both the Developmental Reading Lab and remedial English and Reading in 1977-78. She adds that her work in the developmental program actually started in March 1977. She submits that if developmental reading requires dual certification and if she had been told as much, she would have and could have obtained her English certification by asking for it. Claiming that eligibility for certification has long been held to be sufficient to justify a claim of seniority, she submits that a hearing is necessary so that the certification bureau can be asked to verify her qualification as to the time she first taught Developmental Reading. She cites Saad v. Bd. of Ed. of Dumont, 1982 S.L.D. 440, among other cases, in support of her contention in this regard. She claims that given the length of her service and her eligibility for certification endorsements in English and Elementary Education, her length of service would give her seniority from March 1, 1977 or an additional 15 months (allowing for half-time service from March 1, 1977 to June 30, 1977) over the seniority calculated previously. She thus calculates her total seniority as 11.2 years of English and Elementary seniority, which would encompass the teaching of Reading. According to petitioner, even if intervenor were tenured as of June 1989, she, petitioner, must prevail.

Finally, petitioner argues that intervenor is not tenured. She claims that Exhibit P-25 establishes that intervenor served as a replacement for a teacher on leave from November 11, 1985 to June 30, 1986. Citing Sayreville Education Association v. Board of Education of Sayreville, 193 N.J. Super. 424 (App. Div. 1984), petitioner avers that Cusack's tenurable service began on or about

September 1, 1986. Thus, petitioner reasons, intervenor had not yet earned tenure as of June 30, 1989, the time of the RIF. Thus, in accordance with such cases as Joseph Grosso v. Board of Education of the Borough of New Providence, Union County, decided by the Commissioner May 22, 1989, rev'd St. Bd. March 7, 1990, petitioner claims that by virtue of her eligibility to hold the English endorsement, as well as her actual experience teaching the course, she has the right to supersede intervenor, a nontenured teaching staff member, regardless of English seniority.

Accordingly, petitioner seeks reversal of the initial decision.

The Board's reply exceptions support the ALJ's decision and urge that the Commissioner adopt it. More specifically, the Board advances three reply exceptions.

At Exception I, the Board claims the ALJ was correct in ruling that the position sought by petitioner required English certification. It cites N.J.A.C. 6:11-6.1(a)(7) which states that an English endorsement authorizes the holder to teach English in all public schools. It further claims that the fact that the Developmental Reading program in question is part of the English curriculum in the district supports its contention that an English endorsement is necessary to work as a Developmental Reading teacher in the district.

The Board offers Exhibit R-8 to buttress its position by contrasting the Developmental Reading course it offers to a remedial subject offered only to students who have failed the High School Proficiency Test or otherwise demonstrated problems in reading. The Board contends the ALJ correctly ruled that petitioner could not teach Developmental Reading in its district without a proper English certificate because all Northern Highlands Regional High School students must take and pass ninth grade English, a part of which is the Developmental Reading component.

At Exception II, the Board avers that the ALJ was correct in deciding that petitioner's eligibility for an English certificate was insufficient to give her tenure and/or seniority protection. Citing the ALJ's conclusion in the initial decision at page 5, the Board submits that because petitioner did not even take the required State test until August 1989, four months after the Board acted to eliminate her position, the ALJ correctly ruled that refusal to grant petitioner tenure protection in English was not merely an elevation of form over substance but, rather, a recognition that in order to obtain a certificate petitioner had to pass a test. It also cites N.J.A.C. 6:11-5.1(a)(3) and N.J.A.C. 6:11-5.2(b) in this regard.

The Board also claims that even if the ALJ's determination were incorrect in holding that the eligibility standards set forth in Kane v. Hoboken of Ed., 1975 S.L.D. 12 and Saad v. Dumont Board of Education, 1982 S.L.D. 444 were no longer viable because of the State test requirement, petitioner's eligibility argument fails under even this outdated precedent. It claims that the necessity of

having to pass a test was a requirement in 1986 which precluded a finding of seniority due to certificate eligibility under Kane and Saad. Further, The Board argues that it is clear from a review of the briefs and documents submitted that petitioner was dilatory in taking the action necessary to obtain English certification. It claims that it took her almost a year to obtain the certification, and it cannot be said that she had done everything except obtain the certificate when it took her a year to do so. Thus, the Board submits that petitioner's claim that she was eligible for an English certificate in the spring of 1989 is simply incorrect, and the ALJ properly held that petitioner had no seniority protection in the category of English.

At Exception III, the Board argues that petitioner's other arguments are either without merit or are irrelevant. It first reiterates its position that the issue of whether Intervenor Cusack was tenured in the spring of 1989 is irrelevant if, as the ALJ found, petitioner did not have tenure or seniority protection as an English teacher at that time and if Developmental Reading required possession of an English certificate.

Second, the Board counters petitioner's estoppel argument claiming that the Board bore a responsibility to inform petitioner of the proper certification for the course in question by citing Sydnor v. Englewood Board of Education, 1976 S.L.D. 113, 117 for the proposition that "[t]he procuring of certification is the primary responsibility of a teacher." (Reply Exceptions, at p. 4, quoting Sydnor, at 117)

Finally, in response to petitioner's reliance on the Bednar doctrine, which holds that a tenured teacher is entitled to a position within the scope of her tenure as against a nontenured teacher, the Board cites its accord with the ALJ's opinion, which gave no credence to petitioner's position that Bednar establishes that she is entitled to intervenor's job. (Bednar v. Bd. of Ed. of Westwood Regional Sch. Dist., Bergen County, decided by the Commissioner May 13, 1985, aff'd St. Bd. December 3, 1986, rev'd/rem'd to St. Bd. by N.J. Superior Court 221 N.J. Super. 239 (App. Div. 1987), Cert. denied 110 N.J. 512 (1988)) The Board contends tenure protection is not extended to those employees who are not the holders of proper certificates in full force and effect. The Board argues that it is beyond dispute that petitioner did not hold an English certificate in the spring of 1989 when she was riffed and, thus, she cannot claim protection under the Bednar doctrine.

For the reasons stated above, the Board asks that the Commissioner adopt the initial decision as his own.

Upon his careful and independent review of the record of this matter, the Commissioner rejects the initial decision for the reasons which follow.

It is undisputed that the Northern Highlands School District requires all freshmen to participate in a four-week

Developmental Reading course, whereby the students engage exclusively in a program designed to be "successful in honing students' reading skills." (See Exhibits R-13 and P-1.) Intervenor Cusack, according to the record, changes students every four weeks, and teaches reading exclusively, all year long. (See Exhibit P-25.) It is also undisputed that petitioner herein holds an endorsement as a Teacher of Reading, issued December 1978 and as a Reading Specialist, issued October 1981 (See Exhibits R-2 and R-3, attached to the Affidavit of John W. Mintzer, dated February 27, 1990.)

The Commissioner agrees with the ALJ that it is well-established that in order to obtain the statutory protection of tenure an individual must comply with the precise requirements for tenure acquisition, including having the appropriate certificate and endorsement for the position. However, contrary to the ALJ, he finds that a Reading endorsement on an instructional certificate is an appropriate certification for the Developmental Reading course in question. N.J.A.C. 6:11-6.2(a)19 explains the endorsement in Reading. It states: "[t]his endorsement authorizes the holder to teach reading in all public schools." It is beyond cavil that Developmental Reading is precisely the type of subject matter which the holder of a Reading endorsement is qualified to teach. The key to this case lies in the recognition that the position in question is one exclusively dedicated to teaching reading. The mere fact that Developmental Reading happens to be part of the regular ninth grade English curriculum is of no moment. The same is true for the fact that the grades assigned by the Reading Lab instructor are turned over to the English Department for incorporation in the marking period's average. The fact remains that the endorsement required to teach any given subject matter is gauged by the materials to be taught. Be it Remedial or Developmental Reading, one need only possess an endorsement in Reading, in full force and effect, to teach such subject matter. The Commissioner so finds. Accordingly, the Commissioner finds that petitioner was fully certified from December 1978 to teach the course known in the Board's district as Developmental Reading Lab.

Having concluded that petitioner herein is properly certified to teach the Developmental Reading Lab segment of the ninth grade English program at Northern Highlands Regional High School by virtue of her holding an endorsement in Reading, it need only be stated that the record before the Commissioner convinces him that Petitioner Bosco is entitled to the position of Developmental Reading instructor over intervenor by virtue of either her tenure or seniority in the district. Case law such as Capodilupo v. Board of Education of the Town of West Orange, Essex County, decided by the Commissioner May 3, 1985, aff'd/rev'd St. Bd. September 3, 1986, aff'd N.J. Superior Court 218 N.J. Super. 510 (App. Div. 1987), Cert. denied 109 N.J. 514 (1987); Bednar, supra; and Grosso, supra, has clearly established that the tenure rights of a teaching staff member who possesses appropriate certification may not be abridged by a nontenured teacher in claiming the same position.

The record before the Commissioner established that Intervenor Cusack commenced her employment with the Board on

November 11, 1985, but that her first year's service was as a replacement for Ms. Brodow, who was on leave. (P-25 in evidence) Intervenor's service with the district was full-time and uninterrupted. (P-25 in evidence)

On the other hand, petitioner's service began in the district as of March 1, 1977, under a New York State Provisional Elementary Teacher certificate. She acquired her New Jersey instructional certificate with an endorsement in Reading in December 1978. See Initial Decision, at page 3 and P-7. She served as a Reading Lab teacher during the years 1977-78 through 1983-84, half-time. See Bosco Certification, Ryan Certification, Brodow Certification, Hopkins Certification.

Having determined that a Reading endorsement on an instructional certificate is appropriate for teaching Developmental Reading in the Board's district, petitioner's creditable service toward tenure began as of December 1978, when her Reading endorsement issued. Petitioner thus acquired tenure as of December 1981 pursuant to N.J.S.A. 18A:28-5(c), in that she had served at that point for more than three academic years within four consecutive years. If intervenor's service during her first year, from November 11, 1985 to June 30, 1986 was not creditable toward tenure due to the fact that she served as a substitute for another teacher on leave, at the time of petitioner's RIF, intervenor was not tenured, and, thus, petitioner may lay claim to intervenor's position pursuant to Capodilupo, supra; Bednar, supra; and Grosso, supra. In the alternative, even assuming arguendo Intervenor Cusack is tenured, petitioner still prevails by virtue of seniority pursuant to N.J.A.C. 6:3-1.10 et seq. This conclusion follows because intervenor has less seniority in Reading than Petitioner Bosco, even under the Board's presentation of facts, once it is acknowledged that teaching Developmental Reading in the Board's district requires only a Reading endorsement.

Accordingly, for the reasons expressed above, the initial decision rendered by the Office of Administrative Law is reversed. The Board's Motion for Summary Decision is denied. The Board is hereby directed to reinstate petitioner to the Developmental Reading position in question with all back pay and emoluments of employment due and owing. However, pursuant to N.J.A.C. 6:24-1.18(c)1 in the absence of a demonstration of bad faith, pre-judgment interest is denied, as is petitioner's request for post-judgment interest in that there has been no showing that any amounts of money are due petitioner following successful adjudication. N.J.A.C. 6:24-1.18(c)2

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6305-88
AGENCY DKT. NO. 249-7/88

THEODORE BONNER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

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

Martin R. Pachman, Esq., for respondent (Pachman & Glickman, attorneys)

Record Closed: August 4, 1989 Decided: June 19, 1990

BEFORE **RICHARD J. MURPHY,** ALJ:

Procedural History and Statement of the Case

Petitioner Theodore Bonner, a tenured physical education teacher, appeals to the Commissioner of Education from the action of the respondent Board of Education of the Township of East Brunswick (Board) in withholding his increment for the 1988-89 school year. The question presented is whether the Board's action in withholding petitioner's increment was reasonably based on good cause pursuant to *N.J.S.A.* 18A:29-14, or whether it was, as the petitioner alleges, arbitrary, capricious, and without reasonable basis under that section. The Board claims that its action was reasonably based on poor attendance, insufficient notice to substitute service, lateness, and falsification of student grades.

Procedural History

Theodore Bonner filed a petition with the Commissioner of Education on July 27, 1988 and filed with the Office of Administrative Law on August 24, 1988, for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing scheduled for October 11, 1988 was adjourned at the request of petitioner's attorney, who had an arbitration conflict. A subsequent prehearing was scheduled for October 31, but adjourned when ALJ Miller recused himself, and the matter was finally preheard on December 14, with a prehearing order issuing on December 19, 1988, setting hearing dates for April 18 and 19, 1989. Those hearing dates were adjourned at the request of respondent's attorney due to a family illness, and the matter was rescheduled for May 30 and June 5, 1989. The hearing was completed on May 30, but the record remained open until August 4, 1989 for receipt of post-hearing submissions, which were delayed at the request of respondent's attorney. The due date of the opinion was originally September 18, 1989, but this was extended on several occasions for a variety of reasons as set forth in Orders of Extensions: the last Order of Extension was until June 29, 1990. I regret any hardship or inconvenience that this unavoidable delay may have caused the parties. I note that some of the delay in the processing of this matter at OAL was due to adjournment requests for counsel.

Findings of Fact

The facts necessary to decide this case are not in dispute and are discussed below under the headings of Falsification of Student Grades, Poor Attendance, Lateness to Assign Responsibilities, and Inadequate Notice to Substitute Service:

(1) Falsification of Grades

As to this charge, which is the most serious allegation against the petitioner, Theodore Bonner claims that he did not falsify grades and argues that his administrators did not act as though he did. The grades at issue are from the first marking period of the 1987-88 school year, during which Mr. Bonner taught physical education. The statement of facts set forth in respondent's memorandum on this issue is essentially accurate and I include it in my decision:

> [a] review of Mr. Bonner's grade books (R-10 and R-11) showed that after his initial testing of each 6th and 7th grade student, no entries recording grades on any aspect of performance were entered in those books. When Mr. Houser met with Mr.

> Bonner on December 16, 1987 to discuss this situation and ask how the grades were developed, Mr. Bonner insisted that he had the grades on some other papers, but could not produce them. Indeed, in his written response on R-8, Mr. Bonner states, "Although I did indeed have all of the required information which I brought in when requested to do so while under my doctor's care, my grade book was not kept up to date due to extenuating circumstances." At the hearing, Mr. Bonner claimed that the grades were kept on a "roster sheet" which his wife threw out.
>
> Beyond this factual pattern, Mr. Waddell testified, and Mr. Bonner did not dispute, that when Waddell called Bonner at home to request that he enter his grades, Bonner stated, "Why don't you just give them all A's and B's. You know that's the way in East Brunswick." Waddell then insisted that Bonner come in and make the proper entries. Of course, at the hearing Mr. Bonner insisted he was merely joking. Mr. Waddell denied that he understood Mr. Bonner to be making a joke.
>
> . . . By December 9, Mr. Bonner had been out of school for a total of 17 days (R-3). His grade books were barren. Mr. Houser met with him on that date over his record keeping (R-9). Mr. Bonner neither entered his grades into the book, nor preserved his only alleged record of grades. At least a week later, when he responded to R-8, he did not indicate that his records were lost. In fact, grades were changed based upon his lack of back-up for the grades given. When students spoke to him about how they were graded, he advised them to have their parents go to the Board and request a pass-fail system be instituted (R-8). Only at the hearing did Mr. Bonner relate how his only record of students' achievement, maintained on roster sheets, was thrown out by his wife when he left them on the dining room table. . . . (respondent's brief at 4-5) (emphasis added)

The facts, as advanced by petitioner's attorney in her brief of July 7, are also essentially accurate and I set them forth below:

> Larry T. Waddell, the Assistant Principal at Hammarskjold, testified that it was not uncommon for physical education teachers to use the roster sheets which they received at the beginning of the school year as a document on which student grades were recorded. The reason for this was that is was easier to fold up, put in the teacher's pocket and take outside during physical education class than the grade book.
>
> During the first marking period in 1987-88, Bonner was absent on a number of days for reasons of personal illness. The end of the first marking period arrived and Bonner had not entered his grades on the appropriate sheets to be placed into the computer for entry onto the students' report cards.

> Bonner had not entered most of the grades for the first marking period in his grade books. Rather he had maintained them on the roster sheets, a practice which was not uncommon as testified to by Waddell. He had those roster sheets at home.
>
> Because Bonner had not placed the grades in the grade books, no other teacher was able to transfer the grades onto the computer sheets for him. Waddell called Bonner who was at home ill and requested that he come into school to enter the grades. Bonner reported to work with the roster sheets, entered the office and filled out the computer forms. Waddell admitted that he saw Bonner at school. While Waddell stated that he couldn't say that he had seen the roster sheets, he also stated that he could not deny that he had seen them, he simply did not remember one way or the other.
>
> Bonner returned home and left the roster sheets on his dining room table. They were subsequently accidentally thrown out by his wife.
>
> After the grades were entered, Bonner's administrators had a number of concerns about his grades and his comments about the grades during the first marking period. Waddell had a conference with Bonner on December 9, 1987 (R-9). The issues involved in that conference and memorandum included the failure to enter first quarter final grades in the grade book for many sixth and seventh grade students and the distribution of "A"s for sixth and seventh grade students (the memorandum does not indicate if there were not enough or too many "A"s). There is no indication in the memorandum that Waddell had any reason to believe that Bonner had falsified grades.
>
> Houser met with Bonner on December 16, 1987 concerning student grades. He summarized that meeting in a memorandum dated December 17, 1987 (R-8). That memorandum indicates the meeting concerning an allegation of failing to return parents' phone calls concerning report cards grades and alleged remarks that he made to students about the grading procedure.
>
> Both Waddell and Houser admitted that at no time did they call to Bonner's attention their alleged belief that he falsified grades. . . . (respondent's brief at 10-12) (emphasis added)

There is no dispute as to the above facts and I so **FIND.** The question is whether the Board has proven its allegation of falsification of grades, or, whether the petitioner's handling of the grades supports, in some other respect, the withholding of his increment.

(2) Poor Attendance

Again, there is no dispute as to the facts on this point, and I include and adopt as my own the factual statements made by the opposing attorneys in their post-hearing briefs. Counsel for petitioner set forth the following facts as to attendance:

> [t]he petitioner is an extremely long term employee of the Board of Education. He has worked there for 32 years, serving first an elementary school teacher and for most of his employment as a physical education teacher. For the 1987-88 school year, the petitioner was employed as a physical education teacher at the Hammarskjold Middle School. His principal at Hammarskjold was Philip S. Houser and his assistant principal, Larry T. Waddell.
>
> As a public school employee, the petitioner is entitled to a minimum ten paid sick days per year. N.J.S.A. 18A:302. Unused sick days can be accumulated to be used in future years as necessary. N.J.S.A. 18A:30-3.
>
> The petitioner's attendance records for the years starting 1979-80 were placed into evidence (P-3) and show that until the year in question, 1987-88, Bonner used only a few of his statutory sick days each year and accumulated the rest. A review of the record shows that in 1979-80 Bonner used three illness days and had 50 accumulated at the end of the year, in 1980-81 he used five illness days and had 55 accumulated at the end of the year, in 1981-82 he used six illness days and had 59 accumulated at the end of the year, in 1983-84 Bonner used no illness days and had 73 accumulated at the end of the year, in 1984-85 Bonner used five illness days and had 78 accumulated at the end of the year, in 1985-86 Bonner used four illness days and had 84 accumulated at the end of the year and in 1986-87 Bonner used seven illness days with 89.5 accumulated at the end of the year. Bonner also used some personal days each year, and in 1986-87 used five death in the immediate family days at the time that his mother passed away.
>
> 1987-88 was not a good year for the petitioner. He was upset over the recent death of his mother, his only living blood relative at the time. He suffered from prostate problems, was concerned that he suffered from diabetes as his mother had and had problems with his son who was on drugs. As a result, Bonner was absent for 21 and a half days for reasons of personal illness. He did not use up most of his accumulated sick days, and whenever he was requested to bring in a physician's certificate, he brought in such a certificate.
>
> Philip Houser, the principal of Hammarskjold Middle School, testified that he had no reason to doubt the legitimacy of Bonner's illnesses. He indicated that when he recommended that the petitioner's increment be withheld for attendance purposes, he only considered the 1987-88 year, not Bonner's previous record. He further testified that prior to the

> 1987-88 school year, he had never given Bonner any indication that Bonner had a problem with attendance.
>
> Curiously, despite Houser's recommendation that Bonner's increment be withheld for reasons of poor attendance (R-12), Houser testified that on one occasion when Bonner telephoned that he would be late to work due to problems on the New Jersey Turnpike, he advised Bonner to take a sick day. . . . (petitioner's brief at 10-12)

Respondent offers the following responsive statement of facts, as to absences, which does not raise any dispute of facts, but fleshes out the undisputed facts, from the Board's point of view:

> [i]n dealing with the factual underpinnings of the Board's first reason, Petitioner does not deny that during the 1987-88 school year he was absent due to illness for 21 1/2 days, used 2 illness-in-family days, as well as 2 personal days. He also does not deny that there were numerous instances of tardiness, and that on some occasions of absences he called the substitute service between 6:30 and 7:30 a.m., making the acquisition of a substitute to cover his classes commencing at 8:25 a.m. virtually impossible.
>
> Rather than deny, Mr. Bonner, at the hearing in this matter, sought to excuse or explain his attendance problems. Petitioner claimed he was having a "bad year" due to the recent death of his mother, and certain claimed medical problems. . . . both Mr. Houser, the building principal, and Mr. Waddell, the Assistant Principal, denied any explanations by Mr. Bonner beyond those contained in his responses to Exhibits R-2, R-4 and R-8. As to Mr. Bonner's claim regarding his bereavement over a death in his family, . . . this event occurred in early April of 1987, and not during the 1987-88 school year at all. In fact, after utilizing his bereavement leave in April of 1987, he did not use a single day off for the balance of that year. It was during the 1987-88 school year that the excessive absenteeism of Petitioner manifested itself. During that entire year, the only medical excuses provided by Mr. Bonner are contained in Exhibit R-7. Those medical notes make no statement which could be evidentiary of Petitioner's claim, raised only at the hearing below, that he had prostrate, diabetes and family problems. The only indication of any specific medical issue is the statement on the note dated December 10, 1987, which indicates office visits on December 8 and December 10 for a urological condition and states that Petitioner is able to return to work on December 11, 1987.
>
> . . . Petitioner's reaction to being cautioned by the administration about his rate of absenteeism was rejection and indignation. . . . his response [is] set forth as part of Exhibit R-2. By December 15, 1987, the date of his response, Petitioner had been cautioned about his absenteeism on November 19 (R-1), his tardiness and failure to cover assignments on November 20 (R-2), and his additional absenteeism on

> December 9, 1987 (R-3). On December 15, Mr. Bonner wrote, in Exhibit R-2, that "being penalized and harrassed for my illness is shocking and disruptive to my school performance." . . . the medical notes referred to above in R-7 represent a period of time from November 30 to December 10, and, therefore, could not have been submitted prior to the December 9 memo of Mr. Houser. Thus, Mr. Bonner, writing on December 15, attempted to show that the memo of December 9 was not justified, using medical notes not provided until after December 11, 1989.
>
> When on March 2, 1987, Principal Houser again wrote to Petitioner, noting that since December 9 he had used an additional 5 1/2 days of either sick leave or illness-in-family days (R-4), Mr. Bonner responded with the claim that his absences were dur to a "major medical problem," and that he had already provided the necessary notes from his doctor. No notes evidencing a "major medical problem" were ever received by the school district, and none was alleged to exist at the hearing of this matter. Between March 2, 1987 and the end of the school year, Mr. Bonner used another 3 days of sick leave, bringing his total absences to 25 1/2. . . . (respondent's brief at 1-3) (emphasis added)

There is no dispute as to the above facts as set forth by counsel for the parties and I so **FIND.**

(3) **Inadequate Notice to the Substitute Service**

In connection with petitioner's absences, the Board cites what it found was inadequate notice by petitioner to substitute service, so that his classes be covered by substitute teachers during those absences. The petitioner's proposed finding of fact as to this point is essentially accurate and it is incorporated and adopted as follows:

> [t]he Board of Education has a procedure concerning when a teacher who will be absent should notify the substitute service. For the 1987-88 school year, that procedure was set forth in a memorandum sent by Brenda Witt, Assistant Superintendent for Personnel, to all personnel of the school district (P-2). While not stating a specific limitation as to when calls can be made, the memorandum indicates that a call is to be made to the substitute service, and that the substitute service can only be called until 7:30 a.m. The memo refers to calls made after 7:30 a.m. as "emergency" calls which must be made directly to the switchboard, rather than to the substitute service.
>
> The petitioner testified that he was shocked to learn that he had been accused of not notifying the sub service on a

> timely basis, as he always telephoned by 7:30, which he understood to be the deadline pursuant to the notification Brenda Witt, exhibit P-2. Houser himself testified that he had no information to indicate that Bonner ever had called the sub service later than 7:30 in the morning. Houser did testify that there were problems with obtaining a substitute for Bonner's class on occasion because if the hour at which he had called in. However, he admitted that this was not a problem particular to Bonner, but rather a problem which happened for many teachers and in many situations even if the teachers called in well before 7:30.
>
> . . .
>
> Houser's testimony was that he could not remember Bonner ever calling later than 7:30 as far as a specific date was concerned, but he appeared to have some type of vague recollection that there were problems. . . . (petitioner's brief at 6-8) (emphasis added)

Respondent Board notes and emphasizes some additional facts in his post-hearing statement, which is incorporated and adopted:

> [p]etitioner claims that the substitute procedure as set forth in the memorandum identified as P-2 sets a deadline of 7:30 a.m. and that, therefore, he was in compliance. . . . that memorandum states: "It is imperative to call 257-3821 as soon as you realize you will not be available for work. Late calls may mean your class will not be covered." The only mention of the 7:30 a.m. time is a single line (repeated twice) stating, "EMERGENCY calls after 7:30 a.m. requesting substitute for the same date - 613-6700." . . . the memorandum from the Assistant Superintendent requests calls to be made as early as possible, and states that those after 7:30 a.m. are to be made only in an emergency. . . . in his response to R-4, Mr. Bonner claimed that he did call as soon as he knew he was going to be absent. . . . at the hearing . . . that 7:30 a.m. [was] the . . . [deadline for calling in], even though his first period class met at 8:46 a.m. in the gymnasium. . . . (respondent's brief at 3) (emphasis added)

There is no dispute as to the facts as set forth above on the question of calls to the substitute service and I so **FIND.**

(4) **Lateness to Assigned Responsibilities**

There is no dispute of fact as to the question of lateness and I adopt and incorporate the findings of fact proposed by petitioner Bonner and respondent Board on this point:

> [t]he petitioner himself testified that on a few occasions he had a problem in commuting from South Orange due to either car trouble or traffic problems on the New Jersey Turnpike. . . .
>
> The board placed into evidence what it contended was the record of the petitioner's latenesses (R-6, second page). That summary of the petitioner's "absence record" shows in the reason column one late for February 26 and even that late has a question mark after it. There are two other dates with the notation (L) in a lefthand column which Houser indicated meant the petitioner had been late to work. However, in the reasons column on one of those dates, January 28, there is an indication of ill as the reason for absence and on the other date, February 18, there is an indication of the reason for absence being illness in the family.
>
> The petitioner alleged in this matter that he was treated differently with regard to his record in terms of latenes than white employees. The petitioner requested that the respondent in discovery provide him with the lateness records of his co-workers in order to show said differential treatment. As of the date of the hearing, the respondent has not yet provided this information.
>
> At the conclusion of the hearing, the respondent indicated the information was forthcoming. Petitioner's counsel was notified subsequently that the respondent does not have records of when other teachers at Hammarskjold were late. . . . (petitioner's brief at 8-9)

The respondent Board's proposed the finding on lateness is also accurate, and is adopted and incorporated:

> [i]n addition to the absenteeism set forth above, Mr. Bonner was late to school, by his own admission, on "a number of occasions." Mr. Bonner asserts that on each occasion he suffered either car problems or traffic problems. Mr. Houser testified that Petitioner's lateness amounted to a continuing part of the problem with his attendance record. (respondent's brief at 3) (emphasis added)

There is no dispute of fact as to the question of lateness as set forth above and I so **FIND.**

Issue

The question presented is whether the action of the respondent Board of Education of the Township of East Brunswick in withholding petitioner Theodore Bonner's increment for the 1987-88 school year was for good cause pursuant to *N.J.S.A.* 18A:29-14 on the basis of the facts as found above, or whether it was unreasonable, arbitrary, and capricious and therefore subject to reversal by the Commissioner of Education.

Arguments and Conclusions of Law

Since the above factual findings address two basic areas of performance those being (1) Falsification of Student Grades and (2) Absenteeism, Tardiness and Lateness of Calls to Substitute Service, the arguments and conclusions will be so structured.

(1) As to Falsification

Petitioner argues that the facts show that he did not falsify his grades, they also show that his administrators did not act as though they though he did. Specifically, petitioner argues that he maintained grades pursuant to a procedure used by many physical education teachers, for convenience on roster sheets handed out at the beginning of the school year, and that he used those sheets to enter the grades on the commuter sheets at school. He claims that the roster sheets were subsequently thrown out by his wife. He notes that the supposedly "false grades" were never brought to his attention by the administration until April of 1988 and cites this to support his argument that the administration did not believe that the grades were "false," in the sense of being unsupported by class performance and evaluation. The heart of petitioner's argument is to falsification as set forth in the following paragraph:

> [w]e submit that the facts show that the Board of Education would have had good cause had they sought to prove that Bonner failed to enter the grades for the first marking period into his grade book however, they cannot prove that the grades were false, they cannot point to one instance in which they requested Bonner to support the grade he gave a particular student that he was unable to support and their actions were totally inconsistent with the actions of supervisors who believe that in fact grades were falsified, the supervisors having become participants in said falsification. For these reasons we submit that the allegations against Bonner

> concerning falsifications to student grades must be dismissed. . . . (petitioner's brief at 15) (emphasis added)

The respondent Board makes the following argument as to the charge of falsification:

> "[f]alse," according to Black's Law Dictionary, Revised Fourth Edition, is defined as "untrue." Since a final marking period grade is supposed to represent the assessment of student achievement for the period of time set forth, and since Mr. Bonner had no such records, the grades were untrue in that there was no justification for them. Indeed, Mr. Bonner's suggestion to "just give them all A's and B's" demonstrates his attitude toward his grading responsibilities. As the Commissioner has stated in speaking of grades assigned by teachers, "The acts of teachers may neither be insulated from administrative review of their supervisors not from quasi judicial review by the Commissioner of judicial review by the courts" Talarsky v. Edison Twp. Bd. of Ed., 1977 SLD 862; Matawan Reg. Teachers Assn. v. Bd. of Ed., 1987 SL _____ (Aug. 12, 1987). By issuing grades which were not reviewable based upon any records, not only were those grades false, but also the absence of any justification served to insulate them from actual review as to their legitimacy or accuracy.
>
> It is interesting to note that Mr. Bonner demands by this Petition that the Board had insufficient cause to reach the conclusion that he was not worthy of an increment in light of all of the mitigating circumstances which he now claims exist, but at the same time denied his students any basis for his assessment of them. . . . (respondent's brief at 5-6) (emphasis added)

I, substantially, for the reasons advanced by the petitioner, **CONCLUDE** that the charge of falsification of student grades is not born out by the facts as found above. The charge of falsification is a grave one which cuts to the very core of a teacher's duty. Although these facts support the conclusion, (and I so **CONCLUDE**) that the petitioner neglected to properly enter grades for the first marking period into his grade book, I cannot **CONCLUDE**, for the reasons set forth by petitioner in his post hearing brief, that he engaged in falsification as alleged. Had he awarded false or fictitious grades, this sanction of a loss increment would not be sufficient. As it is under the facts found above, it is evident that he neglected to record these grades in a proper and timely manner and that this lead to some administrative difficulties for the students and the school.

(2) **Absenteeism, Lateness, and Inadequate Notice to Substitute Service**

As to attendance, the parties agree and cite authority for the principle that, although excessive absence can alone be sufficient reason for withholding of an increment in cases where it adversly affects the continuity of the teaching, the circumstances of those absences, as well as their impact, on continuity of instruction, must be considered before withholding of an increment. In particular, the Board must scrutinize the reasons for absences, as well past record, including attendance.

Petitioner argues that his absences in 1987-88 were legitimate and related to personal illness, or family crisis such as death and drug problems (of Mr. Bonner's son), and did not exceed his allotted accumulated sick leave. He also denies that the Board has shown that his absences had an adverse impact on the continuity of his instruction, he also cites his minimal use of sick time in previous years. Although he concedes that 1987-88 was not a "good year" for him, he argues that the justifiable circumstances of the absences, the lack of any evidence of detrimental effect on his teaching, and his prior record, did not warrant withholding his increment. He also notes that, on at least one occasion, he was advised to take a sick day by the administration, when he gave notice that he would be late for work due to problems in transit.

The respondent Board questions the excuses offered by petitioner for his absences, and notes that his mother died in April of 1987, well before the 1987-88 school year, and notes that the medical notes introduced (R-7) did not establish that he had prostrate problems, diabetes, or other family problems. The Board also notes that the petitioner was cautioned by the administration about his absences and other problems, and responded by accusing the administration of harassment (*see,* R-1-3). Respondent also questions whether use of an additional five and one half sick days between December 9, 1987 and March 2, 1988 was justified under the circumstances, in light of the absence of any convincing proof of serious illness.

As to the related questions of inadequate notice to substitute service and lateness to assign responsibilities, petitioner argues that he had always called the substitute service by 7:30 a.m., which he understood to be the deadline, and any instances of lateness, were legitimate and unavoidable. He also suggest that he was the victim of "differential treatment," possibly based on racial discrimination (petitioner's brief at 9), but offers no evidence to support this claim. I **CONCLUDE** that the guidelines established by the respondent Board for calls of substitute service

allowed calls to be made until 7:30 a.m., and that there is insufficient evidence to establish that petitioner made calls after that time, and that this aspect thus cannot support the withholding of his increment.

As to the allegation of lateness, I **CONCLUDE** that, although there is evidence that the petitioner was late on at least three occasions (January 28, February 18 and 26) that, given the clear lack of clear records as to lateness and the petitioner's claim as to legitimate excuses for those incidents of lateness which the Board has not disputed, these few incidents of lateness were reasonably explained and should not have been considered by the Board in its decision to withhold petitioner's increment.

Having **CONCLUDED** that the Board has failed to support its claim of false grading, as well as inadequate notice to substitute service and excessive or unreasonable lateness as to assigned responsibilities, the question narrows to whether the Board's withholding of petitioner's increment should be upheld by the Commissioner of Education under *N.J.S.A.* 18A:29-14 on the basis of his failure to properly enter grades as discussed, which led to administrative problems, and because of his level of absences during the school year of 1987-88.

Boards of Education are empowered to withhold increments under certain circumstances:

> [a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year by a recorded roll call majority vote of the full membership of the board of education . . . The member may appeal from such action to the commissioner under rules prescribed by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid. . . . [*N.J.S.A.* 18A:20-14; emphasis added]

Annual increments are "in the nature of a reward for meritorious service to the school district" and are a management prerogative that serves the purposes of "affording teachers economic security and of encouraging quality performance." *See, North Plainfield Education Assoc. v. Bd. of Ed. of North Plainfield, 96 N.J.* 587, 593 (1984); *see*, also, *Berndards Township Board of Education v. Bernards Township Education Association,* 79 *N.J.* 311, 321 (1979). The purpose of the Commissioner's review on appeals of withheld increments is to determine whether the Board had a reasonable basis for its conclusion, and not to substitute his judgment for that of the

Board and redetermine for himself whether a teacher's performance had in fact been unsatisfactory. *See, Kopera v. Bd. of Ed. of Town of W. Orange,* 60 *N.J. Super.* 288 (App. Div. 1960). Lack of knowledge on the part of teachers and principals as to the criteria used by a school superintendent to make a recommendation of withholding of an increment can render that action arbitrary, especially where based on only one criterion of evaluation. *See, Basile v. Bd. of Ed.,* 2 *N.J.A.R.* 199 (1980). There is no question that either failure to properly perform duties or excessive absences can, under the appropriate circumstances, constitute good cause for the withholding of an increment.

In order for a Board of Education to reasonably and lawfully consider absences as part of a decision to withhold an increment, the Board must consider the particular circumstances of the absences and assess the degree of any discontinuity of instruction or other negative impact on students that was caused by the absences. *See, Meli v. Bd. of Ed. of the Burlington County Vocational-Technical Schools,* OAL DKT. NO. EDU 3691-85 (Jan. 23, 1986), reversed, N.J. Comm. of Ed. (Mar. 10, 1986), aff'd, N.J. State Board (July 7, 1986), reversed, N.J. App. Div. (A-5820-85T7, May 21, 1987 (unreported). Withholding of an increment cannot be based solely on a number of absences, without consideration or these other factors. *See, Kuehn v. Bd. of Ed. of Teaneck,* OAL DKT. NO. EDU 1077-81 (Oct. 9, 1981), reversed, N.J. Comm. of Ed. (Nov. 25, 1981), reversed, N.J. State Board (Feb. 1, 1983).

The standard of review for the withholding of increments for absenteeism was clarified by the Commissioner of Education in the matter of *Darius Transky v. Bd. of Ed. of the City of Trenton,* decided April 19, 1989, aff'd N.J. State Board (September 8, 1989):

> [n]otwithstanding petitioner's exceptions to the contrary, the record amply supports that the Board's action was a reasonable exercise of its discretionary authority.
>
> . . .
>
> As to the issue of absenteeism, the Commissioner fully concurs with the ALJ that there is no evidence in the record that the Board considered the particular circumstances of petitioner's absences in the 1987-88 school year. Kuehn, supra; Meli, supra It is necessary, however, to clarify several other points of the ALJ regarding the issue of contractual and statutory entitlement to sick leave and increment withholding and the issue of burden of proof with respect to impact on excessive absenteeism or continuity of instruction.
>
> Initially, the Commissioner would stress that regardless of how excellent a teacher's performance may be when present and

even if absences are legitimate and within statutory and contractual entitlements, excessive absenteeism may be grounds for increment withholding. Trautwein v. Bd. of Ed. of Bound Brook, N.J. Superior Court, Appellate Division 1980 S.L.D. 1539; * * * *

Moreover, the Board does not need to make a prima facie showing that the teacher's performance was lessened or that discontinuity of instruction was proved by the Board. In the Trautwein case the Appellate Division specifically rejected the Commissioner's and State Board's affirmance that no prima facie showing was made that Trautwein's performance was lessened by her excessive absences because "*** this improperly placed the burden of proof on the board rather than on the teacher, where it belonged." (at 1542) In Meli v Bd. of Ed. of Burlington County Vocational Technical School, 1984 S.L.D. 906, aff'd State Board 921, it was determined that:

> Common sense dictates that a teacher's continued absence must, at some point, have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress (at 913)

Moreover, in increment withholding cases the burden of proving that a teacher's excessive absenteeism is not harmful to the education process rests with the petitioner in the matter, not with a board of education. The issue of the burden was addressed in Angelucci, supra, which reads in pertinent part:

> No offering is made as to how this lack of harm would be determined. Conjecturally, it might be made by a comparison between some agreed upon testing procedure administered to pupils on a basis of no absenteeism of the teacher involved with the results of such testing during periods when the teacher was not in attendance. Yearly scores are eliminated because the comparative basis of the teacher being present is not available. Comparison with other similar grades or classes is discouraged by teachers themselves. The Commissioner foresees monumental problems compounded in any such determination. Assuming, arguendo, that as stated the absences of the teachers involved have no adverse effect of their pupils what limit might be expected to be drawn, if any. Could the teachers not be present at all during the year and still have their absence have no impact on the pupils. The teachers herein involved are admittedly of outstanding ability with resultant good evaluations. Such characteristics must have accrued to the teacher when present in the classroom and actively involved in pupils, not absent from that classroom no matter how legitimate the reason. . . . improperly places the burden of proof on the Board, rather than the teacher, where it belongs. (emphasis supplied) (1980 S.L.D. at 1077)

> What is necessary for the Board to show, however, is that the concern for continuity of instruction was specifically considered (1) by the Board when weighing its decision to withhold an increment and (2) by the supervisor(s) during the period in which the excessive absenteeism was occurring. . . . (Commissioner's decision at 23-25) (emphasis added)

As the Commissioner held in *Transky*, the burden of proof that petitioner's absenteeism did not harmfully impact on the education process rests with Theodore Bonner. His absences were heavily concentrated between the beginning of school in September and December 9, when he accumulated 17 days of absence. During this period, he also failed to keep an appropriate and adequate record of student's performance and grades and this was the cause of some administrative difficulty, as well as consternation to students and parents. The administration was concerned with petitioner's attendance as early as November 19, when it notified him that his absence for 8 days out of the 56 school days was "unusually high" and a manner of concern (R-1). By December 9, the administration advised petitioner that he had been out for a total of 15 days for illness, with two unspecified days which was regarded as "an abnormal attendance record" (R-3). It is evident that the Board did weigh the concern for continuity of instruction and its decision to withhold the increment, and that this was considered by supervisors during the period in which the excessive absenteeism was occurring, as per the *Transky* decision. The Board's conclusion that there was an adverse affect on the continuity and instruction was reasonably based both on the number of days taken prior to December 9 (and there after), as well as on the fact that petitioner had made no grade entries up until that time. It may be that he had merely placed the grades on a roster sheet, which was inadvertently discarded, but I **CONCLUDE** that there is a connection between the degree of absences and the state of his grade book, and also note his adversary and cavalier attitude toward grading, as expressed in statements that he concedes having made.

Under the totality of these circumstances, I **CONCLUDE** that the action of the Board of Education of the Township of East Brunswick in withholding Theodore Bonner's increment on April 28, 1988 for the 1988-89 school year was for good cause and otherwise reasonable and proper under *N.J.S.A.* 18A:29-14 and should not be disturbed by the Commissioner, beyond noting that the grounds for that withholding have been modified as **CONCLUDED** and **RECOMMENDED** above. It is also fair to say that petitioner, who had worked for the Board of Education for some 32 years, was a good teacher who had a bad year in terms of attendance and

performance of duties as discussed above, but it was not inappropriate or unreasonable for the Board to withhold his increment based on that bad year and I so **CONCLUDE.**

Order

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that the action of the respondent Board of Education of the Township of East Brunswick in withholding the increment of the petitioner Theodore Bonner on April 28, 1988 for the 1988-89 school year for the reasons discussed above should be **AFFIRMED** by the Commissioner of Education.

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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 19, 1990
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

6/20/90
DATE

Seymour Cooperman
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 25 1990
DATE

Jaynee LaVecchia/hs
OFFICE OF ADMINISTRATIVE LAW

ct

THEODORE BONNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies by respondent Board were timely filed pursuant to N.J.A.C. 1:1-18.4 and are summarily set forth below.

In his exceptions petitioner fully endorses the ALJ's analysis and dismissal of the Board's charges of falsification of grades, inadequate notice to the district substitute service and lateness to assigned responsibilities. He takes issue, however, with the ALJ's determination to nonetheless sustain the disputed withholding action on the basis of facts found regarding petitioner's attendance and his attention to keeping records of grades. By so determining, petitioner argues, the ALJ acted in violation of Kopera, supra, by substituting his judgment for that of the Board, since the Board had based its actions on a set of facts other than those accepted by the ALJ. Moreover, petitioner contends, neither the Board nor the ALJ properly considered the factors to be weighed in withholding increments for reasons of attendance. Specifically, no consideration was given to the reasons for petitioner's absences, their effect on instructional continuity, petitioner's prior excellent attendance record or petitioner's statutory right to use accumulated sick time; rather, both the evaluating principal and the Board simply made a mechanistic determination based on number of days absent. Finally, petitioner attacks the credibility of the principal on whose recommendation the Board acted to withhold the increment, contending that the principal "rushed to judgment" based on his own perceptions of petitioner's conduct rather than on any investigation of fact. He further notes that this same principal was involved in the case of Salvatore D'Amico v. Board of Education of East Brunswick, Middlesex County, decided by the Commissioner July 31, 1984 wherein the Commissioner reversed the board's withholding action because the facts on which it was based were not as the principal had represented to the board in recommending withholding.

In reply, the Board argues that all facts were indeed as the Board claimed them to be and that its decision to withhold was therefore proper. Any appearance to the contrary is attributable in one instance to petitioner's (and subsequently the ALJ's) separation into distinct components of a group of factors that were considered

by the Board as one reason and, in the other, by a misconstrual of what the Board meant by "falsification."

In its withholding notice to petitioner, the Board argues, it gave as the first of its two statements of reason:

> 1. Poor attendance; inadequate notice to the substitute service during an absence; lateness to assigned responsibilities.
> (See Exhibit J-1, Statement of Reasons)

Where the ALJ erred, according to the Board, was in analyzing each of these factors as though it were a separate reason and then determining that petitioner's offenses in each area were insufficient to serve as a basis for withholding. For example, the ALJ found that petitioner was late on a number of occasions (Initial Decision, at p. 9), then concluded that the Board failed to support its claim of "excessive and unreasonable lateness" and held that a "***few instances of lateness were reasonably explained and should not have been considered by the Board in its decision to withhold petitioner's increment." (Id., at p. 13) The Board, on the other hand, viewed these latenesses as one of the several ways in which petitioner was absent from his classroom duties during 1987-88, not as reasons in and of themselves for increment withholding; it certainly never claimed that the latenesses were excessive or unreasonable per se. Similarly, the Board never contended that petitioner had regularly called the substitute service after the 7:30 a.m. emergency cut-off time but, rather, that on numerous occasions he had called the service sufficiently late that no coverage was available for his 8:46 a.m. classes and that it appeared highly unlikely, given the reported nature of his absences, that he could not have called earlier than he did (even the night before, as suggested by Exhibit P-2).

With respect to falsification of grades, the Board contends that both petitioner and the ALJ have assumed that by "falsification" the Board meant entry of totally fictitious grades, whereas the Board plainly meant that petitioner "had failed to keep an appropriate and adequate record of students' performance and grades and, therefore, the final recorded grade for each student was false or untrue in the sense that the grade could not be justified by the records.***" (Reply Exceptions, at p. 7) This interpretation of "falsification" is clearly supported by the ALJ's findings of fact, which are precisely the facts alleged by the Board in support of its charge; no attempt was made to demonstrate, nor did the Board ever believe, that petitioner had falsified grades in any other sense.

With respect to attendance, the Board supports the ALJ's findings and conclusions and replies to petitioner's objections by noting that

> ***assuming arguendo that each and every absence of Petitioner was legitimate [in fact the Board challenged this assumption due to absence of what it considered to be adequate medical documenta-

> tion], and that the days were available for Petitioner's use, that does not mean, as Petitioner would have [the Commissioner] believe, that the sheer numbers themselves cannot be a significant factor for the Board to consider in withholding an increment [provided that the Board considered their impact on continuity of instruction]. (Reply Exceptions, at p. 5)

The Board continues:

> In the instant matter, the actions of Petitioner regarding his absenteeism, his tardiness, and his lack of concern with the continuity of education of his students by his cavalier attitude toward even assisting in acquiring a substitute during his absences demonstrate in total a level of performance which did not merit the awarding of an increment. As our Supreme Court has stated in discussing N.J.S.A. 18A:29-14, "The purpose of the statute is thus to reward only those who have contributed to the educational process, thereby encouraging high standards of performance. In determining whether to withhold a salary increment, a local board is thereby making a judgment concerning the quality of the educational system. It is reasonable to assume that an adversely affected teacher will strive to eliminate the causes or basis of 'inefficiency.' The decision to withhold an increment is therefore a matter of essential managerial prerogative which has been delegated by the Legislature to the Board." Bernards Twp. Bd. of Ed. v. Bernards Twp. Ed. Assn., 79 N.J. 311, 321 (1979). (Id., at pp. 6-7)

Given that the factual bases for its action were proven as true, the Board argues, petitioner's and the ALJ's misunderstanding of what the Board meant by the wording of its specific reasons should not be used as a means of defeating the Board's exercise of its lawful managerial prerogative. Moreover, the ALJ found these bases sufficient to justify withholding even given his misconstrual of the Board's reasons.

Finally, the Board objects to petitioner's attack on the credibility of his evaluating principal based on a prior unrelated matter, arguing that such attack is both irrelevant to the present situation and improper as a matter of law, since deeming credibility res judicata would mean that the trier of fact who made the initial credibility determination would control all future triers of fact whenever the same witness testified regardless of circumstances.

Upon careful review of this matter, the Commissioner initially rejects petitioner's argument that the facts were not as claimed by the Board. On the contrary, as noted by the ALJ, the underlying facts of this matter are essentially undisputed. Rather,

what petitioner challenges is whether the Board's statement of reasons was an accurate representation of those facts and whether they constituted a reasonable basis for withholding.

With respect to the Board's first stated reason (absenteeism, tardiness, late calls to substitute service), the record is clear that the Board was considering petitioner's attendance as a totality, with each of the listed factors deemed to be contributory to the problem. It was, therefore, inappropriate for petitioner and the ALJ to isolate and judge each factor as if it were a separate reason for withholding, particularly since the ALJ appears to have applied the tenure standard of preponderance of evidence rather than the increment withholding standard of reasonable basis as the standard of review in dismissing "charges" of tardiness and late substitute calls. The undisputed facts show that petitioner was tardy on several occasions and that his calls to the substitute service, while at or before the "emergency" 7:30 a.m. deadline, were sufficiently late to preclude adequate arrangements for morning classes. He was also absent for a total of 25½ days during the course of the year, with most absences concentrated in the opening months of school despite repeated notices from the principal to the effect that students were being deprived of necessary teacher contact. Thus, there is, in the aggregate, unquestionably a reasonable basis underlying all components of the Board's first stated reason for withholding, so that the Commissioner may not upset the Board's determination by substituting his judgment for that of the Board or the evaluator on whose recommendation it acted. (Kopera, supra) Also plain from the evidence is that the evaluator did consider both the reasons for petitioner's attendance problems and their effect on educational continuity. (Findings of Fact, Initial Decision at pp. 5-9; Exhibits R-1, R-3, R-4, R-5, R-6)

The Commissioner does concur with petitioner that there is no evidence that petitioner's prior excellent attendance record was considered in the withholding decision; indeed, the evaluating principal specifically stated that he did not consider it. Notwithstanding this fact, given the number of days petitioner was absent, the flimsiness of the medical documentation provided for those days and the clear concern expressed by the principal for their impact on continuity of instruction, the Board has more than amply met its burden of demonstrating reasonable basis under Kopera. This is particularly so since case law has long held awarding of an increment to be a reward for meritorious service within a given year.

With respect to the Board's second stated reason for withholding (falsification of grades), it would, in the Commissioner's view, elevate form over substance to conclude that petitioner had not "falsified" grades within the meaning of that word as used by the Board merely because the more common usage of "falsify" connotes something other than the Board unquestionably intended. The ALJ dealt with this distinction by concluding that petitioner did not falsify grades, but did neglect his duties with regard to their proper recording and entry. Petitioner, in turn, seeks to capitalize on this determination by arguing that the ALJ improperly substituted his judgment for that of the Board (Kopera,

supra) in recommending withholding on a basis other than that considered by the Board. The Commissioner rejects this view, holding instead that the undisputed facts plainly warrant the Board's contention that petitioner falsified grades in the sense that his final grades were unsupported by any available records and hence impossible to verify on review or challenge.

The Commissioner also notes that, contrary to petitioner's assertions, the Board bore no obligation to prove the educational impact of petitioner's 1987-88 attendance pattern; rather, the burden of refuting the Board's judgment of negative impact rested with petitioner, who did not attempt to demonstrate that the Board erred in imputing negative impact. Moreover, the Commissioner explicitly rejects petitioner's contention that the ALJ erred in relating petitioner's grading deficiencies to his frequent periods of absence. On the contrary, evidence adduced at hearing (Initial Decision, at pp. 3-4) and in documentation (Exhibits R-8, R-9) plainly demonstrates a connection between the two problems. Finally, the Commissioner rejects petitioner's attack on the credibility of his evaluating principal as totally unfounded in the record of this matter and his references to prior credibility determinations as meritless and properly ignored by the ALJ before whom they were initially raised. (Petitioner's Letter Memorandum in Lieu of Brief, at pp. 15-17)

Accordingly, while modifying the ALJ's conclusions with respect to certain individual aspects of this matter as set forth above, the Commissioner affirms the determination of the Office of Administrative Law that the action of the East Brunswick Board of Education to withhold petitioner's increment was reasonably based and therefore not subject to disturbance by the Commissioner. The Petition of Appeal in the instant matter is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5506-89
AGENCY DKT. NO. 195-6/89

KATHLEEN MORANO,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF VERONA,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

George H. Buermann, Esq., for the respondent (Harris, Dickson. Buermann, Camp, Ashenfelter, Slous & Boyd, attorneys)

Arnold S. Cohen, Esq., for intervenor **Robert Roma** (Oxfeld, Cohen, Friedman, Levine & Brooks, attorneys)

Record Closed: June 11, 1990 Decided: June 27, 1990

BEFORE **JOHN R. TASSINI**, ALJ:

Petitioner, a tenured teacher employed by the Board of Education of the Borough of Verona ("Board"), as part of a reduction in force ("RIF"), effective September 1, 1989, was reduced from full-time to 3/5 time duties with a pro rata reduction of her

salary, etc. See, N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-9 et seq. While it has reduced petitioner's duties, the Board has retained the intervenor as a full-time teacher of bookkeeping and accounting, subjects which the petitioner is endorsed and authorized to teach and has taught in the Board's school system. The petitioner contends that the intervenor is not tenured and, in the alternative, if he is tenured, the petitioner contends that the intervenor could have no seniority in the position of teacher of bookkeeping and accounting before October 4, 1989, when he first became endorsed and authorized to teach those subjects. Since the petitioner had seniority as a teacher of accounting and bookkeeping and, she contends, the intervenor could have no such seniority effective September 1, 1989, she demands relief including orders reinstating her as a full time teacher of accounting and bookkeeping (in the position now held by the intervenor), with back pay, etc. See, N.J.S.A. 18A:28-12 and N.J.A.C. 6:11-6.2(a)4.

The intervenor contends that (1) prior to his actual endorsement and authorization to teach bookkeeping and accounting, he was "eligible" for same; (2) even though the State Board of Examiners did not endorse and authorize him to teach those subjects until October 4, 1989, by reason of such eligibility, he is entitled to "tenure recognition" and/or "seniority credit," for the time that he has taught those subjects, and (3) by reason of such tenure recognition and seniority credit, he is senior to petitioner and should not be removed from the subject position so that she can be placed there.

PROCEDURAL HISTORY

The Board notified petitioner that effective September 1, 1989, she would be reduced from a full-time to a 3/5 position. By her petition, filed with the Commissioner of Education on June 20, 1989, petitioner demanded relief including an order requiring the Board to appoint her to a full-time position for the 1989-90 school year. See, N.J.S.A. 18A:6-9. In its answer, filed with the Commissioner on July 24, 1989, the Board denied any wrongdoing and submitted that petitioner was not entitled to the relief demanded. The matter was transmitted to the OAL where, on July 26, 1989, it was filed as a contested case. See, N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq.; and N.J.A.C. 1:1-3.1. On October 31, 1989 the matter was the subject of a prehearing conference and a prehearing order was entered thereafter, allowing the intervention of Robert Roma, among other things. On February 23, 1990, the matter was the subject of a conference, during which the parties agreed to develop a joint stipulation of facts to be used as the basis for this initial decision. On April 20, 1990, I received the parties' proposed joint

stipulation and thereafter I received a letter from the petitioner's attorney with additional stipulated information. See, J-1. By my letter dated June 4, 1990, I set forth my proposed Findings of Fact, based upon the proposed joint stipulation and letter from petitioner's attorney, and I invited any objection to the Findings to be filed by June 12, 1990, however, no objections were filed. The parties' briefs in support of their respective positions were due on June 11, 1990 and the record was closed on that date.

FINDINGS OF FACT

Based upon the parties' proposed stipulation, etc., I **FIND** the following **FACTS:**

The Petitioner

Prior to the 1978-79 school year, the State Board of Examiners endorsed and authorized petitioner to teach the following subjects: "Comprehensive Business" (which includes "bookkeeping and accounting"), "Data processing," "Secretarial studies" and "Marketing." See, N.J.S.A. 18A:6-34 et seq. and N.J.A.C. 6:11-6.2(a)4(i), (iii), (v) and (vii).

Beginning with the 1978-79 school year and continuously thereafter until September 1, 1989, petitioner was employed by the Board in its school system as a full-time teacher, teaching each of the above-noted subjects for which she was endorsed and authorized, i.e., including bookkeeping and accounting.

By the beginning of the 1981-82 school year, the petitioner acquired tenure and began to accrue seniority in the above-noted subjects, i.e., including bookkeeping and accounting. See, N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10.

The Intervenor

Prior to February 1, 1970, the State Board of Examiners endorsed and authorized the intervenor to teach "General business." See, N.J.A.C. 6:11-6.2(a)4(iv).

Since February 1, 1970 and continuously thereafter,. the intervenor was employed by the Board in its school system as a full-time teacher teaching business courses, including accounting and bookkeeping.

The record of "Classes Taught" by the intervenor shows that he taught the following subjects: (1) one class of "Recordkeeping" for the 1972-73 school year; (2) one class of "Business Mathematics" during the 1973-74, 1974-75, 1979-80, 1983-84, 1985-86, 1986-87, 1987-88 and 1988-89 school years; (3) one class of "Distributive Education I" for the 1975-76 school year; (4) one class of "Distributive Education II" for the 1975-76 school year; (5) one class of "Consumer Economics" during the 1978-79 school year; (6) one-half a class of "Business Law" during the 1986-87, 1987-88 and 1988-89 school years; and (7) one-half a class of "Business Management" during the 1986-87, 1987-88 and 1988-89 school years. The stipulation and record of "Classes Taught" by the intervenor also shows that he taught (8) "Bookkeeping I" and (9) "Bookkeeping II" during the 1972-73, 1973-74, 1974-75, 1976-77, 1977-78, 1978-79, 1979-80, 1980-81 and 1981-82 school years; (10) "Accounting I" during the 1982-83, 1983-84, 1984-85, 1985-86, 1986-87, 1987-88 and 1988-89 school years; and (11) "Accounting II" during the 1982-83, 1983-84, 1984-85, 1986-87, and 1987-88 school years.

On February 2, 1973, the Board recognized intervenor as having acquired tenure.

In May 1989, the intervenor applied to the State Board of Examiners for endorsement and authorization to teach Business Education, but his application was denied (because he lacked sufficient course work). Thereafter the intervenor took the National Teachers Examination for Accounting: on September 1, 1989, he learned he had passed it and, on October 4, 1989, the State Board of Examiners endorsed and authorized the intervenor to teach that subject. See, N.J.A.C. 6:11-5.1(a)(2) and N.J.A.C. 6:11-6.2(a)4(ii).

The RIF, Petitioner's Reduction and the Intervenor's Retention as a Teacher of Accounting and Bookkeeping

Effective September 1, 1989, i.e., for the 1989-90 school year, as part of an RIF the Board reduced petitioner to 3/5 of her duties with a pro rata reduction of her salary, etc.

Effective September 1, 1989, the Board continued to retain the intervenor as a full-time teacher of accounting and bookkeeping, despite the petitioner's demand for assignment to that position.

LEGAL DISCUSSION

TENURE

A tenured teacher whose position had been abolished or reduced as part of an RIF would be entitled to preference as against a nontenured teacher with the same certification who was also applying for the same position. Capodilupo v. W. Orange Tp. Ed. Bd., 218 N.J. Super. 510, 515 (App. Div. 1987). See also, Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 242 (App. Div. 1987). If the intervenor lacks tenure, therefore, the petitioner must be appointed to his position as teacher of bookkeeping and accounting.

The tenure provisions in school laws were designed to aid in the establishment of a competent and efficient school system by affording to teachers a measure of security in the ranks they hold after years of service. Viemeister v. Bd. of Education of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949). However, in order to acquire the security of permanent employment by tenure, a teacher must comply with the precise conditions set forth in the statute. Zimmerman v. Board of Education of Newark, 38 N.J. 65, 72 (1962).

Statutes and regulations prohibit a teacher being employed except to teach a subject for which he holds an appropriate endorsement and authorization and this is in keeping with the students' right to a thorough and efficient education. See, N.J.S.A. 18A:3-15.6; N.J.S.A. 18A:6-33.8; N.J.S.A. 18A:6-40; N.J.A.C. 6:11-3.1; N.J.A.C. 6:11-6.1(a); N.J.A.C. 6:11-6.2(a); and N.J. Const., (1947), Art. VIII, §IV, par 1. Further, to acquire tenure, a teacher must have held a certificate which is "appropriate" for the subjects he has taught. See, N.J.S.A. 18A:28-4 and N.J.A.C. 6:11-6.2(a).

The intervenor's "General business" endorsement and authorization, which he had since at least February 1, 1970, allowed him to properly teach subjects including at least the following: "business law, economic geography, economics, social business studies, consumer education sales, retailing [and]) advertising." See, N.J.A.C. 6:11-6.2(a)4(iv).

As noted above, the record of "Classes Taught" by the intervenor shows that he taught the following subjects: (1) one class of "Recordkeeping" for the 1972-73 school year; (2) one class of "Business Mathematics: during the 1973-74 , 1974-75, 1979-80, 1983-84, 1985-86, 1986-87, 1987-88 and 1988-89 school years; (3) one class of "Distributive Education I" for the 1975-76 school year; (4) one class of "Distributive Education II" for the 1975-76 school year; (5) one class of "Consumer Economics" during the 1978-79 school year; (6) one-half a class of "Business Law" during the 1986-87, 1987-88 and 1988-89 school years; and (7) one-half a class of "Business Management" during the 1986-87, 1987-88 and 1988-89 school years. These are all specifically included as within the regulatory list of "general business" subjects areas, reasonably and normally related to General business" studies and not distinct from general business by reason of a specialized regulatory endorsement and authorization. See, N.J.A.C. 6:11-6.2. I, therefore, **FIND AND CONCLUDE** that the intervenor held the "appropriate" endorsement to teach these subjects; the intervenor did teach these subjects "three consecutive academic years, together with employment at the beginning of the next succeeding academic year," and he would have had tenure to teach "General business" subjects by September 1, 1989. See, N.J.S.A. 18A:28-5.

It must also be noted, however, that while the intervenor taught "Bookkeeping I," "Bookkeeping II," and "Accounting II" between 1972 and 1988, these are subjects which are conspicuously absent from the regulatory list of "General business" subject areas; they are subjects which are included in the "Comprehensive" business regulatory list of subject areas; and they are subjects for which there is a special endorsement and authorization. Distinguish N.J.A.C. 6:11-6.2(a)4(iv) from N.J.A.C. 6:11-6.2(a)4(i) and (ii). I, therefore, **FIND** and **CONCLUDE** that, until October 4, 1989, when the State Board of Examiners endorsed and authorized the intervenor to teach "Bookkeeping and Accounting," he did not hold the "appropriate" endorsement to teach those subjects.

SENIORITY

Assuming that the intervenor, like the petitioner, has tenure, it must next be determined who between them, on September 1, 1989, had seniority for the position of teacher of bookkeeping and accounting.

Seniority for a teaching position is recognizable only when the teacher had endorsement authorization to teach the subject and taught the endorsed and authorized

subject. See, N.J.A.C. 6:3-1.10(f) and Morer v. Bd. of Ed. of Teaneck, 1976 S.L.D. 963. More particularly, a teacher would not accrue seniority for the period he taught prior to his being endorsed and authorized to teach the relevant subject. See, Dedrick v. Bd. of Ed. of Hammonton, 1977 S.L.D. 1043.

The Commissioner's Decision of February 27, 1989 in Jennings v. Bd. of Ed. of Highland Park has been cited by the Board of Education for the proposition that "retroactive seniority" may be granted where a teacher has successfully completed all required casework to be "eligible" to obtain an appropriate endorsement for a subject he had taught. The Board of Education has neglected to note that the State Board of Education decision of December 6, 1989 reversed the Commissioner and reinstated the (ALJ) sadministrative law judge's decision of December 19, 1988 granting summary decision and dismissing the petition of a teacher who claimed tenure as a teacher of "health," for which he had allegedly completed the necessary "coursework," although the only endorsement he held was for "physical education." Contrast, N.J.A.C. 6:11-6.2(a)17 with N.J.A.C. 6:11-6.2(a) 10 and 11. The State Board of Education endorsed the ALJ's reasoning which is as follows: No teacher shall acquire tenure if he has not held the "appropriate" certificate for the position in which he was employed. The teacher's "physical education" endorsement was not appropriate for teaching " health" since other endorsements are specifically provided for this subject. No equitable remedy is available to confer tenure on a teacher who has not complied with the longstanding statutory and regulatory requirements for endorsement and tenure, despite the board of education's purported conferring of tenure upon that teacher. There can be no such "remedy" because (1) tenure is acquired only by compliance with the statute providing for same; (2) the unendorsed teacher acted unreasonably, given the clear statutory and regulatory requirements for endorsement, tenure and seniority; and (3) to afford the unendorsed teacher "retroactive seniority" could cause a loss and denial of rights for the innocent, properly endorsed teacher who is entitled to the subject position.

It is stipulated that, prior to September 1, 1989, the petitioner's "Comprehensive business endorsement and authorization included bookkeeping and accounting and she taught those subjects in the Board's school system. The petitioner therefore had seniority in those subjects prior to September 1, 1989. On the other hand, prior to October 4, 1989, the intervenor taught bookkeeping and accounting without endorsement and authorization from the State Board of Examiners, so he could not have had seniority in those subjects on September 1, 1989.

The laws relating to endorsement, authorization and seniority are not new and the intervenor has shown no facts or circumstances explaining or excusing his failure to obtain the appropriate accounting and bookkeeping endorsement and authorization before September 1, 1989. Further, there is no statute or regulation providing for seniority credit for the teaching of a subject without endorsement and authorization. To the contrary, N.J.A.C. 6:11-6.1(a) disallows teaching a subject by one who is not appropriately endorsed and authorized. To recognize "seniority" based upon "eligibility" for endorsement and authorization to teach a subject would have results including the following: It would erode the authority of the regulatory system. It would result in uncertainty and confusion by, e.g., entertaining the claims of teachers who are unendorsed and unauthorized, that they should be afforded seniority-type rights over teachers who conscientiously secured endorsement and authorization. It would ultimately deny the endorsed and authorized teachers their rights afforded by the statutory and regulatory system.

Given the above, I **FIND** and **CONCLUDE** that, on September 1, 1989, the petitioner had seniority as a teacher of bookkeeping and accounting; the intervenor had no seniority as a teacher of bookkeeping and accounting; the petitioner had a right to employment as a (full time) teacher of bookkeeping and accounting; and the Board wrongfully failed to employ the petitioner in the subject position.

ORDERS

I **GRANT** the petitioner's claim for relief.

I **ORDER** the Board to employ petitioner in the position of teacher of bookkeeping and accounting effective September 1, 1989, with back pay and other benefits and credits, subject to petitioner's obligation to mitigate her damages.

I **ORDER** the petitioner to forward to the Board within 30 days of the date of this decision tax returns, etc., evidencing any income and mitigation of her damages since September 1, 1989.

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.

6/27/90
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

6/29/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 0 3 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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KATHLEEN MORANO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF VERONA, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondent and Intervenor Robert Roma, and replies thereto by petitioner, were timely filed pursuant to N.J.A.C. 1:1-18.4.

Initially, the Commissioner fully endorses and adopts as him own the ALJ's discussion and conclusions regarding Intervenor Roma's general status as a tenured teaching staff member and notes that no objections were filed with regard to this aspect of the initial decision.

With regard to Roma's seniority, however, respondent Board of Education and Roma himself argue that, in the past, the Commissioner has awarded retroactive seniority to teachers who had completed all requisite requirements but failed to apply for certification through inadvertent error, citing Barbara Saad v. Board of Education of the Borough of Dumont, Bergen County, 1982 S.L.D. 440 and drawing an analogy between the facts of that matter and the matter at hand. The Board further argues that the ALJ's decision visits upon Roma consequences "***extraordinary and out of all proportion to the mistake of not having applied for an accounting and bookkeeping endorsement in 1970," including the possibility of not being able to adequately support his family and inability to find comparable employment should he leave the district as a result of the present proceedings. (Board's Exceptions, at p. 2)

In reply, petitioner reiterates the arguments of her earlier brief, which were incorporated into the initial decision and need not be repeated here.

Upon careful review of this matter, the Commissioner affirms the initial decision of the ALJ for the reasons stated therein. In so doing, he is mindful of Saad, its predecessors and its progeny, and, in response to the Board's (and Roma's) exceptions, notes that the State Board's decision in Jennings, supra, has effectively superseded those earlier decisions wherein credit was granted for service prior to proper certification. As noted by the ALJ, where primary responsibility for acquisition of certification rests with the teacher and the controlling regulations

are clear on their face, the law makes no provision for retroactive accreditation even in the absence of fault or deliberate delay on the part of the teacher.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter and petitioner's prayer for relief is granted in accordance with the directives of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3533-89
AGENCY DKT. NO. 59-3/89

PAUL NORMAN BOWER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE,
Respondent.

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

Melvin Randall, Esq. for respondent
(Love & Randall, attorneys)

Record Closed: May 8, 1990 Decided: June 20, 1990

BEFORE **KEN R. SPRINGER**, ALJ:

Statement of the Case

This is an appeal by a teacher who seeks indemnification of criminal defense costs under *N.J.S.A.* 18A:16-6.1. Basically, there are two issues: (1) whether the criminal action involves an act or omission arising out of and in the course of the

performance of his teaching duties; and (2) whether the criminal proceeding was resolved in petitioner's favor. For the reasons which follow, petitioner has failed to satisfy either of the statutory requirements for indemnification.

Procedural History

On March 30, 1989, petitioner Paul Norman Bower ("Bower") filed a verified petition of appeal with the Commissioner of Education ("Commissioner"). Respondent East Orange Board of Education ("Board") filed its answer on April 17, 1989. Subsequently, on May 12, 1989 the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case.

On February 2, 1990, the Board filed a motion for summary decision, together with a supporting brief. Petitioner failed to file timely opposing papers. Nevertheless, on March 15, 1990 the OAL denied the motion due to the lack of a factual record. The OAL held a hearing on April 2, 1990. Instead of offering testimony, the parties entered into a joint stipulation of facts. Both parties submitted post-hearing briefs. The record closed on May 8, 1990 on receipt of the last papers filed by Bower.

Findings of Fact

All of the relevant facts are stipulated. From the pleadings, written submissions and exhibits submitted by the parties, **I FIND:**

Paul Norman Bower is a tenured teaching staff member employed by the East Orange Board of Education. On February 10, 1987 the Essex County Grand Jury handed down a seven-count indictment, No. 87-02-615, charging him with aggravated sexual assault and with endangering the welfare of young children Specifically, the indictment charged that, at various times between September 1985 and June 1986, Bower performed fellatio on one child and committed anal penetration on the same child and two others. All three alleged victims were six year old students who attend school in the East Orange district. On the existing record, it is unclear whether the children were in any of Bower's classes; whether the incidents allegedly took place on or off school premises, and whether during or after school hours.

At its meeting on March 3, 1987, the Board voted unanimously to suspend Bower without pay, effective immediately. Thereafter, on October 11, 1988, a Superior Court judge in Essex County entered an order granting defendant's motion to dismiss the indictment. Although the order itself is silent on the subject, both parties agree that this dismissal was "without prejudice." The record fails to disclose the reasons for dismissing the first indictment. In connection with his criminal defense against the first indictment, Bower incurred legal fees and disbursements totaling $20,340.95.[1]

One week later, on October 17, 1988, the Board vacated its suspension of Bower and permitted him to return to work in a non-teaching assignment. On March 15, 1989, the Essex County Grand Jury reindicted Bower, by Indictment No. 89-3-1313, on the exact same charges. Again, on March 28, 1989, the Board voted to suspend Bower immediately without pay. Criminal charges were still pending against Bower on the date that the record closed.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that Bower is not entitled to indemnification of the costs of his criminal defense.

N.J.S.A. 18A:16-6 and *N.J.S.A.* 18A:16-6.1 are companion enactments. Under Chapter 16-6, a school board shall defray the reasonable costs of defending its employee against any *civil* action "for any act or omission arising out of and in the course of the performance of the duties of such office, position [or] employment[.]" Likewise, Chapter 16-6.1 obligates a school board to reimburse its employees for the cost, including reasonable counsel fees and expenses, of defending its employee against any *criminal* action "for any such act or omission." Clearly this language relates back to the preceding statute and tracks the requirement that the event must arise "out of and in the course of the performance" of the employee's duties.

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[1]Although the amount seems unusually high to charge a public body for a case which never went to trial, the Board has not argued that the legal fees are excessive or unreasonable.

Unlike the civil statute, the criminal statute contains additional language limiting its application to proceedings which are "dismissed or result in a final disposition in favor of such person." Thus, the criminal statute is more restrictive than the civil statute. Claims involving criminal conduct "should be analyzed strictly rather than liberally, so that reimbursement of legal fees and expenses should only ensue when the circumstances are such as to fit clearly within the legislative limitations." *Powers v. Union City. Bd. of Ed.*, 124 *N.J. Super.* 590, 597 (Law Div. 1973), *aff'd o.b.* 127 *N.J. Super.* 294 (App. Div. 1974), certif. den. 65 *N.J.* 575 (1975).

The initial inquiry, then, is whether the criminal charges arose out of and in the course of petitioner's duties. In *Powers*, the court held that counsel fees incurred in the successful defense against criminal charges of an alleged scheme to extort kickbacks from contractors did not qualify for indemnification. The court applied a two-fold test. It was insufficient that the criminal action may have involved an act or omission "*arising out of* the performance" of duties. It must also have occurred "*in the course of* the same." 124 *N.J. Super.* at 595. While the criminal conduct of extortion might have originated out of the performance of official duties, such conduct "cannot be said to have been accomplished in the course of carrying out those duties." (at 596).

As a matter of law, it is difficult to imagine any circumstances where sexual assault against a child could be legitimately characterized as having occurred in the course of carrying out teaching duties. See *McCorkle v. Pittsgrove Twp. Bd. of Ed.*, No. A-5550-81T2 (N.J. App. Div. June 2, 1983).[2] Nevertheless, denial of petitioner's claim need not be grounded on the abstract nature of the charges. Rather, the record in this case is devoid of "any indication of any nexus between the conduct

[2]Bower's contention that an administrative agency may freely ignore a relevant unpublished appellate court opinion is incorrect. The mere fortuity of a decision not to recommend publication of a particular decision does not excuse an agency from complying with the law. *Eherenstorfer v. Div. of Public Welfare*, 196 *N.J. Super.* 405, 411 (App. Div. 1984). Regardless of whether such decision technically constitutes binding precedent, "an administrative agency must either apply the reasoning of an unpublished opinion, distinguish the situation on the facts, or explain its policy reasons for declining to follow the decision." *Div. of Motor Vehicles v. Festa*, 6 *N.J.A.R.* 173, 177 (Dir. of Motor Vehicles 1982).

forming the basis of the charges and Petitioner's performance of his duties as a teacher." *Pawlak v. Hopatcong Bd. of Ed.* 12 *N.J.A.R.* 25, 46 (St. Bd. 1988), aff'd on other grounds, No. A-5083-87T2 (N.J.App. Div. July 12, 1989). Simply stated, petitioner's claim must fail for lack of proof that the events underlying the criminal complaint were carried on within the scope of Bower's duties "as to time, place and subject matter." *Powers* at 597.

Bower's reliance on *Cilento v. Hillside Bd. of Ed.*, 1985 *S.L.D.* __(Comm'r Oct. 7, 1985) is misplaced. That case dealt with the legal question of whether a disorderly persons offense is a "criminal action" within the intendment of *N.J.S.A.* 18A:16-6.1. Both sides entered into a stipulation that the charge of simple assault "pertained to the performance of [Cilento's] duties as a teacher," and the precise issue of whether the alleged conduct occurred in the course of his duties was never addressed. In contrast, here the East Orange Board concedes nothing about the relationship between the charges and Bower's authorized duties.

Additionally, Bower's claim cannot succeed because of the absence of any final favorable disposition on the criminal charges. Dismissal of an indictment otherwise than on its merits is not a final disposition in favor of an employee. Therefore, in *Pawlak, supra,* the Appellate Division refused to allow reimbursement of counsel fees in connection with a pretrial intervention program resulting in dismissal of the criminal charges. Instead, the court construed *N.J.S.A.* 18A:16-6.1 as requiring that a person be found "blameless" or "determined innocent" in order to collect counsel fees. (slip op. at 10) Since petitioner "chose not to defend his innocence and did not take the risk of being found guilty," reimbursing him "would allow him to have it both ways "(slip op. at 8) Here too, Bower has never stood trial or been vindicated or exonerated from the criminal charges. Nor is the disposition "final" in any meaningful sense, given the fact that Bower was promptly reindicted on identical criminal charges. Reimbursable costs envisioned by *N.J.S.A.* 18A:16-6.1 are those reasonable counsel fees and expenses "of the original hearing or trial and all appeals." There having been no criminal hearing or trial leading to an acquittal there can be no reimbursable expenses.

Order

It is **ORDERED** that the relief requested by petitioner is denied.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

June 20, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

6/25/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties

JUN 26 1990
Date

Jaynes LaVecchia S.W.
OFFICE OF ADMINISTRATIVE LAW

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PAUL NORMAN BOWER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION 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. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner submits in exceptions that it is absurd for the determination as to whether or not the teacher is entitled to indemnification pursuant to N.J.S.A. 18A:16-6.1 to rest upon the nature of the false charges filed against him by a student. Petitioner contends the ALJ erred in so doing. Rather, relying on Powers v. Union City Bd. of Ed., 124 N.J. Super. 590, 595 (Law Div. 1973), petitioner argues that the charges against him arose "in the course" of his employment in that it occurred within a period and at a place where the employee was supposed to be while he was fulfilling his duties as a teacher. Thus, he claims, he is entitled to indemnification.

Petitioner also avers the ALJ erred in denying his indemnification claim stating that because he was reindicted there is an "absence of any final favorable disposition on the criminal charges." (Exceptions, at p. 4, quoting N.J.S.A. 18A:16-6.1) Petitioner claims the ALJ misreads the statute in that Section 6.1 reads, in pertinent part, that a teacher is entitled to reimbursement "should such proceeding be dismissed or result in a final disposition in favor of such person." (Id.) He claims the ALJ ignored the fact that the word "or" is used in the statute not the word "and." He claims there are circumstances where the charges may be dismissed and no final disposition is made. Petitioner claims that Thadeus Pawlak v. Board of Education of the Borough of Hopatcong, decided by the Commissioner January 27, 1988, aff'd, State Board October 4, 1989, can offer no support for the ALJ's assertions because that case dealt with pretrial intervention and not a situation wherein the charges were dismissed for lack of prosecution, as is the case herein.

Accordingly, petitioner seeks a decision reversing the initial decision and directing that he is entitled to the benefits of N.J.S.A. 18A:16-6.1.

By way of reply, the Board submits that the ALJ correctly analyzed the issues in this matter. It maintains the facts do not support petitioner's claim for indemnification for the costs of his criminal defense because he failed to establish that the events which bring him to this point arise "out of and in the course of the performance" of his employment duties. Relying on Powers, supra, the Board says the meaning of the statute should be interpreted strictly because the claim involves criminal conduct.

Further, the Board avers that there has been no showing that the events forming the basis of the indictment were carried on within the scope of Bower's duties "as to time, place and subject matter." (Reply Exceptions, at p. 1, quoting Powers, supra, at 597) It supports the ALJ's point that the stipulated facts fail to establish whether any of the alleged victims were Bower's students, whether the incidents took place on or off school premises, or whether they occurred during or after school hours. Consequently, the Board submits, petitioner's claim must fail.

Finally, the Board reserves the right to contest the reasonableness of counsel fees and requests the right for a hearing on the merits of same should the Commissioner decide in favor of petitioner and requests the right for a hearing on the merits of same in its reply exceptions. It claims that while the issue of reasonableness was raised parenthetically by the ALJ's opinion, it was not raised by the Board because petitioner had failed to satisfy the factual predicates. It further avers that since the matter never proceeded to plenary hearing, the issue of counsel fees and the reasonableness thereof were never addressed. Thus, the Board now submits, the legal fees seem excessive.

Upon his careful and independent review of this matter, the Commissioner affirms the findings and conclusions of the ALJ below. He adds the following.

In response to petitioner's contention that the events alleged in the first indictment "arose 'in the course' of his employment in that it occurred within a period and at a place where the employee was supposed to be while he was fulfilling his duties as a teacher." (Exceptions, at p. 3, quoting N.J.S.A. 18A:16-6.1), the Commissioner finds and determines, as did the ALJ, that until fully adjudicated with a final disposition, petitioner cannot argue that the events in question arose out of the course of his duties, thus, entitling him to indemnification pursuant to N.J.S.A. 18A:16-6.1. The record before the Commissioner consists only of a copy of the Indictment No. 615-2-87, dated February 10, 1987, a copy of the Order of Dismissal of Indictment No. 87-02-615, dated October 11, 1988 and a copy of Indictment No. 1313-3-89, dated March 15, 1989, along with copies of Board minutes and resolutions pertaining to petitioner's suspensions. Nothing in the record before the Commissioner speaks to the alleged circumstances of the case, when or where such alleged incidents occurred or under what

circumstances they may have occurred. The Commissioner finds that said record is simply too limited to draw any conclusions to either support or defeat petitioner's claim for indemnification. Accordingly, such argument is dismissed as being without merit, notwithstanding petitioner's contention that "it occurred within a period and at a place where the employee was supposed to be while he was fulfilling his duties as a teacher." (Exceptions, at p. 3)

Moreover, the Commissioner finds and determines that the dismissal of the first indictment, without prejudice, coupled with the reindictment filed approximately one year later for precisely the same allegations, can in no way be considered a final favorable disposition on the criminal charges. Petitioner's exception that the State Board decision in Pawlak, supra, is inapposite because it dealt not with a dismissal of an indictment but, rather, with Pawlak's participation in a pretrial intervention program, is misguided. As discussed by the ALJ, an unpublished Appellate decision in Pawlak*, required that a person be found "blameless" or "innocent." (Pawlak Appellate Division Slip Opinion, at p. 9) Said discussion considered situations other than PTI in arriving at its conclusion that one must be "determined innocent or exonerated" in order to seek indemnification under statutes such as N.J.S.A. 18A:16-6.1. Thus, petitioner's narrow reading of the State Board decision in Pawlak is dismissed as being without merit.

Finally, because the Commissioner adopts the ALJ's recommendation dismissing the relief requested by petitioner, the Commissioner does not reach the Board's request made in reply exceptions to consider the issue of the reasonableness of the petitioner's attorney fees for defense of the first indictment.

Accordingly, for the reasons expressed by the ALJ, as supplemented herein, the Commissioner dismisses the instant Petition of Appeal with prejudice. Such dismissal does not preclude the filing of a petition upon disposition of the second indictment.

COMMISSIONER OF EDUCATION

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* The Commissioner concurs with the ALJ's analysis of the legal import of unpublished decisions as explicated on page 4 of the initial decision for purposes of administrative review.

PAUL NORMAN BOWER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 10, 1990

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Love & Randall
(Melvin Randall, Esq., of Counsel)

On February 10, 1987, Petitioner was charged in a seven-count grand jury indictment with aggravated sexual assault and endangering the welfare of young children. On October 11, 1988, that indictment was dismissed without prejudice. However, on March 15, 1989, Petitioner was reindicted on the same charges.

On March 30, 1989, Petitioner filed a petition of appeal with the Commissioner seeking indemnification from the Board, pursuant to N.J.S.A. 18A:16-6.1, of his legal fees and disbursements incurred in defense of those charges.

On June 20, 1990, an Administrative Law Judge ("ALJ") recommended dismissal of the petition, explaining that the record was devoid of "any indication of any nexus between the conduct forming the basis of the charges and Petitioner's performance of his duties as a teacher," and that there had not been a final favorable disposition of the criminal charges.

On July 3, 1990, the second indictment against Petitioner was dismissed with prejudice.

On August 10, 1990, the Commissioner adopted the ALJ's findings and conclusions, and dismissed the petition. The Commissioner agreed with the ALJ that there was nothing in the record to support Petitioner's claim that the events alleged in the indictment arose out of the course of his employment, as required by N.J.S.A. 18A:16-6.1. Moreover, the Commissioner determined that the dismissal of the first indictment, coupled with the reindictment on the same charges, could in no way be considered a final favorable disposition of those charges.

The Commissioner made no mention of the dismissal of the second indictment, but noted that his decision did not preclude the

filing of another petition "upon disposition of the second indictment." By letter dated August 15, 1990, Dr. Seymour Weiss, director of the Bureau of Controversies and Disputes, advised Petitioner's attorney that the July 3 dismissal order was not considered by the Commissioner in rendering his decision since "mere dismissal of the charges does not in and of itself entitle your client to the relief he seeks."

Petitioner filed the instant appeal from the Commissioner's decision.

After a thorough review of the record, we remand this matter to the Commissioner for determination of Petitioner's entitlement to indemnification under N.J.S.A. 18A:16-6.1 in light of the dismissal of the second indictment. Under the circumstances, we find that requiring Petitioner to file another petition of appeal would elevate form over substance.

On remand, Petitioner has the burden of establishing 1) a nexus between the alleged conduct forming the basis of the charges and the performance of his duties in the district so as to support a finding that the criminal actions against him involved alleged acts or omissions arising out of and in the course of the performance of his duties, and 2) a favorable disposition of the criminal charges.

We do not retain jurisdiction.

December 5, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3557-90
AGENCY DKT. NO. 92-4/90

IN THE MATTER OF THE ANNUAL
SCHOOL ELECTION IN THE SCHOOL
DISTRICT OF THE TOWNSHIP OF
EAST HANOVER, MORRIS COUNTY

Cecelia M. Millea, defeated petitioner candidate

Thomas Millea, her husband, for petitioner

Andrea T. Maenza, successful candidate, respondent/intervenor

Philip Maenza, Esq., her husband, for respondent/intervenor

James J. Ryan, Board Secretary, and **Joan Luckowiak**, Superintendent of Schools, no appearance

Joseph Accardi, Esq., Board Attorney, no appearance

Record Closed: June 8, 1990 Decided: June 25, 1990

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

Cecelia M. Millea, a defeated candidate for school board membership in the annual school election of the School District of East Hanover, Morris County, on April 24, 1990, alleged there were procedural violations of statute at both district polling places during the voting process, the first concerning alleged failure of election workers to verify voters' signatures with signatures in the municipal voting record book and, secondly, procedural violations in the processing and canvass of civilian

absentee ballots that permitted persons to vote by civilian absentee ballots as well as to appear and vote at the polls. Her letter complaint requesting an inquiry by the Commissioner of the Department of Education was acknowledged and received by him on April 27, 1990, three days after the school election on April 24, 1990. The Commissioner's letter acknowledgment to defeated candidate Millea noted that the Board secretary "is hereby advised to notify appropriate school election officials to be present at the time of the inquiry." The Commissioner transmitted the matter to the Office of Administrative Law on May 8, 1990, for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

Subsequent to transmission, Andrea T. Maenza, successful candidate, filed in the Office of Administrative Law on June 5, 1990 a formal request, which was granted, to intervene in opposition to Millea's letter complaint In addition, intervenor Maenza alleged that there are some 51 absentee ballots still maintained in a vault at the Morris County Board of Elections that have not been tallied, allegedly because they were received at the Board late and were not delivered until after election day, for the reason that, allegedly, the return address envelopes mailed to applicants for civilian absentee ballots contained an erroneous return address. Intervenor contended the 51 ballots should be tallied and those votes counted retroactively, in order that the margin of her victory over Millea be increased and, more importantly, it was urged, that the school budget defeat should be changed.

The matter was heard in the Office of Administrative Law on June 8, 1990, before the undersigned administrative law judge sitting in the Municipal Court of the Township of Morris County and was concluded then.

GENERAL FACTS

The Township of East Hanover is a type II school district and is part of a regional high school district in Hanover Park High School. The East Hanover Board of Education consists of five members, with one seat to be elected for a three-year term at the April 24, 1990 school election. Only two candidates, Millea and Maenza, appeared on the machine ballot There were two polling places: one at Central School and one at Hanover Park Regional High School. Each polling place served four districts of the municipality. Central School for districts 1, 3, 5 and 6, and

Hanover Park High School for districts 2, 4, 7 and 8. There were four voting machines at each location, two for local and two for regional elections. Both polling places were open from 3 p.m. to 9 p.m. on election day. Official result of the election certified to the district by the Morris County Board of Elections was 438 votes for candidate Maenza and 426 for candidate Millea, the defeated incumbent. A certification of civilian absentee ballots by the Morris County Board of Elections (J-1) showed 48 such votes for successful candidate Maenza and 50 such votes for defeated candidate Millea. The current expense budget was defeated in a canvass of civilian absentee ballots by 47 no votes to 39 yes votes; the capital outlay budget was defeated by 49 no votes to 35 yes votes. There were 181 absentee ballots mailed out by the Morris County Board of Election to applying voters. At least 98 civilian absentee ballots were cast and counted; some 51 such ballots were regarded as late and not counted. The difference of 32 such ballots were apparently not cast.

DISCUSSION

Offered by and received from defeated candidate Millea was her statement of "three procedural issues (P-1) that impacted the outcome of the election." To the two issues isolated in her letter complaint filed with the Commissioner on April 27, 1990 was a third issue (P-1 at 2) in which she alleged the absentee ballot procedure was erroneous and misleading in that a total budget figure of $8,636,700 appeared when the actual figure otherwise submitted by the Board to the voters was only $7,486,764, a difference of some $1.2 million. P-1, Exhibit 3. She alleged that since she was the incumbent running for re-election and had openly supported the budget, the error "distorted the absentee voters' perception of both the budget and her candidacy, thus affording her successful opponent an unfair advantage with absentee voters. She conceded the budget question on the machine ballots was corrected prior to the election.

It should be noted that Millea's request of the Commissioner to conduct a recount of the machine ballots cast, made pursuant to N.J.S.A. 18A:14-63.2, 63.14, was granted and effected by the Commissioner through his delegee on May 26, 1990. The result confirmed the election results previously certified by the Morris County Board of Election and Maenza's defeat of Millea by 12 votes.

N.J.S.A. 18A:14-63.12 provides:

> Upon written request within five 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 ten qualified voters at any school election, the Commissioner of Education or his authorized representative shall inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred and if they affected the outcome of the election. [Emphasis added].

But school election law provides, in N.J.S.A. 18A:14-28, that civilian absentee ballots shall be forwarded to voters, voted and returned and the result thereof canvassed and certified by the county board of elections to the secretary of the board of education of the district in which the election is held, and shall be counted, in determining the result of the election, in the same manner as is required under the "Absentee Voting Law (1953)," N.J.S.A. 19:57-1 et seq. That law provides, in N.J.S.A. 19:57-24:

> . . . Disputes as to the qualifications of military service or civilian absentee voters to vote or as to whether or not or how any such military or civilian absentee ballot shall be counted in such [school] election shall be referred to the superior court for determination. [Emphasis added].

In consequence thereof, intervenor Maenza withdrew and dismissed her counter-pleading for relief concerning the 51 absentee ballots presently impounded, as being beyond the jurisdiction and power of the Commissioner to remediate under his controversies and disputes jurisdiction of N.J.S.A. 18A:6-9.

It is my view that similar disposition must be made as a matter of law to the two questions raised by defeated candidate Millea (first and third, P-1 at 3-4), which questioned whether or not or how many civilian absentee ballots should be counted. In In the Matter of the Annual School Election of the School District of the Borough of Rutherford, Bergen Bounty, 1974 S.L.D. 381, the Commissioner said:

> The [Commissioner] . . . denied a . . . request by [a candidate] for a recount of the absentee ballots in conjunction with a recheck of the voting machines in question. The basis for this determination was grounded on the fact that the Commissioner has consistently held in past decisions that he is without authority to make any determination with respect to

> the results of the counting of absentee ballots. He has held further that the procedures for counting such absentee ballots are set forth in Title 19 of the New Jersey statutes governing elections, and that he must accept the certification of the county board of elections which was previously made to the secretary of the board of education and included in the vote totals of a school election as required by N.J.S.A. 18A:14-28. See also, In the Matter of the Annual School Election of the School District of the Township of Monroe, Glouster County, 1973 S.L.D. 212, 215-16; affirmed State Board of Education, 1974 S.L.D. 1413. [Id. at 381.]

Millea's letter complaint, as modified by her claims in P-1 in respect of relief sought concerning civilian absentee ballots, therefore, should be, and is hereby, **DISMISSED**.

Millea's remaining allegation, as reflected in P-1 at 2, was to the effect that election workers did not compare signatures of voters as they appeared on a poll list and signature comparison record with the voter register book, because, in at least one instance at the Central School polls, she observed the poll list some 15 feet away from the table where voter registration books were kept. N.J.S.A. 18A:14-47 specifies that signature copy registers shall be used in each polling place during school elections and that an election officer must compare a voter's signature on the poll list with the signature in the signature copy register before handing the voter an official ballot. N.J.S.A. 18A:14-51. If the signature thus written in the poll list is the same or sufficiently similar to the signature in the signature copy register, the voter shall be eligible to receive a ballot. Under N.J.S.A. 18A:14-51 1, it is provided that the comparison of the signatures of a voter upon registration and upon election day shall be had in full view of the challengers. Under N.J.S.A. 18A:14-51.2, upon any question or challenge of a voter duly registered, it shall be the duty of the election board and the privilege of all of its members to put such questions as are proper to determine the right of the voter to vote. Millea testified that she was assisted by five challengers, including herself, each of whom served for approximately one hour in the two polling places. She alleged she did check new voters and found "specific evidence" of a voter who was allowed to vote when his signature did not compare to that in the registration book. Documentation in support thereof appeared in Exhibit 2 of P-1; but no apparent challenge under N.J.S.A. 18A:14-51.2 was ever made to that voter at the time he presented himself at the polls. Inspection of the exhibit does not reveal that the signature written on the poll list was sufficiently

dissimilar to that on the signature copy register; no reasonable conclusion can be drawn, therefore, that the vote cast represented an illegal vote, nor that the vote if illegal as cast so seriously affected outcome of the election as to thwart the will of the electorate. In In Re Wene, 26 N.J. Super. 363 (Law Div. 1953), the court said at 383:

> The rule in our State is firmly established that if any irregularity or other deviation from the election law by election officials be adjudged to have the effect of invalidating a vote or an election, where the statute does not so expressly provide, there must be a connection between such irregularity and the result of the election; that is, the irregularity must be the producing cause of illegal votes that would not have been cast or of defeating legal votes that would have been counted, had the irregularity not taken place, and to an extent to challenge or change the result of the election; or it must be shown that the irregularity in some other way influenced the election so as to have repressed a full and free expression of the popular will . . .

See also, N.J.S.A. 18A:14-63.12: the Commissioner shall "determine if . . . violations occurred and if they affected the outcome of the election."

Having considered the testimony of the parties, I find and determine that no such showing by defeated candidate Millea on the issue of alleged failure of signature comparison has been made even presumptively nor, in my view, has recitation of a mere possibility that an irregularity occurred in one polling place in respect of failure of appropriate signature comparison established that the practice was so pervasive as to affect the election outcome under the Wene standard The complaint of defeated candidate in Millea in that final respect, therefore, in my opinion, should be, and is hereby, **DISMISSED**.

CONCLUSION

For the foregoing reasons, I **CONCLUDE** (1) that the letter complaint of defeated candidate Millea, as modified in P-1, should be **DISMISSED** on those issues pertaining to questioning of the canvass of civilian absentee ballots for lack of appropriate jurisdiction herein; and (2) that the complaint concerning alleged improper signature comparison by workers at the polls likewise should be **DISMISSED** for failure of proof, under N.J.S.A. 18A:14-63.12. The election of Andrea

T. Maenza to the school board of the East Hanover Township School District in the annual school election of April 24, 1990, as heretofore certified by the Morris County Board of Elections to the district, is hereby **CONFIRMED**.

The Board is **ADMONISHED** to ensure, through its board secretary under N.J.S.A. 18A:14-63, proper conduct of future school elections, particularly with reference to signature comparison procedures under N.J.S.A. 18A:14-51, challenge procedures under N.J.S.A. 18A:14-51.2, 51.3 and procedures for printing and distribution of civilian absentee ballot under N.J.S.A. 18A:14-27. The Board is likewise cautioned to have available in future any and all necessary school election officials for resolution of inquiries ordered by the Commissioner.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

June 25, 1990
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

6/29/90
Date

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 02 1990
Date

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF EAST	:	DECISION
HANOVER, MORRIS COUNTY.	:	
	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law that the letter complaint filed by defeated candidate Millea, as modified in P-1, is hereby dismissed on those issues pertaining to the canvass of civilian absentee ballots for lack of appropriate jurisdiction before the Commissioner of Education. The Commissioner further adopts the findings and conclusions of the Office of Administrative Law that the complaint concerning alleged improper signature comparison by workers at the polls be dismissed for failure of proof, pursuant to N.J.S.A. 18A:14-63.12.

Accordingly, the Commissioner finds and determines that the election of Ms. Andrea T. Maenza to the School Board of East Hanover Township School District in the annual school election of April 24, 1990 as certified by the Morris County Board of Elections to the district is confirmed.

The Commissioner thus 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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ORDER AS TO MOTION
TO DISMISS
OAL DKT. NO. EDU 1414-90
AGENCY DKT. NO. 41-2/90

HUNTERDON LEARNING CENTER, AND M.L.G. ON BEHALF OF HER MINOR CHILD, E.M.,
Petitioners,
v.
DIVISION OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

Joseph J. Haskins, Jr., Esq., for the petitioners (Ferro, Lippman & Spiniello, attorneys)

Marlene Zuberman, Deputy Attorney General, for the respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: May 15, 1990 Decided: June 28, 1990

BEFORE BEATRICE S. TYLUTKI, ALJ:

This matter concerns the petition filed by Hunterdon Learning Center, and M.L.G. on behalf of her minor child, E.M., the petitioners, on February 20, 1990, asking for emergent relief. The emergent relief requested was the removal of the Hunterdon Learning Center (Center) from conditional approval status. The

respondent, the Division of Special Education, by giving the Center this status prevented it from accepting any new students. In addition, the petitioners alleged that the respondent's failure to remove the Center from this status was a violation of its constitutional equal protection and due process rights. The petitioners also alleged that certain regulations were unconstitutionally vague. The matter was transmitted to the Office of Administrative Law (OAL) on February 26, 1990, for determination was a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Prior to the prehearing conference, I was informed by a letter from Joseph J. Haskins, Jr., Esq., on behalf of the petitioners, that the Center had been removed from conditional approval status as of February 26, 1990, and therefore the petitioners no longer sought emergent relief in this matter.

By letter dated March 27, 1990, Deputy Attorney General Marlene Zuberman, on behalf of the respondent filed a motion to dismiss on the grounds that the case was now moot. Ms. Zuberman stated that since the Center was removed from conditional approval status, the only remaining issues in this matter were the petitioners' constitutional arguments. Ms. Zuberman argued that the OAL has no jurisdiction to entertain these remaining issues and that the proper forum is the Appellate Division of the New Jersey Superior Court pursuant to R. 2:4-1(b) (1990).

In response, Mr. Haskins argued that the matter is not moot and that there is a factual controversy as to whether the Center was entitled to have been removed from the conditional approval status on December 8, 1989. In response, Deputy Attorney General Zuberman argued that even if the petitioners were to show that the Center was entitled to removal from this status as of December 8, 1989, the OAL cannot grant any meaningful relief and therefore the continuation of the case was a waste of judicial resource and time.

At the prehearing conference, which took place on May 15, 1989, I gave the parties the opportunity to orally supplement their arguments as to the motion to dismiss. At that time, Mr. Haskins admitted that there was no substantive relief that could be offered at this time; however, he argued that the Center still wanted to proceed in order to clarify the applicable law and to develop a factual record. Ms. Zuberman again reiterated her position that there were no factual disputes, that

there was no relief that could be given to the petitioners if they were successful, and that the OAL was not the proper forum for the constitutional issues.

The record in this matter closed on May 15, 1990.

FACTUAL FINDINGS

Having reviewed the pleadings, I **FIND** that the pertinent facts in this matter are not in dispute. The Center is a State approved private school for the handicapped located in Califon, New Jersey. After an on-site review, the respondent placed the Center on conditional approval status, effective October 30, 1989, for alleged noncompliance with State and Federal regulations. The Center was required to prepare a corrective action plan in accordance with N.J.A.C. 6:28-9.1(d). As a result of being placed on this status, the Center could not accept any new students.

On December 8, 1989, the Center submitted a corrective action plan to the respondent; however, this plan was deemed unacceptable. It is the petitioners' position that the Center should have been removed from the conditional approval status when it filed the corrective action plan. In February 1990, the Center submitted a revised corrective action plan in an attempt to accelerate its removal from conditional approval status. When the respondent took no action on this plan, the Center on February 20, 1990, filed the petition in this matter. The respondent removed the Center from conditional approval status on February 26, 1990.

CONCLUSIONS OF LAW

It has been clearly established that issues which become moot or academic prior to a hearing are not proper subjects for judicial review, Anderson v. Sills, 143 N.J. Super. 432 (Ch. Div. 1976); Oxfeld v. N.J. State Bd. of Ed., 68 N.J. 301 (1975); In re Geraghty, 68 N.J. 209 (1975); Sente v. Clifton Mayor and Municipal Council, 66 N.J. 204 (1974). The bases for this position are: (1) judicial economy and restraint, (2) the courts will not decide cases in which the issues are hypothetical, (3) the courts will not consider cases where a judgment cannot grant an effective relief, (4) the courts will not consider cases where the parties do not have concrete adversarial interest. Idem.

In this matter, the petitioners argued that the issue of whether the Center should have been removed from the conditional approval status effective December

8, 1989, rather than February 26, 1990 is a question of regulatory interpretation and therefore is not moot. In support of their argument, petitioners rely on State Department of Health v. Tegnazian, 205 N.J. Super. 160 (App. Div. 1985). In that case, the Department of Health revoked a nursing home administrator's license and the Appellate Division reversed the final decision revoking the license. Therefore, the facts in the Tegnazian case are different and there is no language in that decision to support the petitioners' argument that this matter is not moot. Based on the facts before me, I **CONCLUDE** that I cannot grant any relief even if I determine that the Center should have been removed from conditional approval status on December 8, 1989. A review of the relevant regulations shows that no residual effect attaches to any change in the date on which the Center's status was changed.

As already stated, I find that there are no factual disputes in this matter, and I **CONCLUDE** that there is no need for a hearing to develop a factual record. Further, I agree with Ms. Zuberman's argument that where there are only constitutional issues, the case cannot be considered by OAL. See, Cicoria v. Pinelands Commission, 9 N.J.A.R. 167, 174 (1986), Abbott v. Burke, 100 N.J. 269 (1985).

I **CONCLUDE** that this matter is moot and I **ORDER** that the petition be **DISMISSED**.

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 days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

June 28, 1990
DATE

BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 3 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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HUNTERDON LEARNING CENTER, AND M.L.G., on behalf of her minor child, E.M.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
DIVISION OF SPECIAL EDUCATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Respondent filed timely reply exceptions thereto.

Petitioners' exceptions reiterate those arguments raised at hearing before the Office of Administrative Law. They aver that even though the Hunterdon Learning Center was removed from conditional approval status on February 26, 1990 because it complied with the directives of respondent, its compliance was done involuntarily as a matter of economic survival. They continue to allege that the relevant portions of the administrative code do not empower respondent to refuse to restore the school to approved status once the school submitted its corrective action plan. Because these matters remain unresolved, petitioners submit that the matter is not moot, as the ALJ concluded.

Additionally, petitioners claim that "because the applicable portions of the Code ostensibly vest unchecked discretion in Respondent," (Exceptions, at p. 2), the issue mentioned above is likely to recur, and therefore is not moot. They cite Middlesex County Bar Ass'n v. Parkin, 226 N.J. Super. 387, 390 (App. Div. 1988), Cert. denied 113 N.J. 380 (1988) for the proposition that the likelihood of a recurring issue was held to overcome a mootness argument under the facts of that case, where a shutdown of workers' compensation courts was the catalyst for commencing the action, even though courts were reopened subsequent to the commencement of said action.

Petitioners summarize their exceptions by submitting that there are more than merely constitutional issues remaining in this case and, therefore, the case should not be dismissed. Petitioners seek reversal of the initial decision.

By way of reply to petitioners' exceptions, respondent states it will rely on its two letter memoranda of law. It adds, however, that petitioners' "argument that the issue in this matter is likely to recur because the 'applicable portions of the Code ostensibly vest unchecked discretion in Respondent,' does not militate a hearing in this matter." (Reply Exceptions, at p. 1)

Rather, respondent claims that petitioners' attack on the amount of discretion the Code vests in the Division of Special Education is a facial challenge to the regulations and therefore properly belongs in the Appellate Division. Accordingly, respondent submits that the ALJ's initial decision is correct and should be adopted.

Upon a careful and independent review of the instant matter, the Commissioner affirms the findings and the conclusion of the Office of Administrative Law that this matter is moot. The arguments petitioners submitted in exceptions mirror those proffered at hearing, and raise no new considerations. The Commissioner finds that the ALJ fully and fairly disposed of such arguments in her initial decision and, thus, dismisses them as being without merit. It bears emphasizing that the record indicates that petitioners' counsel himself stated at the prehearing conference held on May 15, 1990 "that there was no substantive relief that could be offered at this time***." (See Initial Decision Order As to Motion To Dismiss, dated June 28, 1990, at page 2.) Said statement is uncontradicted in his exceptions.

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3562-90
AGENCY DKT. NO. 109-5/90

IN RE ANNUAL SCHOOL ELECTION HELD IN THE CITY OF LONG BRANCH SCHOOL DISTRICT, MONMOUTH COUNTY

James A. Vaccaro, Sr., petitioner, pro se
Malachi J. Kenney, Esq., on behalf of the Long Branch Board of Education (Kenney, Kenney, Gross & McDonough, attorneys)

Record Closed: June 26, 1990 Decided: June 29, 1990

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

James A. Vaccaro, Sr., (petitioner), a defeated candidate in the school election held April 24, 1990 in the Long Branch City School District, filed a letter May 1, 1990 with the Commissioner of Education requesting a recount of the ballots cast and an inquiry into the conduct of the election. The Commissioner transferred the matter of the inquiry on May 8, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. An inquiry was scheduled and conducted June 25, 1990 at the Oceanport Borough Municipal Building, Oceanport. Petitioner presented his proofs at that time which consisted soley of sworn testimony from his wife, Karen H. Vaccaro.

Findings are reached that petitioner's proofs fail to establish any violation of school election law, N.J.S.A. 18A:14-1, et seq. Therefore, the conclusion is reached that petitioner failed to establish the election was conducted in any manner contrary to law.

The undisputed facts of the matter are these. Petitioner was one of nine announced candidates for election for one of three, three year terms to membership on the Board at this election. Petitioner was unsuccessful in his quest. In fact, petitioner fell 16 votes short of tying the lowest tally of successful candidates. Petitioner thereafter filed his requested inquiry on the strength of what it is his wife told him after the election. On the strength of that information, petitioner's requested inquiry addresses alleged challengers, electioneering, asserted early closing of a polling place, and inaccurate tally of ballots, and absentee ballots. With respect to the latter allegation, this judge ruled on the record that the Commissioner of Education is without authority to make any determination with respect to the result of absentee ballots. See, N.J.S.A. 19:57-24. Therefore, evidence was limited to the allegations other than absentee ballots.

The testimony of petitioner's wife, Karen H. Vaccaro, establishes the following facts regarding each relevant section of petitioner's letter inquiry:

Electioneering

1. Ms. Vaccaro testified that she reported to the Garfield School Polling Place, one of seven polling places authorized for this election, between 8:35 p.m. and 8:40 p.m. Ms. Vaccaro testified she remaind in her automobile until shortly before the polls were scheduled to close at 9:00 p.m. Ms. Vaccaro's testimony shows her car was parked anywhere from 50 to 150 feet from the entrance to the polling place.

2. As Ms. Vaccaro waited in her automobile, she observed three individuals standing in front of the polling place. While she specifically identified those three individuals as a former board member, an individual whose wife was a candidate for city counsel, and the pastor of a local church, Ms. Vaccaro acknowledged that she could not hear whatever conversation was occurring between and among those three individuals as she sat in her car.

3. Ms. Vaccaro testified she observed three other individuals at separate times enter the polling place and that some words were exchanged between those individuals and the three persons who were standing in front of the entrance. Again, Ms. Vaccaro testified that she did not hear what was said.

4. Curiously, Ms. Vaccaro then testified when the three individuals observed it was she sitting in her car she heard either one or all of them exclaimed "Let's go" and they left.

The foregoing evidence constitutes all the proofs regarding petitioner's complaint of inproper electioneering. These facts do not establish as objective fact, nor inferential fact, nor prima facia proof, that the three individuals observed by Ms. Vaccaro standing in front of the entrance to the polling place were engaged in improper electioneering.

Challengers

1. Ms. Vaccaro's testimony regarding challengers is merely that when she entered the polling place at approximately 8:50 to 8:55 p.m., she observed a person she assumed to be a challenger because the person was wearing a badge seated with two other individuals, both of whom she identified as teachers. When the person identified as the challenger greeted Ms. Vaccaro, Ms. Vaccaro's testimony is that both teachers immediately ceased talking.

2. Petitioner, while not testifying under oath, represented at the opening of the inquiry that a particular candidate failed to sign an appropriate form designating an individual to act as a challenger. That form was not produced by petitioner, nor did petitioner explain how it is he acquired that information.

The foregoing constitutes all the proofs submitted by petitioner in support of his allegation of "challenger" being somehow improperly used, or appointed, or engaging in improper conduct during the course of the election. Such proofs fail to show any impropriety regarding challengers.

Early Closing of Election

1. Ms. Vaccaro testified that when she entered the Garfield School polling place, and after having observed the challenger seated with the two teachers above, she observed the election officials seated at the table. She also observed that the signature copy registers were closed and in the canvas bags which are generally used for transporting the signature copy registers. The time, according to Ms. Vaccaro, was 8:50 p.m. Ms. Vaccaro testified that the challenger mentioned above exclaimed that she was in a hurry to depart the polling place.

2. Ms. Vaccaro acknowledged that during the tir
inside the Garfield School Place polling p
appeared at the polling place to claim their r
was any person turned away by electior
properly being given their right to vote.
she observed the books in the canvas b
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IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE SCHOOL DISTRICT OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY.

COMMISSIONER OF EDUCATION

DECISION

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

Upon careful consideration, the Commissioner concurs with the ALJ that petitioner's proofs fail to establish any violation of election law through electioneering, improper behavior or early closing of polls, and that the one apparent challengers or tallying error, which did not affect the outcome of the election has already been cured by the Commissioner's recount decision May 21, 1990.

Accordingly, the Commissioner adopts the initial de of the Office of Administrative Law as the final decision i matter and confirms the April 24, 1990 election of Violeta Homer Tricules and Shelly T. Owens to three-year terms on t Branch Board of Education.

IT IS SO ORDERED.

COMMISSIONER

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3561-90
AGENCY DKT. NO. 107-4/90

IN THE MATTER OF THE 1990
SCHOOL ELECTION HELD IN
THE SCHOOL DISTRICT OF
BERLIN TOWNSHIP,
CAMDEN COUNTY

William Neumann, petitioner, *pro se*

Charles A. Rizzi, Jr., Esq., for respondent (Capehart and Scatchard, attorneys)

Record Closed: June 15, 1990 Decided: July 6, 1990

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

William Neumann (petitioner) an unsuccessful candidate for school board in Berlin Township School District petitioned the Commissioner of Education (Commissioner) for an investigation and invalidation of the election held on April 24, 1990. On May 8, 1990 the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A hearing was held on June 15, 1990, when the record closed. A list of exhibits placed in evidence is appended to this decision. Petitioner and Ralph Jedlicka, the Secretary of the Berlin Township Board of Education (Board) were the only witnesses. Petitioner conceded that he was not alleging that the school administration intentionally placed the name of Walter Neumann rather than his name, William Neumann, on the ballot. Since he lost by only four votes, he argues

that, *prima facie*, use of the wrong name could have resulted in his failure to obtain five votes and in all the circumstances, fairness requires that a new election be held.

The following facts were uncontroverted, and I **FIND** them to be true.

Ralph Jedlicka, a former elementary school teacher, was appointed to the position of secretary of the Board on July 1, 1989, upon the retirement of the former secretary, who trained Jedlicka for his duties, one of which is preparing for the annual elections. Jedlicka knew Neumann as the parent of a student, but did not know his first name. The Board uses voting machines so Jedlicka scheduled a drawing for positions on the ballot. He placed the names of four candidates for the three three-year terms on small slips of paper (R-1). The names were taken from the filed petitions. When the slip which had William Neumann written on it was drawn, Jedlicka read the name off the slip as Walter Neumann and it was duly recorded as such by the Superintendent's secretary on the Report of Drawing for Position. The report was typed from the draft and thereafter all items were proofread against the typed draft, which said Walter Neumann. Thus the published public notices in newspapers, the machine ballots, and the absentee ballots said "Walter Neumann."

Jedlicka inspected the machines and ballots. He did not give notice to the candidates of their right to inspect the machines or the time and place they could do so. Petitioner never saw the legal notices, never knew he had a right to inspect the machines and had no knowledge until he himself voted at about 6:10 p.m. that an incorrect name was on the ballot. Petitioner works in the corrections system, and no one reached him at work to advise him of the error. Jedlicka did not learn of the error until after 6:00 p.m., when election workers told him. Jedlicka spoke to the judge of the election who, in turn, called the county board of elections. The county office said they would check into it. When the machine votes were counted for the three-year terms the results were: Edwards 205; Reid 178; Murren 144 and Neumann 140: Neumann and Murren each had two absentee votes. The three winning candidates were all incumbents. A new election would cost about $2,000.

Three newspapers published articles prior to the election in which the candidates were named. The local newspapers correctly named William Neumann. A county wide and a Philadelphia newspaper named Walter Neumann as the candidate. Petitioner saw one of these articles and assumed the paper had printed a typographical error. Petitioner had disseminated about five hundred fliers in five or six neighborhoods. In his fliers, petitioner referred to himself and signed as "Bill"

Neumann His letterhead said "W.E. Neumann." The printed machine ballot displayed the last names of candidates in bold face and twice the size of first names Petitioner admits that no one has told him, "I would have voted for you if I saw your name," but most people know him as Bill and his son as Billy and some do not know his last name

Conclusions and Disposition

N.J.S.A. 18A:14-42b contains the following provision:

> b. Written notice of the time and place when the machines will be prepared for use at the elections shall be mailed to each candidate to be voted upon at such election, stating the time and place where the machines may be examined, at which time and place said candidates shall be afforded an opportunity to see that the machines are in proper condition for use in the election;

I **CONCLUDE** that the secretary of the Board violated the statute. Had he not done so, it is very likely that his inadvertent error would have been corrected with no damage done. Although it is true that petitioner might not have sent a representative to view the machines or that his representative might have failed to see the error, offering the opportunity to cure any such error would weigh in the Board's favor.

N.J.A.C. 6:24-6.5 effective May 5, 1986 sets the standard of review:

> 6:24-6.5 Finding of error/relief
> Where the commissioner finds as a result of a recount or **an inquiry** that an error has occurred which alters the result of the election **or that irregularities have occurred sufficient to influence the outcome,** he or she shall order such relief as is appropriate.

Prior to its amendment, the rule was:

> Where the Commissioner finds as a result of a recount that an error has occurred which alters the result of the election, he shall order such relief as is appropriate.

Board counsel argues that despite the irregularities in this case, petitioner has not proved that correction of the error would have resulted in a change in the outcome. The Board cites *In the Matter of the Annual School Election held in the*

School District of the Borough of Point Pleasant, Ocean County OAL Dkt. No. L587-87 (April 27, 1987), Commissioner's decision (June 4, 1987) for the proposition that despite irregularities, if the will of the people has been fairly expressed and determined and that will has not been thwarted, the elected will not be set aside. In the Point Pleasant election petitioner received 580 votes whereas his winning opponent of the same last name received 649 votes. The difference of 69 votes was overwhelming. The only violation was the failure of the Board to give notice of the time and place machines could be inspected. It was not the Board's fault that both candidates had the same last name. In his decision the Commissioner noted that the petitioner failed to demonstrate that the single violation of school law influenced the outcome of the election. Neither the Commissioner nor the Administrative Law Judge mentioned *N.J.A.C.* 6:24-6.5, but the Commissioner used the standard in that rule in determining the case.

In a West Orange 1978 election case, cited by the respondent, there was more than one irregularity, but the losing candidate received 57 votes fewer than the winner and did not prove that misdirection of absentee ballots which caused numerous absentee ballots to be late and not counted would have changed the results. To do so, she would have had to bring 58 or more absentee voters whose ballots were not counted to testify they voted for her. This case *In the Matter of Annual School Election in West Orange* 1978 *S.L.D.* 360 is therefore not on point because of the magnitude of the disparity between the votes for the winner and the loser. In a 1974 case, however, a new election was mandated due to a widespread disregard of the election laws, but because the number of votes cast illegally was known and could not have affected the front runner due to his vote margin, only two seats were to be filled in a new election. *In re Annual School Board Election held in Township of Wayne,* 1974 *S.L.D.* 1078., App. Div. December 23, 1974.

In *In the Matter of Annual School Election of Lower Alloways Creek* 1975 *S.L.D.* 276, the losing candidate had eight fewer votes than the winner. The losing candidate was given the right to prove noneligible persons voted. Under the *Wayne* decision no new election would be mandated unless the loser could prove there were at least eight illegal votes and, to the extent possible, for whom they were cast. *Application of James T. Murphy,* 101 *N.J. Super.* 163 (App. Div. 1968).

Minor irregularities will not void an election. In the instant case, it was not charged that illegal votes were cast. As to an irregularity, there must be a connection between the irregularity and the result of the election, it must be shown

that the irregulatory influenced the election so as to have repressed a full and free expression of the popular will. *In re Wene*, 26 *N.J. Super.* 363, 383 (Law Div. 1953).

The irregularity here was failure to give notice to candidates to check the machine and the machine ballots. Precedent dictates that this violation is not cause for a new election. If the right to inspect had been exercised, however, the printing of the wrong name would have been discovered before the election. In this case, some persons knew the candidate only as "Bill" and might not have been sure of his last name. Petitioner could not prove that four persons failed to vote for him because they did not recognize the name "Walter" Neumann. It is certainly possible: one can reasonably theorize that one or two people were confused. Unfortunately it is only possible to theorize or speculate, for there is absolutely no proof that even one person, let alone four, did not vote for petitioner due to the erroneous first name on the ballot. I **CONCLUDE** that, pursuant to the case law discussed above, petitioner has not proved that the irregularities which occurred were sufficient to influence the outcome of the election.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis does not so act in forty-five 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 **DR. JOHN ELLIS** for consideration.

July 6, 1990
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

DATE

Segmon Weems
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 12 1990
DATE

Jacquee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF BERLIN, CAMDEN COUNTY.	:	
	:	

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

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner has failed to meet his burden of proving that the irregularities which occurred during the 1990 school election in respondent's district were sufficient to influence the outcome of the election so as to have repressed a full and free expression of the popular will pursuant to the standard so stated in In re Wene, supra. In so concluding, however, the Board is admonished to ensure, through its board secretary under N.J.S.A. 18A:14-63, strict compliance with all school election laws.

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

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1128-89
AGENCY DKT. NO. 21-1/89

KATHLEEN MEGARA,
Petitioner,
v.
BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

Charles H. Goldstein, Esq., for petitioner (Selikoff & Cohen, attorneys)
Patrick J. Moore, Esq., for respondent (John D. Wade, attorney)

Record Closed: May 15, 1990 Decided: June 29, 1990

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

Kathleen Megara, a teacher in the employ of the Black Horse Regional School District Board of Education (Board), filed a Petition of Appeal to the Commissioner of Education seeking an Order by which the Board would be obligated to grant her an additional year of military service credit for salary purposes under N.J.S.A. 18A:29-11 in addition to the two years credit it already granted her. The Board denies petitioner has such a legally enforceable claim against it. After the Commissioner transferred the matter on February 15, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted March 5, 1990 at the Stratford Municipal Court, Stratford, New Jersey, after which the

parties filed a letter memorandum in support of their respective positions. Petitioner's letter memorandum was filed beyond the time originally set, and the record remaind open for 15 days in the event the Board chose to respond. The record closed May 15, 1990.

Findings are reached in this initial decision that petitioner did in fact serve on active duty in the United States Navy for at least three years. The conclusion is reached that under N.J.S.A. 18A:29-11 petitioner is entitled to receive an additional year of military service credit for salary purposes in addition to the two years already credited her by the Board.

FACTS

The facts are not complex, nor are they in dispute. On September 1, 1969 petitioner enrolled at Villanova University as a student in its nursing program leading towards a baccalaureate degree. Two years later, on September 1, 1971, petitioner enlisted in the United States Navy. Petitioner was ordered by her military superiors to continue attendance at Villanova University in pursuit of a baccalaureate degree in nursing. Petitioner was further obligated to report to the Commanding Officer of the Naval Reserve Officer Training Corps at Villanova University on a daily basis. During petitioner's stay at Villanova, her tuition was paid and she was paid by the Navy through her third and fourth year of studies until she was awarded her baccalaureate degree. Subsequent to her acquisition of the degree in May or June 1973, she then was assigned basic training after which she was assigned to a naval hospital. Petitioner remaind on active duty until December 31, 1974.

Petitioner, other than reporting to the officer at Villanova on a daily basis, had no other assigned duties from the United States Navy between 1971 through 1974. As a student, petitioner returned to her own home during school holiday recesses, and during school vacation time or, alternatively, petitioner would take leaves of absences without pay ostensibly from the Navy during the 1972 and 1973 summer. The United States Navy considers petitioner to have been on active duty with it between 1971 through 1974.

The foregoing facts are not disputed by the parties and it is upon the foregoing basis petitioner demands the extra year of military service credit for salary purposes.

ANALYSIS

The Board objects to petitioner's demand for another year of military service credit for salary purposes under the law on the grounds that the "active duty" petitioner served is not the active duty contemplated in the statute. The Board argues in this regard as follows:

> The statute in question was initially enacted in 1954, immediately after the Korean War. As the Court is aware the year of enactment was also less then ten years after the cessation of hostilities in World War II. Obviously, the New Jersey Legislature wanted to reward these brave men and women who risked so much in these times of crisis.
>
> Although respondent does not take the position that the purpose of the military services credit law was to reward service men and/or service women only when they serve in time of war, there is at least one New Jersey Supreme Court case that seems to indicate that this was the intent of the legislature. In Lavin v. Hackensack Board of Education, 90 N.J. 145 (1982), the Supreme Court of New Jersey stated that, "the legislative purpose of N.J.S.A. 18A:29-11 is to reward veterans for service to their country in time of war." 90 N.J. at 151. See also, Camden County Vocational v. Board of Educ., 207 N.J. Super 23, 26-27 (App. Div. 1986). However, respondent is not asking the Court to endorse such a conservative position. Respondent merely wishes to the Court to render a fair and reasonable decision after considering the facts in this matter * * *
>
> Respondent's point in enumerating the aforesaid facts is that, when comparing them to the legislative intent as surmised from the time of inactment and judicial interpretation, it seems absurd to believe that the legislature intended to reward petitioner for attending college at the Navy's expense. What petitioner claims was "military service" was actually enhancement of her civilan career at the expense of US taxpayers. Thus, petitioner has already been rewarded for "service to her country" by the Navy picking up the tab for her obtaining her nursing degree, as well as the two years military service credit already granted to her by respondent * * *

Petitioner contends that the sole issue presented in this case is whether petitioner, admittedly on active duty with the United States Navy between September 1971 through December 1974, is entitled to three years military service credit for salary

purposes under N.J.S.A. 29-11. Petitioner points out that unlike N.J.S.A. 3A:23-1 which limits leaves of absences without loss of pay or time to those engaged in field training, the legislature provided no such limitation on active duty or training in the statue here under consideration. Petitioner argues:

> it is uncontradicted that [petitioner] served during the Vietnam Era and that further, her testimony and the documentation presented indicated that her active duty was considered to occurred during the Vietnam era, which for purposes of military classification was considered in time of war. Furthermore, Lavin, supra, and Camden County Vocational, supra, shed no light on either a legislative or judicial interpretation of what is considered active duty or service. However, since the legislature has chosen not to limit what is considered active duty, the only appropriate reliance and guideline must be the military's definitation. As argued, the legislature had the knowledge and ability to limit the scope of military considerations as it did in N.J.S.A. 38:23-1. It has not done so in N.J.S.A. 18A:29-11 and the respondent has presented no argument to disrupt the plain launguage of the statue. The burden and benefits analysis that Respondent seeks to place on the statue, while creative, has no foundation in law * * *

It is noted that N.J.S.A. 18A:29-11 provides as follows:

> Every member who, after July 1, 1940 has served or hereafter shall serve, in the active military or naval service of the United States or of this state, including activity service in the women's army corps, the women's reserve of the naval service, or any similar organization authorized by the United States to serve with the army or navy, in time of war or in an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or instutition of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments.
>
> Nothing contained in this section shall be construed to reduce the number of employment or adjustment increments to which any member may be entitled under the terms of any law, or regulation, or action of any employing board or officer of this state, relating to leaves of absence.

In this case, it is clear that the United States Navy considered petitioner to be on active duty for the period September 1, 1971 through December 31, 1974 despite the fact that at all relevant times she was a student enrolled at Villanova University in pursuit of a baccalaureate degree. Nevertheless, the fact that petitioner's active duty was to continue her pursuit of a baccalaureate degree does not nor should it demean the active duty status in which the United States Navy placed her. Service to our country takes on many forms and surely the need for nurses by all branches of the military is apparent in light of the ultimate purpose of any society maintaining an armed militia.

Active duty is not defined by the legislature in its expression which grants military service credit for salary purposes to those who serve our country. This forum certainly should not provide a restriction to active duty, directly contrary to what the United States Navy considers active duty, particular when the legislature itself could have provided a more restrictive view of that concept should it have so desired. The fact that the legislature did not so desire is apparent through the absence in its expression of what constitutes active duty.

Therefore, petitioner's military service between September 1, 1971 through December 3, 1974 must be considered as having qualified her for a minimum of three years military service credit for salary purposes under N.J.S.A. 18A:29-11. That being so, the Board is hereby directed to grant Kathleen Megara an additional year of military service credit for salary purposes retroactive to September 1, 1987, the date petitioner was granted the initial two years of military service credit by the Board.

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.

June 29, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

7/2/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 0 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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KATHLEEN MEGARA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BLACK HORSE PIKE REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful and independent consideration, the Commissioner agrees with the findings and conclusions of the ALJ. Specifically, he concurs that petitioner was on active duty during the period in dispute and is therefore entitled to an additional year of military service credit for salary purposes under N.J.S.A. 18A:29-11.

Accordingly, the initial decision is adopted as the final decision in this matter for the reasons stated therein, and the respondent Board of Education is hereby directed to grant petitioner salary credit consistent with the instructions of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5854-89
AGENCY DKT. NO. 203-6/89

CARMEN DI SIMONI,
Petitioner,
v.
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT # 1, PASSAIC COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Richard M. Salsberg, Esq., and Richard H. Bauch, Esq., for respondent (DeMaria, Ellis & Hunt, attorneys)

Record Closed: June 18, 1990 Decided: July 9, 1990

BEFORE JAMES A. OSPENSON, ALJ:

The position of Carmen DiSimoni as academic supervisor, which required a principal certificate and in which he was tenured in service with the Board of Education of the Passaic County Regional High School District # 1, Passaic County, was abolished by the Board in or about April 1989. Petitioner was returned to a classroom teaching position. In a petition of appeal filed in the Bureau of Controversies and Disputes of the Department of Education on June 28, 1989, petitioner alleged that the Board continued in its employ a non-tenured teaching staff member (John Wallace) in the position of associate principal of student activities, which requires a principal certificate and in which petitioner is qualified as certificate holder to serve. It was alleged that as a tenured administrator requiring a principal certificate, who was the subject of a reduction in force, petitioner has greater right to the position of associate principal of student activities than does the

non-tenured incumbent holder of the position, Wallace. Petitioner sought judgment directing his instatement in the position of associate principal of student activities, together with differential back pay and emoluments. In its answer, the Board admitted the sequence of events generally but denied the incumbent holder of the position of associate principal of student activities is not tenured and denied that Board action was improper or that petitioner is entitled to judgment as demanded. The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on August 8, 1989 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, the matter came on for prehearing conference in the Office of Administrative Law on October 26, 1989 and an order was entered. Petitioner was ordered to give notice to John Wallace, as associate principal of student activities, of his right to move for leave to intervene and/or participate in the matter, pursuant to N.J.A.C. 1:1-12.1 et seq. Such notice issued by certified mail on November 16, 1989 (P-1); no motion for leave to intervene was thereafter filed in the cause; the right to do so, therefore, is deemed waived.

The parties were 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 necessary, which thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, the matters at issue were to be addressed and resolved as if on cross-motions for summary decision, on pleadings, admissions, stipulations, documentation and memoranda of law, in accordance with N.J.A.C. 1:1-13.1 et seq. Stipulations and memoranda of law having been filed, the record closed on June 18, 1990.

At issue are whether petitioner's tenure, certification and/or seniority rights were violated by the Board when it transferred him to a classroom teaching position and continued in its employ an untenured or less senior employee than he in the position of associate principal of student activities; and, if so, whether petitioner is entitled to relief as demanded.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

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

1. Petitioner, Carmen DiSimoni, is tenured in the district as a teaching staff member, having been employed by the Board in the following positions with all requisite certifications:

1959-84	Teacher of social studies
1984-85	Curriculum coordinator whose duties included teaching three (3) classes daily
1985-89	Academic supervisor
1989-Present	Teacher of social studies

2. During the 1984-85 school term, petitioner was appointed to the position of "Curriculum Coordinator", an unrecognized title.

3. On or about November 27, 1984 the Board applied to the county superintendent of schools, Gustave F. Perna, for approval of a number of unrecognized titles including the curriculum coordinator position held by petitioner. The certificate required for the position was a principal/supervisor certificate. Attached as Exhibit A is the request for approval of unrecognized titles with attachments submitted by the superintendent, Dr. Louis R. Centolanza, dated November 27, 1984.

4. Approval was given by the county superintendent on March 1, 1985 for use of the unrecognized title "Curriculum Coordinator" as submitted by the Board.

5. Commencing with the 1985/86 school term, petitioner was assigned to the position of "Academic Supervisor", also an unrecognized title.

6. On or about October 24, 1985, the superintendent requested from the county superintendent approval for use of several unrecognized titles including the title of "Academic Supervisor (Supervisor)" to which

petitioner was assigned, and the title of "Associate Principal in Charge of Student Activities (Asst./Vice Principal)," pursuant to Exhibit B annexed hereto, both positions requiring a principal certificate. Approval was given by the county superintendent on or about February 3, 1985. The request and approval, with attachments, is attached as Exhibit B.

7. Petitioner served in the position of academic supervisor commencing with the 1985/86 school term until June 30, 1989, when the Board abolished the position. Petitioner thereafter returned to his former position as teacher of social studies, in which position he continues to serve as of date of stipulation.

8. The present holder of the position of associate principal in charge of student activities, John Wallace, was appointed to that position effective August 1, 1987 and continues to serve in that position as of date of stipulation.

9. John Wallace is tenured in the district, having been employed by the Board in the following positions with all requisite certifications:

1968-87 -	Teacher of social studies
1987-Present -	Associate principal in charge of student activities

10. Annexed as Exhibit C is the request for approval of unrecognized titles sent by the Board to the county superintendent on October 28, 1987 and approved on April 22, 1988, concerning the academic supervisor and associate principal in charge of student activities, inter alia.

11. Annexed as Exhibit D is the Board's appointment and compensation schedule for the academic year 1987-88, regarding the individuals holding the positions of associate principal in charge of student activities (Anthony DePasquale) and academic supervisor (Carmen DiSimoni) during 1987-88. The schedule was incorporated into the Board's budget for 1987-88.

DISCUSSION

Parenthetically, it may be noted, although the parties have recognized (finding no. 9) that John Wallace is presently tenured not only in the position of teacher of social studies for service from 1968-87 but in the position of associate principal of student activities for service in that position from August 1, 1987, a 12-month position, until more than two years thereafter in August 1989, tenure in that position, under N.J.S.A. 18A:28-6, had not been acquired by Wallace at the time petitioner filed his petition on June 28, 1989. Petitioner asserted that because of his "tenure" he had a greater entitlement to the position of associate principal in charge of student activities because of that circumstance. Pb. at 5. Although factual circumstances may have changed since the time the petition was filed, I shall nevertheless address the issues petitioner raises, for the sake of the discussion only, as if all rights between the parties were fixed as of the filing date. Petitioner's essential argument is this:

> . . . In the final analysis, petitioner's rights to the position of associate principal in charge of student activities are guided by the fact that he has accrued tenure by serving in two unrecognized titles [curriculum coordinator 1984-85 and academic supervisor 1985-89] over the course of five years, both of which required a principal's certificate. . . . [Wallace], holder of the associate principal's position, did not accrue tenure in said capacity until August 1989, after the within petition of appeal was filed. At the time the petition was filed, petitioner was tenured and the holder of the associate principal position was not. Based on the Capodilupo and Bednar decisions of the Appellate Division[1] and the Commissioner decisions which have since followed, petitioner asserts that because of his tenure he had a greater entitlement to the appointment to the position of associate principal than did Wallace, who in June of 1989 at the time in which this petition of appeal was filed did not have tenure. . . .
>
> While the function of the positions of curriculum coordinator and academic supervisor may differ from that of the associate position, they appear to be on the same organizational plan, require the same certification [that of principal], and have the individual holding the said positions reporting to the superintendent. There is no question but that petitioner is "qualified" to hold the position of associate principal. . . . [Pb. at 5].

[1]See 6-7 infra.

Petitioner's claim to "tenure" bears analysis. There is little question that he has acquired it, but his tenure is in the position of academic supervisor for service in the position under N.J.S.A. 18A:28-6 in 1985-89. Though the position of academic supervisor is an unrecognized if approved title by the county superintendent, that it is a separate tenurable position from that of associate principal in charge of student activities is clear from the evidence. The only commonality between the two positions is the certification requirement imposed by the Board and approved by the county superintendent: that of "principal." Otherwise, the two positions are differentiable under N.J.S.A. 18A:28-5, 6. N.J.A.C. 6:11-10.4(c) notes the supervisor endorsement is required for supervisors of instruction who do not hold a school administrator's or principal's endorsement. A supervisor is any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. The vice principal position is a separately tenurable position and is so recognized under N.J.A.C. 6:11-10.4(b). That the two positions here are factually differentiable in the view of the district is evidenced by analysis of job descriptions in Exhibits B, C and D.

Petitioner's claim, therefore, must be tested against analysis of those authorities upon which he principally relies. In Capodilupo v. West Orange Township Board of Ed., 218 N.J. Super. 510 (App. Div. 1987), it appeared Capodilupo had been employed by the Board for five years teaching secondary school physical education, holding an instructional teaching certificate endorsed in both elementary and secondary physical education. He was tenured in the position and had never taught elementary physical education. Thus, he was a tenured teacher seeking instatement to a position for which he was certified but in which he had acquired no demonstrable experience. The two candidates whom he sought to replace had experience in the elementary school position and were certified but had not acquired tenure. The Appellate Division affirmed the State Board of Education and the latter's ruling that a tenured teacher seeking instatement within the endorsements on his instructional certificate is entitled to preference in a rif as against non-tenured applicants with the same certification. Id. at 515. In Bednar v. Westwood Board of Ed., 221 N.J. Super. 239 (1987), Bednar, a tenured teacher holding an instructional certificate with a comprehensive subject field endorsement in art, worked as a full-time elementary art teacher until his position was reduced to a part-time elementary art teaching position. Another untenured high school or seventh-eighth grade art teacher was continued in the Board's employ, although he

had been employed less than two years and thus did not have tenure. The Appellate Division held that Bednar by his tenure as an art teacher could avoid a rif by claiming the secondary school job of a non-tenured art teacher with experience in the specific category of secondary art. The statute, N.J.S.A. 18A:28-10, said the Appellate Division, does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority." Judgment of the State Board to the contrary was reversed, since the State Board's approach tended to erode tenure rights that appear plain on the face of the statute. Id. at 241-3.

The precise facts of neither Capodilupo nor Bednar are apposite here. Though both raised claims of tenure and certification, the tenured position here from which petitioner raises claim to that held by Wallace is a claim to another or different tenurable position, one in which petitioner never saw service. The issue presented then becomes whether on the basis of petitioner's having held a position of general supervisor he may now claim the position of assistant principal merely on the basis of a principal's certificate endorsement when he has had no service in the other tenurable position. As argued by the Board, the Commissioner in DeCarlo v. Board of Ed., Borough of South Plainfield, 1988 S.L.D. -- (August 4, 1988) has ruled one may not so claim:

> . . . Because supervisors and assistant or vice principals are separately tenurable positions pursuant to N.J.S.A. 18A:28-5, petitioner acquired tenure as a supervisor, not a vice principal, notwithstanding the fact that he may have also held a principal's endorsement. Therefore, he had no claim to the position of vice principal. The Commissioner so finds notwithstanding the Board's having required such general supervisors to hold a principal's endorsement. . . . An absurd result would ensue if mere possession of the principal's certificate could grant petitioner "bumping" rights over other assistant principals and principals without having served in a principal's capacity. . . . Moreover, the Commissioner's review of the job description for the position in question tends to reflect the fact that although there is overlap, there are significant distinguishing duties between the position of general supervisor and either an assistant principal A or assistant principal B that inure [sic] against any argument suggesting bad faith on the part of the Board as a means of defeating petitioner's tenure and seniority rights.

In Kaprow v. Board of Ed., Township of Berkeley, Ocean County, 1989 S.L.D. -- (November 29, 1989), the Commissioner said he:

> . . . fully endorses the ALJ's view that tenure attaches to the position in which the requisite service was rendered, so that petitioner's claims to the superintendency and various elementary teaching positions can be disposed of without further elaboration. Petitioner has never served, nor does he purport to have served, as an elementary school teacher. . . . The Commissioner rejects as unfounded in law and contrary to sound educational policy the notion that tenure attaches to every endorsement on every certificate held by a teaching staff member regardless of the position in which he or she acquired tenure. . . . Simply put, the cases relied upon by petitioner stand for no more than the proposition that within the scope of the position in which tenure was acquired, seniority regulations cannot be invoked to retain a non-tenured teacher at the expense of a tenured one. These cases did not deal with, nor did the court speak to, holders of more than one type of certificate; neither was the court concerned with claims to positions in more than one of the separate and distinct categories enumerated in N.J.S.A. 18A:28-5. . . . The Commissioner continues in his conviction that tenure rights are not transferable to the position in which one has not achieved tenure. . . .

Based on the foregoing, I **CONCLUDE**, as did the Board in its arguments, that petitioner here acquired tenure only in the position of supervisor, specifically academic supervisor, a position within the meaning of N.J.A.C. 6:11-10.4(c), which required possession of only a supervisor's certificate despite the higher certification ostensibly imposed by the Board and approved by the county superintendent. As suggested by the Board, the descriptive language "supervisor" on request for approval of unrecognized titles in relation to the academic supervisor position can have no meaning other than that the position was proposed as warranting the legal title of supervisor. In contrast, the county superintendent determined that the associate principal position warranted and should be approved under the legal title of "assistant/vice principal," and thus by implication be tenurable separately under the language of N.J.S.A. 18A:28-5 from that of academic supervisor. The case of Grosso v. Board of Ed., Borough of New Providence, Union County, 1990 S.L.D. -- (State Board March 9, 1990) is not to the contrary in its statement that "tenure is achieved in and tenure protection attaches to all endorsements upon a teacher's instructional certificate." Id., slip op. at 4-5. Such positions are not separately tenurable as are those of supervisor and assistant principal.

CONCLUSION

Based on the foregoing, I **CONCLUDE** the petition in this matter should be, and it is hereby, **DISMISSED**, insofar as it made claim to the position of associate principal of student activities held by Wallace based on petitioner's possession of a principal certificate with no attendant service and with antecedent tenure only in the position of academic supervisor. Petitioner's rights remain those of preferred eligibility for reemployment as academic supervisor under N.J.S.A. 18A:28-12.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis does not so act in forty-five 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(c).

I hereby **FILE** this initial decision with **DR. JOHN ELLIS** for consideration.

July 9, 1990
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

7/11/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 13 1990
Date

OFFICE OF ADMINISTRATIVE LAW

amr

CARMEN DI SIMONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioner cites three exceptions to the initial decision, which are summarized, in pertinent part, below.

Petitioner first claims that his tenure status and the nontenure status of John Wallace, at the time in which the instant Petition of Appeal was filed, are controlling. Petitioner argues that any analysis of his claim must be in the context of the rights between the parties as they existed at the time of the filing of the Petition of Appeal, pursuant to N.J.A.C. 6:24-1.1 et seq.

> ***No Petitioner can be placed in a position of having to litigate a moving target. The claim being asserted must be litigated and ultimately adjudicated within the context of the competing rights as they existed at the time the claim was initiated. Therefore, for whatever purpose Judge Ospenson's statement was intended, the rights between the parties were fixed as of the filing date of the within Petition of Appeal. Judge Ospenson's obligation was not only to discuss the issues presented by this case within that context, but to analyze and make a determination within that context. (emphasis in text) (Id.)

Petitioner's second exception speaks to

> THE IMPORT OF CAPODILUPO V. WEST ORANGE BOARD OF EDUCATION, 218 N.J. SUPER. 510 (APP. DIV. 1987) AND BEDNAR V. WESTWOOD BOARD OF EDUCATION, 211 N.J. SUPER. 239 (APP. DIV. 1987). (Id.)

Submitting that the above cases stand for the proposition that the rights afforded to tenured teaching staff members in the positions

enumerated in the tenure law may not be diluted or compromised by reliance upon the narrower seniority categories found in the seniority regulations as set forth in N.J.A.C. 6:3-1.10, petitioner contends that the ALJ erred by focusing on the title used by the district in failing to assign him to the position of associate principal of student activities following the abolition of his position as academic supervisor.

In his third exception, petitioner submits that for tenure purposes, there is no distinction between the titles of associate principal/student activities and academic supervisor. Suggesting that the ALJ concluded that petitioner accrued tenure as a supervisor, because the word supervisor was used in describing his title, petitioner claims the ALJ failed to note the significance of the fact that the certification required for both positions was the same. Moreover, petitioner claims he made no mention of the fact that their responsibilities were virtually identical, nor of the fact that both positions report to the superintendent. Petitioner claims that such factors determine tenure accrual, not the title used. He cites Boeshore v. North Bergen Board of Education, 1974 S.L.D. 804; Page v. Board of Education of the City of Trenton, 1975 S.L.D. 644, aff'd State Board 1976 S.L.D. 1158; and Charles Smith v. Jersey City Board of Education, decided by the Commissioner February 4, 1987, aff'd State Board November 4, 1987 in support of this contention.

In conclusion, petitioner contends that based on the responsibilities assumed and the certification required, the position in which he served, academic supervisor, is comparable for tenure purposes to the associate principal for student activities. Although the duties of the two positions may place them in different "categories" (Exceptions, at p. 7), for seniority purposes, "by virtue of the fact that they are the same ranked positions, tenure accrual in one provides the holder thereof with a 'preference for a greater right of appointment to the other position than the nontenured holder of the position' in this case, Mr. Wallace." (Id., at p. 7) quoting Capodilupo, supra; Bednar, supra; and Mirandi v. Board of Education of the Township of West Orange, decided by the Commissioner April 1, 1985) Thus, petitioner submits that the initial decision must be rejected and that he should be assigned to the position of associate principal in charge of student activities.

The Board summarizes its position by stating that a review of the responsibilities petitioner performed in the position of curriculum coordinator reveals that those duties were narrow unlike the broad responsibilities assigned to the usual vice principal position. As to the academic supervisor position to which petitioner was later assigned, the Board avers that position was proposed by the district to the County Superintendent for approval as an unrecognized title and as falling into the tenure/seniority category of supervisor, which "***categorization was subsequently approved by the County Superintendent." (Reply Exceptions, at p. 1)

By contrast, the Board submits the associate principal in charge of student activities position was proposed to the County Superintendent as falling into the category of assistant principal

or vice principal, citing Exhibit B in support of this proposition. This categorization, too, was subsequently approved by the County Superintendent, the Board claims. It further states that at no time did petitioner challenge the County Superintendent's determination or even the Board's proposal that the academic supervisor position be placed into the category of supervisor. To support its claim that the reasonable expectations of the parties were that the position of academic supervisor be considered a supervisory position as opposed to a principal's position, the Board cites to Exhibit B, the District's Appointment and Compensation Schedule for academic year 1987-88. Said schedule reveals that petitioner was paid not as an associate principal but rather as a supervisor of instruction, the Board contends.

It is also the Board position's that petitioner avoided reference to the County Superintendent's approval and placement of the disputed position in separately tenurable categories in claiming that the responsibilities of the academic supervisor and associate principal positions are virtually identical. On the contrary, the Board submits that even relying on the list of responsibilities set forth in petitioner's exceptions, "the higher authority and sweeping powers of the Associate Principal position are glaringly evident." (Reply Exceptions, at pp. 2-3) It claims that while the academic supervisor position's responsibilities are limited to supervision and oversight of testing, funding applications, a portion of the curriculum and observation of only nontenured staff, the associate principal is directly responsible for building-wide supervision, as well as virtually all co-curricular and extracurricular activities in a large regional high school. Thus, the Board proffers, it cannot be argued that based upon the relative responsibilities of the disputed positions, they are of equal stature.

Thereafter, the Board recites, nearly verbatim, the legal arguments set forth in its Brief in Support of a Motion for Summary Judgment, which arguments are incorporated herein by reference. The Board requests that the Commissioner adopt the decision of the ALJ and that the Petition of Appeal be dismissed.

Upon a careful and independent review of the record, the Commissioner must remand this matter for fact finding as to what endorsement and certificate were required for the positions of academic supervisor and also for associate principal of student activities as approved by the County Superintendent of Schools. The Commissioner observes that the Stipulation of Facts signed by attorneys for the parties herein explicitly states at page 2, paragraph 6 that:

> On or about October 24, 1985, the Respondent's Superintendent, Dr. Louis R. Centolanza, requested from the county superintendent approval of the use of several unrecognized titles including the title of "Academic Supervisor (Supervisor)" to which Petitioner was assigned, and the title of "Associate Principal in Charge of Student Activities (Asst. Vice Principal)," pursuant to Exhibit B annexed hereto, both

> positions requiring a principal certificate. Approval was given by the County Superintendent of Schools on or about February 3, 1985. Said request and approval, with attachments, is attached hereto as Exhibit B. (emphasis supplied)

A perusal of Exhibit B indicates that the form Mr. Melindo A. Persi, County Superintendent of Schools of Passaic County, signed and dated merely required him to check a box indicating that the request for approval of unrecognized titles was approved on February 3, 1985. However, it is not clear from said document whether he was approving the job descriptions attached to said form, which clearly indicate that the position in question required the holder to have a principal's endorsement on a administrative certificate, or whether he approved the title listed on the same form he signed stating that the unrecognized title sought was that of academic supervisor with a job description notation "(Supervisor)".

The matter becomes more baffling upon reading the reply exceptions, which appear to contradict the stipulation of facts agreed to by the parties. Therein, counsel for the Board plainly states at page 1:

> The Academic Supervisor position to which Petitioner was subsequently assigned was clearly proposed by the District to the County Superintendent as falling into the tenure/seniority category of supervisor. This categorization was subsequently approved by the County Superintendent. In contrast, the Associate Principal in Charge of Student Activities position ("Associate Principal") was proposed to the County Superintendent as falling into the category of assistant or vice principal. See Stipulation of Facts, Exhibit B. This categorization was also subsequently approved by the County Superintendent.
>
> (emphasis supplied)

Last, the Commissioner observes that the very first sentence of the initial decision states:

> The position of Carmen DiSimoni as academic supervisor, which required a principal certificate and in which he was tenured in service with the Board of Education of the Passaic County Regional High School District #1, Passaic County, was abolished by the Board in or about April 1989. (emphasis supplied)
>
> (Initial Decision, at p. 1)

Without testimony or further documentation from the County Superintendent himself, explaining precisely what endorsement and certificate he required for these two unrecognized titles, no determination can be made as to whether the two positions were separately tenurable.

Accordingly, for the reasons expressed above, the instant matter is remanded to the Office of Administrative Law for further fact finding and for conclusions of law to be made by the ALJ once it is clear what certification was required for these two positions as established by the County Superintendent.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6864-90
(OAL DKT. NO. EDU 5854-89 ON REMAND)
AGENCY DKT. NO. 203-6/89

CARMEN DI SIMONI,
Petitioner,
v.
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT # 1, PASSAIC COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Richard H. Bauch, Esq., for respondent
(DeMaria, Ellis & Hunt, attorneys)

Record Closed: October 5, 1990 Decided: October 9, 1990

BEFORE JAMES A. OSPENSON, ALJ:

This matter is on remand of OAL Dkt. No. EDU 5854-89 for further fact finding on certifications required for positions of academic supervisor and associate principal of student activities, two unrecognized titles approved by the county superintendent of schools.[1]

---

[1]The remand questioned, at 17-18, introductory language of the initial decision, at 1, to the effect the position of academic supervisor "required a principal certificate." The language was not a finding, it merely paraphrased the petition of appeal

In fulfillment of mandate, the parties having so stipulated, I make the following supplemented Findings of Fact:

> Whereas, the Commissioner of Education issued a decision on August 17, 1990, remanding the above-captioned matter for further fact-finding as to what endorsement and certification the Passaic County Superintendent approved for the unrecognized titles of Academic Supervisor and Associate Principal in Charge of Student Activities; and
>
> Whereas, on April 27, 1988, the County Superintendent issued a determination as to the recommended approved title and required certification for the aforesaid unrecognized titles [specifically, the certificate required for the position of associate principal in charge of student activities is that of principal; the certificate required for the position of academic supervisor is that of supervisor]; and
>
> Whereas, the parties hereto are in agreement that the attached determination of County Superintendent Melindo A. Persi provides the complete factual record as required by the Commissioner of Education's remand order;
>
> Therefore, the parties hereto stipulate and agree, subject to approval of the [administrative law judge] that the attached Exhibit "A," comprised of a 2 page memorandum dated April 27, 1988 from Melindo A. Persi to Dr. Louis R. Centolanza, with a 1 page attached chart, shall constitute the sole additional evidence on the record in connection with the remand proceeding in this action.

CONCLUSION

From the above, I **REAFFIRM** findings and conclusions of the initial decision of July 9, 1990 under OAL Dkt. No. EDU 5854-89. The petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If any party disagrees with this recommended decision, that party may file, within thirteen (13) days from the date on which this decision was mailed to the parties, written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

October 9, 1990
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

OCT 11, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 15 1990
Date

OFFICE OF ADMINISTRATIVE LAW

amr

CARMEN DI SIMONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PASSAIC COUNTY REGIONAL HIGH SCHOOL DISTRICT #1, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record and initial decision on remand have been reviewed. No further exceptions were filed by the parties.

The Commissioner has reviewed the stipulation agreed to by the parties on remand, which establishes that the unrecognized title of academic supervisor required an endorsement as a supervisor, not as a principal, as earlier found by the ALJ at page 6 of the initial decision of July 9, 1990 wherein he stated that "[t]he only commonality between the two positions is the certification requirement imposed by the Board and approved by the county superintendent: that of 'principal.'" With the clarification in the record now that the endorsement requirements differed in that the position of associate principal in charge of student activities required an endorsement of "principal" while the unrecognized title position of academic supervisor specified an endorsement as a supervisor, the Commissioner finds and determines that the two positions are separately tenurable under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6. As such, petitioner herein has acquired tenure in the position of supervisor only.

Further, the Commissioner concurs with the ALJ that Bednar, supra, and Capodilupo, supra, are inapposite to petitioner's claim to the position of associate principal in charge of student activities held by Mr. Wallace, because said claim is to a separately tenurable position in which petitioner never saw service. DeCarlo v. Board of Education of the Borough of South Plainfield, Middlesex County, decided by the Commissioner August 4, 1988 disposes of any such claim in stating:

> ...Because supervisors and assistant or vice princpals are separately tenurable positions pursuant to N.J.S.A. 18A:28-5, petitioner acquired tenure as a supervisor, not a vice principal, notwithstanding the fact that he may have also held a principal's endorsement. Therefore, he had no claim to the position of vice principal. The Commissioner so finds notwithstanding the Board's having required such general supervisors to hold a principal's endorsement.... An absurd result would ensue if

> mere possession of the principal's certificate could grant petitioner "bumping" rights over other assistant principals and principals without having served in a principal's capacity.... Moreover, the Commissioner's review of the job description for the position in question tends to reflect the fact that although there is overlap, there are significant distinguishing duties between the position of general supervisor and either an assistant principal A or assistant principal B that inure [sic] against any argument suggesting bad faith on the part of the Board as a means of defeating petitioner's tenure and seniority rights.
> (Initial Decision of July 9, 1990, at p. 7)

Additionally in Kaprow v. Board of Education of the Township of Berkeley, Ocean County, decided by the Commissioner November 29, 1989 the Commissioner stated that he

> ...fully endorses the ALJ's view that tenure attaches to the position in which the requisite service was rendered, so that petitioner's claims to the superintendency and various elementary teaching positions can be disposed of without further elaboration. Petitioner has never served, nor does he purport to have served, as an elementary school teacher.... The Commissioner rejects as unfounded in law and contrary to sound educational policy the notion that tenure attaches to every endorsement on every certificate held by a teaching staff member regardless of the position in which he or she acquired tenure.... Simply put, the cases relied upon by petitioner stand for no more than the proposition that within the scope of the position in which tenure was acquired, seniority regulations cannot be invoked to retain a non-tenured teacher at the expense of a tenured one. These cases did not deal with, nor did the court speak to, holders of more than one type of certificate; neither was the court concerned with claims to positions in more than one of the separate and distinct categories enumerated in N.J.S.A. 18A:28-5.... The Commissioner continues in his conviction that tenure rights are not transferable to the position in which one has not achieved tenure.... (Id., at p. 8)

In so concluding, the Commissioner would correct a misperception on petitioner's part regarding when the rights of an individual affected by a RIF "vest." The ALJ noted petitioner's argument at page 5 of the initial decision of July 9, 1990 wherein the ALJ stated:

Parenthetically, it may be noted, although the parties have recognized (finding no. 9) that John Wallace is presently tenured not only in the position of teacher of social studies for service from 1968-87 but in the position of associate principal of student activities for service in that position from August 1, 1987, a 12-month position, until more than two years thereafter in August 1989, tenure in that position, under N.J.S.A. 18A:28-6, had not been acquired by Wallace at the time petitioner filed his petition on June 28, 1989. Petitioner asserted that because of his "tenure" he had a greater entitlement to the position of associate principal in charge of student activities because of that circumstance. Pb. at 5. Although factual circumstances may have changed since the time the petition was filed, I shall nevertheless address the issues petitioner raises, for the sake of the discussion only, as if all rights between the parties were fixed as of the filing date. Petitioner's essential argument is this:

> ...In the final analysis, petitioner's rights to the position of associate principal in charge of student activities are guided by the fact that he has accrued tenure by serving in two unrecognized titles [curriculum coordinator 1984-85 and academic supervisor 1985-89] over the course of five years, both of which required a principal's certificate.... [Wallace], holder of the associate principal's position, did not accrue tenure in said capacity until August 1989, after the within petition of appeal was filed. At the time the petition was filed, petitioner was tenured and the holder of the associate principal position was not. Based on the Capodilupo and Bednar decisions of the Appellate Division*** and the Commissioner decisions which have since followed, petitioner asserts that because of his tenure he had a greater entitlement to the appointment to the position of associate principal than did Wallace, who in June of 1989 at the time in which this petition of appeal was filed did not have tenure....
>
> While the function of the positions of curriculum coordinator and academic supervisor may differ from that of the

> associate position, they appear to be on the same organizational plan, require the same certification [that of principal], and have the individual holding the said positions reporting to the superintendent. There is no question but that petitioner is "qualified" to hold the position of associate principal....[Pb. at 5]. (emphasis supplied)

The RIF which resulted in the abolition of the position of academic supervisor occurred on June 30, 1989. (See Stipulation of Facts at page 3 of the initial decision dated July 9, 1990.) Once a board of education has properly acted to abolish a position, the RIF is accomplished. It is at such point that the board is required to consider whether the rights of any teaching staff member affected by said RIF entitles that person to any other position in the district. See James Parker and Joseph Pellegrino v. Board of Education of the Matawan-Aberdeen Regional School District, Monmouth County, decided by the Commissioner August 31, 1989, aff'd/rev'd State Board May 2, 1990.

At the time of the instant RIF, Mr. Wallace served in a nontenured capacity in an unrecognized title position as associate principal in charge of student activities. He was appointed to such 12-month position effective August 1, 1987. (See Stipulation of Facts at page 4 of the initial decision dated June 9, 1990.) He continues to serve in that position to date. Pursuant to N.J.S.A. 18A:28-6(a), Mr. Wallace, who was transferred to the position of associate principal in charge of student activities, after having served many years as a teacher of social studies, was required to serve for "***two consecutive calendar years in the new position unless a shorter period is fixed by the employing board for such purpose.***" No such shorter period is established in the instant record. Thus, because the record makes plain that Mr. Wallace was appointed to said position effective August 1, 1987, he was one month shy of securing tenure in the position in question at the time that the RIF abolishing petitioner's position took place. Had both positions in question required the same endorsements then petitioner's arguments predicated on the holdings of Capidilupo, supra, and Bednar, supra, would be relevant.

However, in light of the holding of Kaprow, supra, and DeCarlo, supra, petitioner may not lay a tenure claim to Mr. Wallace's position because it was a separately tenurable one requiring an endorsement under which he had no service. The Commissioner so finds.

Accordingly, for the reasons expressed in the initial decision dated October 9, 1990 as clarified herein, the Petition of Appeal in this matter is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5646-89
AGENCY DKT. NO. 216-7/89

STEVEN M. REPETTI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri and Pincus, attorneys)

Karen A. Murray, Esq., for respondent
(Murray and Murray, attorneys)

Record Closed: June 8, 1990 Decided: July 2, 1990

BEFORE JAMES A. OSPENSON, ALJ:

Steven M. Repetti, a tenured teaching staff member employed by the Board of Education of the City of Hoboken, Hudson County, alleged the Board improperly failed to grant him salary guide advancement based upon his active military service, in violation of his rights under N.J.S.A. 18A:29-11. His petition of appeal to that effect was filed in the Bureau of Controversies and Disputes of the Department of Education on July 6, 1989. The Board filed an answer in general denial with affirmative defenses on July 28, 1989. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on August 1, 1989 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, the matter came on for prehearing conference in the Office of Administrative Law on November 1, 1989 and an order was entered. 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 thereafter were to be filed in the cause no later than ten days before hearing. Thereafter, it was provided, unless there remained genuine, material triable issues of fact,the matters at issue were to be addressed and resolved as if on cross motions for summary decision, based 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 is whether petitioner is entitled to salary guide advancement by reason of his military service, in accordance with N.J.S.A. 18A:29-11.

Stipulations with documentation having been filed, and time for written legal submissions in argument thereon having elapsed, the record closed on June 8, 1990.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

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

1. Petitioner, Steven M. Repetti, is a tenured teaching staff member employed by the Hoboken Board of Education.

2. Petitioner was initially employed by the Board as a per diem substitute from January 1973 through September 1973. Petitioner was appointed to a full time teaching position effective October 1, 1973, as evidenced by an employment contract (J-1) and letter dated September 19, 1973. (J-2)

3. Petitioner has been regularly and continuously employed by the Board as a full-time elementary teacher since October 1, 1973. (J-3)

4. On October 30, 1970, Petitioner enlisted in the New Jersey National Guard. As part of his National Guard responsibilities, he was assigned to

Fort Jackson, South Carolina for basic and military occupational specialty training from January 7, 1971 to May 7, 1971. (J-4)

5. Subsequent to basic training, Petitioner spent the following periods of time designated on Form 23 (J-5) as Active Duty or Active Duty Training:

June 12, 1971 - June 26, 1971
May 20, 1972 - June 3, 1972
May 19, 1973 - June 3, 1973
August 10, 1974 - August 24, 1974
July 12, 1975 - July 26, 1975
May 15, 1976 - May 29, 1976

6. As a member of the National Guard, Petitioner was required to spend approximately one (1) weekend per month performing national guard duties from May 1971 through October 1976.

7. Petitioner was honorably discharged on October 29, 1976. (J-6; J-7)

8. Petitioner suffered no loss of salary or employment time due to participation in the National Guard.

9. Petitioner has not been granted salary guide credit for military service at any time during his employment with the Board.

10. Prior to the filing of the instant petition, the Petitioner did not have any discussion or communication with the Board or any agent of it regarding salary guide credit for military service.

11. Petitioner's salary guide placement during his years of employment with the Board has been as follows:

1972-1974	-	B.A.,	Step 1
1974-1975	-	B.A.,	Step 2
1975-1976	-	B.A.,	Step 3
1976-1977	-	B.A.,	Step 4

1977-1978	-	B.A.,	Step 5
1978-1979	-	B.A.,	Step 6
1979-1980	-	B.A.,	Step 7
1980-1981	-	B.A. + 30,	Step 8
1981-1982	-	M.A.,	Step 9
1982-1983	-	M.A.,	Step 10
1983-1984	-	M.A. + 30,	Step 11
1984-1985	-	M.A. + 30,	Step 12
1985-1986	-	M.A. + 30,	Step 13
1986-1987	-	M.A. + 30,	Step 14
1987-1988	-	M.A. + 30,	Step 15
1988-1989	-	M.A. + 30,	Step 16
1989-1990	-	M.A. + 30,	Step 17 (maximum)

12. The Board submitted as its exhibits, documents labeled B-1 and B-2. Petitioner did not object to the Board's submission of these documents.

13. Petitioner certified on April 25, 1990 concerning a 1979-89 survey of teachers eligible for military service credit and his non-inclusion thereon. P-1.

DISCUSSION

Petitioner argued simply that as a tenured teaching staff member in the Board's employ since 1973, he is and has been entitled to a one-year salary guide advancement for his military service in the New Jersey National Guard for basic and military occupational specialty training at Fort Jackson, South Carolina, from January 7, 1971 to May 7, 1971, a period of four months and one day, as well as for additional active duty training periods of two weeks per year in the six years from 1971 through 1976, which totaled 91 days. J-4, 5.

Statutory basis for such salary guide advancement, argued petitioner, is N.J.S.A. 18A:29-11, which provides:

> Every member who, after July 1, 1940, has served or hereafter shall serve, in the active military or naval service of the United States or of this state, including active service in the women's army corps, the women's reserve of the naval reserve, or any similar organization authorized by the United States to serve with the army or navy, in time of war or an emergency, or for or during any period of training, or pursuant to or in connection with the operation of any system of selective service, shall be entitled to receive equivalent years of employment credit for such service as if he had been employed for the same period of time in some publicly owned and operated college, school or institution of learning in this or any other state or territory of the United States, except that the period of such service shall not be credited toward more than four employment or adjustment increments. . . .

Petitioner's total military service in the New Jersey National Guard, it was submitted, and I agree, amounted to approximately seven months, which is the equivalent of a one-year salary guide advancement credit under the statute, according to decisional authority in Camden County Vocational-Technical Education Association et al. v. Board of Ed., Camden County Vocational-Technical Schools, 1983 S.L.D. -- (September 30, 1983), affirmed State Board of Education, 1984 S.L.D. -- (November 7, 1984), affirmed 207 N.J. Super. 23 (App. Div. 1986); and Blue, et al. v. Board of Ed., City of Linden, 1981 S.L.D. -- (August 3, 1981), affirmed State Board of Education, 1981 S.L.D. -- (November 10, 1981), appeal dismissed, Superior Court, App. Div. Docket No. A-1625-81T3 (December 17, 1982). In Blue, a petitioner was held entitled to one year of salary guide credit on the basis of five months and 21 days of active military service in the New Jersey National Guard.

But the petition of appeal in this matter, presupposing an undeniable right to a one-year salary guide advancement for military service (even though such service occurred before as well as during petitioner's tenure), sought judgment declaring the Board's refusal so to credit petitioner to be a violation of N.J.S.A. 18A:29-11 and sought, moreover, both "retroactive and prospective compensation" for such abridgment, with both "prejudgment and postjudgment interest." Affirmative defenses included the time-bar of N.J.A.C. 6:24-1.2 and the bar of the doctrine of laches. The subject of retrospective relief in such claims, which ostensibly would include both prejudgment interest and relief for the years before date of filing the

petition of appeal, would seem to have been laid to rest by the Supreme Court in Lavin v. Hackensack Board of Ed., 90 N.J. 145 (1982), in which the court said:

> Municipal financing is predicated on a pay-as-you-go principle. . . . The governing body must prepare a budget "on a cash basis." . . . To rectify the error [of innocently failing to budget appropriately] would necessitate including in the current budget the full aggregate amount claimed. This could have the dual effect of causing some other service to be diminished because of limitations imposed by the CAP law . . . and of imposing the complete tax burden on the existing taxpayer for costs that should have been distributed over a ten-year period. . . . We believe that it is fair and equitable to treat all claims of this nature in like manner. This bright line treatment has the additional advantage of administrative ease. Under these peculiar circumstances, wherein public entities are involved, petitioner and others situated like her should not be granted retroactive monetary relief. However, they should be granted credit for qualified military service in computing their salaries subsequent to making their claims. . . . [The doctrine of] laches should bar plaintiff's retroactive recovery of past due sums. . . . It is appropriate to allow prospective application of petitioner's military credit . . . [Id. at 154-5].

Based on the foregoing, I find and determine that while petitioner here is presumptively entitled to a one-year salary guide advancement by reason of his prior military service, his entitlement may only be prospective and not retrospective in nature, both substantively and by way of any prejudgment interest. Any such retrospective claims are barred by the doctrine of laches, which under the evidential record here I find not unfairly invoked. In view of that holding, I find it unnecessary to consider the Board's defense that such claims are barred by N.J.A.C. 6:24-1.2. See, North Plainfield Education Association v. Board of Ed., North Plainfield, 96 N.J. 587, 594 (1984) (such claims are statutory entitlements). I reject petitioner's argument that his failure to act promptly heretofore to register his claims was without consequence. Cf., B-1 and B-2 with P-1; and Lavin, supra.

There follows necessarily the question to what relief precisely is petitioner entitled. According to the evidential record (finding no. 11), petitioner at the moment has completed 17 years of service in the district. More importantly, for the academic year 1989-90, just after date of filing of petition on July 6, 1989, he was installed on step 17, M.A. + 30, which is maximum under the salary guide. Beyond judgment that petitioner is entitled generally to a one-year salary guide

advancement, prospectively, and beyond judgment in favor of the Board that petitioner's claims for retrospective relief are barred by the doctrine of laches, there remain no further grounds upon which judicial relief is anything but academic. There is no suggestion in the record the present salary guide is currently subject of potential modification or that, if so modified, petitioner's prospective rights would be abridged.

CONCLUSION

Based on the foregoing, I **CONCLUDE** as follows:

1. Petitioner is entitled to a one year military service credit advancement on the salary guide, under N.J.S.A. 18A:29-11, only prospectively and not retrospectively, any such claims for relief in the latter form being barred by the doctrine of laches.

2. Petitioner is so entitled by merit of his New Jersey National Guard service of more than five months active duty during the years 1971 through 1976, which was gained both before and after his first employment in the district in 1973.

3. Specifically, petitioner's claim for retrospective advancement and remuneration as well as for pre and postjudgment relief are denied.

4. No opinion is expressed herein on the Board's defense in bar of claims under N.J.A.C. 6:24-1.2.

5. Petitioner having been installed in the maximum step of the salary guide for the year 1989-1990, coincidentally with filing of petition herein, any further claim for prospective relief is academic.

6. Judgment is entered accordingly.

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 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(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

July 2, 1990
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

July 6, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 0 9 1990
Date

OFFICE OF ADMINISTRATIVE LAW

amr

STEVEN M. REPETTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF HOBOKEN, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by both parties and petitioner's reply to respondent's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, petitioner objects to application of the doctrine of laches to bar his claim for retroactive relief. He argues that the court in Lavin, supra, specifically acknowledged application of laches as a fact-based inquiry which must be independently analyzed in each case, and that, in this matter, the facts preclude its application. He avers:

> ***Laches is a doctrine invoked to terminate a cause of action which has not been asserted for a period of time, to the detriment of the opposing party. Mere passage of time is not enough to establish laches. Generally an action will only be barred where there has been a delay for a length of time which, unexplained and unexcused, is unreasonable and has been prejudicial to the other party. [citations omitted] As the Commissioner of Education has held:
>
> > ***[I]implicit in the doctrine of laches is the inaction of a party with respect to a known right***.
>
> Elowitch v. Bayonne Board of Education, 1967 S.L.D. 86. (Emphasis added.) Accord, Donnelly v. Ritzendollar, 14 N.J. 96, 108 (1953).
>
> ***
>
> At no time has the Board established that the petitioner unduly delayed his suit. There simply are no facts indicating that petitioner failed to act after gaining knowledge of his rights. Indeed, the petitioner thought that his claims were being presented to the Board by his union representative. It is only with this litigation that he learned that, apparently, he was not

> included in those claims. This delay did not prejudice the Board at all. No relevant facts have become stale due to the passage of time. The Board's ability to defend itself has not been curtailed due to any delay. Absent a specific showing of prejudice, laches cannot be found [citation omitted]. (emphasis in text)
>
> (Petitioner's Exceptions, at pp. 2-3)

Petitioner contends that the mere fact that the Board might be required to pay back salary or arrange for compensatory financial remedy as a result of its failure to comply with the law cannot be held as prejudice so as to bar his claim. On the contrary, he claims, the Board should be held accountable for its superior knowledge of, and access to, the law in comparison to himself, a layman. Any prejudice suffered by the Board as a result of his claim was, he avers, due solely to the Board's "gamble" that he would not discover his rights. Therefore, petitioner concludes, the equities in this matter clearly lie with him.

In its exceptions, the Board objects to the ALJ's determination that petitioner's service in the National Guard constituted seven months of "active service" within the meaning of N.J.S.A. 18A:29-11. In challenging the ALJ's determination that petitioner's service was active, the Board argues:

> Pursuant to N.J.S.A. 38A:1-6, federal law, regulations and their interpretations are applicable to defining the state's statute and dealings with the National Guard. The Federal National Guard statute provides as follows:
>
> > "Active duty" means full time duty in the active military service of the United States. It includes such federal duty as full time training duty, annual training duty and attendance while in the active military service, at a school designated as a service school by law or by the secretary of the military department concerned. It does not include full time National Guard Duty.
> >
> > "Full Time National Guard Duty" means training or other duty, other than inactive duty performed by a member of the Army National Guard of the United States or in the Air National Guard of the United States in the member's status as a member of the National Guard of a state or territory, commonwealth of Puerto Rico, or the District of Columbia under Section 316, 502, 503, 504 or 505 of this Title for which the member is entitled to pay

> from the United States or for which the member has waived pay from the United States. [32 U.S.C.A. 101 (12 & 19) (emphasis supplied)]
>
> (Board's Exceptions, at pp. 3-4)

Thus, the Board concludes, National Guard duty does not constitute "active duty." Further, because petitioner has failed to demonstrate that he is classified as a veteran, he does not meet the intent of N.J.S.A. 18A:29-11 as expressed in Lavin, supra, "to reward veterans for service to their country in time of war." Moreover, the Board argues, N.J.S.A. 38A:1-1 clearly indicates that not all military service is "active" and distinguishes among various types of service:

> (i) "Active duty" means full-time duty in the military service, other than active duty for training. State service is meant unless Federal service is specified.
>
> (j) "Active duty for training" means full-time duty in the active military service for training purposes. State service is meant unless Federal service is specified.
>
> (k) "Inactive duty training" means duty performed by a member of the organized militia other than active duty or active duty for training.***
>
> (Board's Exceptions, at p. 5)

However, assuming arguendo that petitioner's service was entirely active, the Board cites Donald J. Ujhely v. Board of Education of the City of Linden, Union County, decided by the Commissioner August 26, 1985 for the propositions that 1) only training rendered prior to employment with the Board of Education can be considered for purposes of military service credit and 2) such service must be under federal jurisdiction in order to be eligible for salary guide credit under N.J.S.A. 18A:29-11. Petitioner's service under federal jurisdiction totalled only four months and one day, while his service prior to employment with the Board totalled four months and twenty-nine days. Either way, petitioner's service fails to meet the five-month threshold established by case law for awarding of salary guide credit. (Camden County Vo-Tech, supra)

In reply, petitioner characterizes as irrelevant and without basis the Board's reliance on federal law and jurisdiction to exclude National Guard service from the purview of N.J.S.A. 18A:29-11, noting that prior decisional law (Blue, supra) has already awarded credit for state Guard service under this statute. Furthermore, even if the definitions of N.J.S.A. 38A:1-1 are used, petitioner contends, his training periods still constitute "active service," as his summer training was full-time during the periods of its occurrence.

Upon careful review, the Commissioner affirms the ALJ's ultimate disposition of this matter, but modifies his findings and conclusions with respect to the precise length of petitioner's creditable service.

Petitioner submitted, and the ALJ accepted, that petitioner's creditable service totalled seven months. Initially, the Commissioner notes that he finds no merit in the Board's argument that otherwise eligible National Guard service must have been under federal jurisdiction to meet the requirements of N.J.S.A. 18A:29-11; indeed, the Commissioner has specifically held that National Guard service is to be accorded the same status as federal service under N.J.S.A. 18A:29-11 based on the clear language of that statute. (Blue, supra) Nor does Ujhely, supra, hold to the contrary, as claimed by the Board, since service under federal jurisdiction was the only service under consideration in that matter. Further, the Commissioner rejects the Board's contention that N.J.S.A. 38A:1-1 works to exclude petitioner's service, since such service was specifically classified by the Guard as Active Duty or Active Duty for Training and was full-time while rendered.

However, while not accepting the Board's analysis in its entirety as indicated below, the Commissioner does concur with the Board that the ALJ erred in crediting petitioner for service rendered while he was employed by the Board on a continuous full-time basis. By its own language, N.J.S.A. 18A:29-11 plainly intends to reward military service by ensuring that time spent in the military will be treated as if the affected party were employed by his or her school district at the time of service; it cannot be construed to provide a "double credit" such that a teacher earning salary guide advancement through teaching service would be entitled to additional credit for concurrent military service. In the instant matter, petitioner was employed on a full-time basis beginning October 3, 1973 and has been continuously employed since (Stipulation of Fact No. 3, Exhibit J-3). Moreover, each ten-month academic year of employment earned him one step's advancement on the district salary guide (Stipulation of Fact No. 11). To grant petitioner additional credit for summer military service during which, for salary guide purposes, he was already receiving credit as an employee of the Board would be beyond the scope of benefit envisioned by statute.

However, the Commissioner does not accept the Board's contention that all service subsequent to petitioner's first employment with the district should be excluded from credit. As petitioner's undisputed employment and salary history shows, petitioner received no salary guide credit for the period during which he was employed as a per diem substitute. Accordingly, by operation of N.J.S.A. 18A:29-11, petitioner is entitled to have any military service rendered between January and September 1973 (the period of his per diem service prior to full-time employment at Step 1 of the salary guide in October 1973) credited toward guide advancement.

Based on these considerations, the Commissioner determines that petitioner's statutory credit entitlement under N.J.S.A. 18A:29-11 totals 5 months and 14 days, covering his period of basic

training in 1971 (Stipulation of Fact No. 4) and all periods of subsequent service through June 3, 1973 (Stipulation of Fact No. 5). As both the ALJ and the parties recognize, service credit of over five months entitles affected persons, including petitioner herein, to a full year's credit for salary guide purposes. (Camden County Vo-Tech, supra)

With respect to the question of petitioner's claim to relief based on the statutory entitlement found above, the Commissioner concurs with the ALJ that prospective relief at this point is academic, petitioner having reached the maximum step of his salary guide independent of the present proceedings. He further concurs, contrary to petitioner's assertions, that the doctrine of laches was fairly applied by the ALJ to bar any claim for retroactive relief herein.

By his own admission (Exhibit P-1), petitioner has been aware of a potential entitlement at least since he completed the district's 1979 military service survey form (Exhibit B-1). Despite his evident recognition that no action appeared to be forthcoming as a result of his claim, petitioner did nothing to check on its status with the Board or any of its agents in the intervening ten years and relied instead on vague assurances from his union representative that the matter was under consideration by the district. (Stipulation of Fact No. 10, Exhibit P-1) Moreover, he continued to rely on such assurances for five years after the protracted litigation which gave rise to the above-mentioned survey -- litigation involving dozens of Hoboken teaching staff members and surely well known to both the union and staff in general -- was definitively resolved (see below). In the Commissioner's view, it simply strains belief beyond all bounds to hold, as petitioner does, that under the circumstances he did not sit on his rights or inexplicably delay in filing his claim for restitution.

The Board, on the other hand, would have had no reason to know of petitioner's claim in the absence of some initiating action by petitioner, which petitioner admittedly did not take beyond providing his completed survey form to his union representative in 1979. This is particularly so in view of Hoboken's history with respect to military service credit disputes. In 1977, 42 Hoboken teaching staff members filed a petition of appeal with the Commissioner on the subject of military service credit,* and the Commissioner's first decision in that matter (Michael Accetta et al. v. Board of Education of the City of Hoboken, Hudson County, decided June 11, 1979) was the impetus for the 1979 survey referenced above

---

* This matter generated both numerous appeals and related litigation, a history of which may be found in the final decision on the matter, Michael Accetta et al. v. Board of Education of the City of Hoboken, Hudson County, 1984 S.L.D. 518, affirmed State Board 533. Worth noting in the present context is that the Hoboken teachers' claims for retroactive entitlements, claims of precisely the type made by petitioner herein, were ultimately disposed of by the parties themselves "in accord with the New Jersey Supreme Court's decision in Lavin [citation omitted]." (at 520)

(Exhibits B-1 and B-2). That survey is here characterized as a good faith effort to systematically and comprehensively identify any persons in the district who might have military service claims, regardless of whether or not they were involved in the parent litigation (which petitioner was not). Given that petitioner never contacted the Board, which evidently did not receive his completed survey form, at any time before, during or after the district's resolution of its military service credit affairs; and that petitioner's district employment record (exhibit J-3) gives no clear indication of active military service prior to his employment by the Board, the Board can hardly be held accountable for its apparent lack of awareness of petitioner's entitlement over these many years. Certainly it cannot be said, as petitioner would have it, that the Board ignored the law and simply gambled that petitioner would not discover his rights.

Under these circumstances, the Commissioner holds that the reasoning of Lavin, supra, with regard to barring of retroactive claims by reason of laches fully applies to the present matter, and that, if anything, the equities in this case lie with the Board.

Accordingly, except as modified herein with respect to the exact length of petitioner's creditable service, the initial decision of the Office of Administrative Law is affirmed for the reasons stated therein together with the additional reasons set forth above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5219-89
AGENCY DKT. NO. 188-6/89

JOHN BALLATO AND
MARGARET BALLATO,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF LONG BRANCH,
MONMOUTH COUNTY,
Respondent.

John W. O'Mara, Esq., for petitioner (Boglioli and O'Mara, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber and McOmber, attorneys)

Record Closed: May 23, 1990 Decided: July 5, 1990

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners John and Margaret Ballato, on behalf of their now 18 year old son, challenge the requirement of the respondent Board of Education City of Long Branch that their son pay a $40 class dues fee in order to obtain physical possession of his high school diploma, currently being withheld by the Board under its policy because of his refusal to tender this fee that funds the school prom, class gifts, and part of the yearbook. The Ballato's son, J.V., has graduated, was allowed to attend graduation ceremonies, has

received all the benefits of graduation, including transcripts of grades which were forwarded to colleges, and lacks only physical possession of the high school diploma that he has academically earned.[1]

ISSUES

The question presented is whether the Commissioner of Education should uphold or set aside the policy requirement of the respondent Board of Education that the petitioner and all students must pay a $40 class dues fee, on pain of being denied physical possession of high school diplomas.

FINDINGS OF FACTS

There is no dispute as to the facts. The parties stipulate that the respondent Long Branch Board of Education has adopted policy number 5127 governing graduation, as to procedures and ceremonies:

> [t]he Board of Education endorses the annual high school graduation program and directs the Superintendent to ascertain that no student be barred from participation for arbitrary or discriminatory reasons. The Board, however, reserves the right to deny participation when extreme circumstances warrant it. Such denial shall be treated in the same manner as a suspension, and the pupil so affected shall be afforded the rights of review provided in policies of this Board. The Board reserves the right to withhold a diploma and transcripts until all school financial obligations are paid.
>
> It shall be the policy of the Board to acknowledge each student's successful completion of the instructional program appropriate to his/her needs and offered by this district by the award of a diploma at fitting graduation ceremonies.
>
> The Board shall award a regular high school diploma to every student enrolled in this district who meets the requirements of graduation established by the Board and approved by the State Board of Education. (J-1) (emphasis added).

[1] As to procedural history, the Department of Education filed this matter with the Office of Administrative Law on July 18, 1989 for hearing as a contested case pursuant to N.J.S.A. 14F-1 et seq., and a prehearing was held by telephone on October 12, with a prehearing order issued on October 27, 1989. The hearing was originally scheduled for December 21, 1989, but was adjourned because of an unavailable witness and was rescheduled and heard on May 8 in West Long Branch with the record closing on May 23, 1990 after receipt of post-hearing briefs.

The parties also stipulate to the following letter from Herbert A. Korey, Superintendent of the Long Branch Public Schools, as to the nature and purpose of the class dues:

(a) The payment of class dues is not as you [referring to petitioner] pointed out a prerequisite for the purchase of a prom bid.

Participation in the class graduation ceremony is not contingent upon the payment of class dues.

Attendance at the senior prom and participation for the graduation ceremony are not contingent on the purchase of a yearbook.

In my investigation I find the following to be the facts of the matter:

1. Class dues are $40 in total and cover a four year period. If a student has paid class dues, he receives the yearbook free.

   If a student does not pay class dues, he may purchase a yearbook at a cost of $35.

2. If a student has paid class dues, his bid to the prom is free.

   If he invites another member of the senior class they would, of course, attend the prom without cost for the bids.

   If he invites a guest other than a senior class member the cost would be $35.

3. If a student has not paid class dues, the prom bid costs approximately $65 for the student and his guest.

All of the above are contrary to the statements made in your letter. In fact, we can readily see that the payment of class dues in an economic savings to members of the class.

It has been a traditional practice to require members of the graduating class to pay class dues. In the absence of payment of class dues or any other charges which students might be assessed, e.g. fines for lost or damaged books and/or equipment, failure to return athletic equipment or return library materials, the High School Diploma will be withheld. This practice has

> been continued to provide the High School administration with the ability to collect monies owed in an appropriate manner.
>
> As with the collection of class dues, the practice has no effect on the student's eligibility for graduation, participation in graduation ceremonies, receipt of transcripts for college attendance, and as stated above, on the prom bid or on the yearbook.
>
> The Board Attorney has again reviewed this practice and has agains issued an opinion that the practice is entirely legal.
>
> Although the above points were made clear to you by Michael Sirianni, the Board President, it is my understanding that you have contacted the office of the Monmouth County Superintendent of Schools and have been told that this was a decision left to the District.
>
> The Board of Education, at its meeting on June 13th, 1989, reviewed your letter and had decided to continue the practice for the good of the school system. (J-3) (emphasis added).

At the hearing, Vice Principal Andrew L. Haines of Long Branch testified that students, in consultation with a professional staff advisor, decided to impose a fee of $40 on each student, which, together with the proceeds of bake sales and the like, funds the school prom, class gifts, and allows poorer students to participate in these activities. If a student pays the $40 class fee over the full period of matriculation, he or she receives, free of charge, the yearbook and prom "bid", as well as diploma. The prom is the primary focus of the class dues: diplomas are funded by the Board out of public funds.

Maragret Ballato, mother of J.B. who is now 18, testified that her son had graduated with "flying colors", in terms of his academic performance, and, but for the matter of his refusal to pay the class dues, was entitled to receive physical possession of his high school diploma.

There is no dispute as to the above material facts and I so **FIND**.

DISCUSSION AND CONCLUSIONS OF LAW

As stated, the issue is whether a graduating student's failure to pay class dues used to fund the school prom, class gifts, and yearbook expenses is a lawful and appropriate basis for a Board of Education policy and action of withholding physical

possession of a high school dimploma, to which a student is otherwised entitled by law. For the reasons set forth, I **CONCLUDE** that the failure to pay class dues cannot lawfully be a basis for withholding a graduating student's diploma, since there is no statutory provision to allow such withholding and because entitlement to a free and efficient public education includes the award of a diploma on graduation, which evidences completion of the necessary academic requirements.

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. . ." Petitioner at age 18 fits within this section's scope and is entitled to a free public education. That education includes a diploma of graduation if he successfully completes the required course work. The school board cannot punish him for failure or unwillingness to fund a school activity through class dues by withholding his diploma.

> [t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years. New Jersey State Constitution, Art. 8, section 4, par. 1. (emphasis added).

Along with the "free" classroom instruction, students are entitled to textbooks "and other school supplies" which "shall be furnished free of cost for use by all pupils in the public schools and money therefor shall be appropriated and raised annually in each school district in the same manner as other school monies are appropriated and raised in the district." N.J.S.A. 18A:34-1.

Parents should not have to bear added costs covering anything that is part of the child's public education, except as otherwise provided by statute. ",T.he Commissioner notes that it is well-settled by the New Jersey Constitution, applicable statutes and case law that a thorough and efficient education 'free of cost' is the constitutional right of every person in the State of New Jersey between the ages of five and eighteen." V.F., on behalf of A.F. v. Bd. of Ed. of Haddon Heights, EDU 4099-88 (June 28, 1988) (emphasis added). V.F. concerned a high school senior who failed physical education because of his failure to wear a proper gym uniform, which he was required to purchase. The Commissioner said that this uniform requirement was "inconsistent with law and, thus, ultra vires." Id. at 16. The Commissioner cited Melvin C. Willet v. Bd. of Ed. of Township of Colts Neck, 1966 S.L.D. 202, 206, aff'd State Bd. of Ed., 1968 S.L.D.

276 for the proposition, which is well settled in case law, that students may not "'be required to bear the costs of school programs and such other activities...'" The legislature subsequently amended the statute discussed in Willett, which prohibited a school board from charging parents for field trips. N.J.S.A. 18A:36-21 & 23. Although it "altered State law to permit parents to bear the cost of field trips, that exception is clearly limited to field trips..." V.F. at 15. Pupils with financial hardship are excepted from its requirements.

> [n] o student shall be prohibited from attending a field trip due to inability to pay the fee regardless of whether or not they have met the financial hardship requirements set forth in section 1 of this act. N.J.S.A. 18A:36-23.

By specifically legislating when parents could be held financially responsible for school related activities, the legislature sought to prevent school boards from charging parents with other costs related to education. Thus, class dues, if related to the educational process, should not be borne by the pupil's parents. If they are related and extra-curricular in nature, payment should be optional and no sanction can be imposed on a non-participating student. Extra-curricular activities cannot require mandatory participation and are of a voluntary nature. The Commissioner of Education has stated that the cost of school programs does not extend to extra-curricular activities which "occur after normal school hours and attendance at them is voluntary." Willett, 1966 S.L.D. at 206.

The respondent School Board has misconstrued the Commissioner's decision in Nicastro v. Bd. of Ed. of the City of Garfield, 1977 S.L.D. 213, as supporting the subsidization of the school's yearbook, when the case in fact emphasized the voluntary purchase of portraits by students who were not charged a sitting fee. In Nicastro, pupils purchasing yearbook portraits paid more than they would have, if everyone had been charged a fee for having their photograph taken, since the photographs of all the students were to be used for the yearbook. The Commissioner reasoned that since buying the photographs was not mandatory, the inflated portrait cost was justified since the purchaser benefited by having a historical record of those who attended the school. Failure to purchase portraits did not result in discipline, since it was voluntary. Thus, there was no adverse impact. Nicastro is distinguishable from the instant case, which concerns a mandatory class fee, for which nonpayment results in withholding of a diploma, the very physical proof and the solemn certification of graduation from high school.

A high school diploma is the public imprimatur of the state and, thus, is more than a mere formalization of graduation; it is a certification to which a public high school student who successfully completes his academic requirements is guaranteed and entitled:

> [w]here a pupil has completed the prescribed course of a public school, having attained, in the judgment of the board, the standards of scholarship fixed for the grade or school, he is entitled to a certificate of graduation or diploma, and the board cannot legally refuse to grant him a diploma . . . The fact that a pupil, not entitled to his diploma, is allowed to participate in the graduation excercises and receive a dummy diploma, to avoid hurting his feelings, does not add to his rights. 79 CJS section 508 (emphasis added).

The Board argues that it has the right to withhold the diploma in certain circumstances. The failure to pay for funding class events, however, does not constitute sufficient grounds for withholding the diploma. Under New Jersey law, a student does not have an explicitly expressed property interest in a high school diploma. Case law, however, has emphasized the importance of the diploma, which can only be denied for failure to complete requirements established by the local board and approved by the State Board of Education. These requirements are academic in nature and relate to course work. Marjorie L. Silverman v. Fred G. Burke, Commissioner of Education et al., 77 S.L.D. 724 (1977). The Commissioner in Silverman applied N.J.A.C. 6:27-1.4 a & b which has since been repealed:

> (a) Subject to approval of the State Board of Education:
>
> 1. Each four-year high school shall establish graduation requirements on the basis of either course credits, program completion of course credits and program completion. . .
>
> (b) Diplomas shall be granted only to pupils who have completed fully the requirements for graduation as established in the curriculum approved by the State Board of Education, except as provided for seniors entering military or naval service. N.J.A.C. 6:27-1.4.

A search of the Administrative Code has revealed no rules governing diplomas. no new rule has been adopted concerning graduation, but rules concerning adult education have been adopted. The language of the agency proposal found at 20 N.J.R. 700, relating to the award of diplomas to adults, is particularly relevant to show the weight the State Board of Education places upon receipt of a high school diploma.

> [t]he rules for certification for a State-issued high school diploma are outlined in N.J.A.C. 6:30-1.3. . . . Certification for a State-issued high school diploma based on the evaluation of high school transcripts has been deleted from the rules and is no longer an option for obtaining a State high school diploma. 20 N.J.R. at 701.

The mere forwarding of petitioner's transcript to college in the instant case does not provide the same educational status as a diploma. Petitioner's transcript can no longer be reviewed in order to obtain a State-issued diploma. The economic impact portion of the agency proposal includes the statement that "adults with high school diplomas benefit significantly from higher than average earnings over their lifetime." 20 N.J.R. 702. A high school diploma is required to apply for many jobs. Petitioner is precluded from doing so unless he receives the diploma, which is the goal and end result of a high school education. The Social Impact portion of the proposal states that:

> [t]he proposed new rules provide several options for adults to improve their academic skills. These options include attending ... classes in adult high schools to earn a locally issued high school diploma. 20 N.J.R. at 701.

New Jersey schools have a constitutional mandate to provide a thorough and efficient education. The Board does not have the discretion to withhold a diploma based upon non-course related factors. Other jurisdictions have entertained both procedural and substantive claims that students have a right to a diploma once they successfully complete required courses for graduation. Only a minority of jurisdictions have held in favor of plaintiffs, since the facts of the cases before them precluded awarding the diploma based upon failure to complete the course work or passing standardized tests.

In Debra P. v. Turlington, 474 F.Supp. 244 (M.D. Fla. 1979), mod., 644 F2d 397 (5th Cir. 1981), 654 F2d 1079 (5th Cir. 1981), aff'd, 730 F2d 1405 (11th Cir. 1984), the court was convinced that the plaintiffs "have a property right in graduation from high school with a standard diploma if they have fulfilled the present requirements of graduation exclusive of the SSAT II requirement. . ." Turlington, 474 F. Supp. at 266. The court held that due process violations occurred because notice had not been given to students to alert them that a passing grade on a standardized test was required before a diploma would be awarded. "Graduation is the logical extension of successful attendance." Id. Graduation does not occur without the award of the diploma. A mere

ceremony without meaning cannot have the same end result as the award of a diploma. In Turlington, the Board wanted to award a certificate of completion instead of a diploma to those who did not pass the test.

> The Court is also of the opinion that the Plaintiffs have a liberty interest in being free of the adverse stigma associated with the certificate of completion. Wisconsin v. Constantineau, 400 U.S. 433, 91 S.Ct. 507, 27 L.Ed2d 515 (1971). This stigma is very real and will affect the economic and psychological development of the individual. Id.

The court cited Goss v. Lopez, 419 US 565, 95 S.Ct. 729, 42 L.Ed. 2d 725 (1975), in support of its conclusion. "The Supreme Court in Goss recognized that even the suspension of a student for one day infringed upon the students' property right in attending school." Turlington, 474 F. Supp. at 266.

The Court of Appeals in Turlington, 654 F2d 1079 (5th Cir. 1981), issued a per curiam decision which was affirmed.

> What the record in this case clearly established and what the panel of this court did hold includes:
>
> a. That a diploma has a unique value in the market place...
>
> d. That if certain attendance requirements are met and if specified courses of study are satisfactorily completed (passed) a diploma will be awarded.
>
> e. That mutual expectations are thus created between the state and the students.
>
> f. That if a student complies with the established requirements and if he or she has satisfactorily passed these required courses of study, there is a property right in the expectation of a diploma... Turlington, 654 F2d at 1080.

The U.S. District Court, N.D. California, has recently held that petitioner "has a protected property interest in a high school education." Swany v. San Ramon Valley Unified School Dist., 720 F. Supp. 764 (N.D. Cal. 1989). The court found that the graduation ceremony from which plaintiff was barred because of his failure to complete his academic requirements, was merely a symbolic exercise. "Thus, barring a student

from the exercises does not deprive him of any future economic or educational opportunities." Id. at 773. Preventing petitioner in the instant case from receipt of a diploma does have an impact on his social and economic position. The court stated that, "[a]lthough Christopher Swany certainly had a protected property interest in a high school diploma, that right obviously only arose when he had fulfilled the necessary requirements for graduation." Id. at 774. Petitioner failed to earn all his course credits and thus could not graduate.

In distinction, petitioner in the instant case fulfilled all of his academic requirements. Since there is no established New Jersey law to the contrary, a New Jersey court should view a high school student as possessing a right to receive his diploma upon completion of all the "academic" requirements approved by the State Board of Education. The local school board's policy of mandatory payment of class dues or denial of diploma contravenes legislative intent as well as statutory proscription: The legislature specifically provided by statute that only field trips be funded by students. Since school boards do not have discretion over mandating funding by students in any area other than field trips, a failure to pay class dues cannot be a basis for withholding a graduating student's diploma.

I so **CONCLUDE** and **ORDER** on the basis of the above that the policy of the Board of Education of the City of Long Branch for withholding physical possession of diplomas from students otherwise entitled to decline to pay the class dues is invalid as discussed above and further **ORDER** that the action of the respondent Board in this instance based on that policy be **REVERSED** and that J.B. immediately receive his high school diploma.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

7.5.90
DATE

RICHARD J. MURPHY, A.L.J.

Receipt Acknowledged:

7-6-90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JUL 11 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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JOHN AND MARGARET BALLATO, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY, RESPONDENT.	:	DECISION

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

The Board avers that the ALJ incorrectly found that its policy and action in the instant matter were unlawful. It contends that the ALJ's conclusion had no statutory underpinning and he erred when determining that since there was no statutory authority allowing for the withholding of a diploma by a board, it may not be done.

As to this, the Board urges that a board of education's policy is entitled to a presumption of correctness absent a showing of bad faith or it being arbitrary, capricious, or a statutory or constitutional violation. It also contends that N.J.S.A. 18A:11-1(c) has been interpreted on more than one occasion by the Commissioner to permit regulation of extracurricular activities, including participation in same by a teacher or a student.

The Board likewise excepts to the ALJ's reasoning that it is unlawful to withhold a diploma because there is the general entitlement to a free and efficient public education and that entitlement includes the award of a diploma on graduation. It avers that such education has never been interpreted in New Jersey to include the award of a physical diploma. The Board then proceeds to rebut the ALJ's analysis of the issue, the arguments of which are incorporated herein by reference.

In addition to the above, the Board argues, inter alia, that the decision has a needlessly wide application in three respects which may lead to unintended ramifications. It states:

> As argued in the letter brief filed with the [ALJ], the Board, and probably many other boards of education, are confronted with students at the end of their high school education owing library books, library fines, athletic equipment, standard textbooks, etc. To find that the withholding of the diploma is violative of the constitutional right to free education leaves

boards without a means short of a civil suit to recoup unreturned materials and/or unpaid assessments. The penalty of barring of a student from the graduation ceremony for certain offenses, something which has been long recognized in New Jersey, may not provide a board of education with enough leverage to achieve a student's compliance. At the same time, it would be totally unfair to prevent a student, who had successfully completed the other criteria, from going forward with his or her life to college or to a job; thus the Board's decision in releasing transcripts makes sense, even though a student obligation may remain outstanding. However, the physical withholding of the diploma itself is without tangible harm, while at the same time providing a board with a real remedy to close out the student's account.

It is submitted that the penalty in withholding a diploma, where there is an outstanding obligation of a graduating student, is an appropriately balanced remedy which matches the offense, and it is a remedy which the Commissioner should sanction. Unfortunately, the [ALJ], in the writing of this particular opinion, seemingly holds otherwise and in fact stresses that the providing of the diploma, regardless of the status of the student's obligations, is an aspect of free and guaranteed education in the State of New Jersey. In a perfect world, there would be no problem with the [ALJ]'s opinion, but the opinion ignores the frequent realities of open student obligations at the end of their high school career.

The second problematic aspect of the decision, which should be narrowed by the Commissioner, is that it concludes that the award of a diploma must be awarded upon graduation, so long as the student meets the necessary academic requirements. This finding is not supported by statute, regulation or decision in the State of New Jersey. Nonetheless, the message is that deportment does not count towards the award of a diploma and that financial obligations can be similarly ignored, just so long as the necessary academic requirements are met. The Commissioner should not affirm the [ALJ] in this aspect without adding to the decision all of the legitimate criteria for graduation.

The third troublesome aspect of the decision is the message which it sends to students about civic responsibilities. As with all members of

> our society, students have to learn the lesson of submitting to authority. In fact, the Legislature sanctioned the importance of such a lesson in passing N.J.S.A. 18A:37-1, which requires pupils in the public schools to comply with the rules established for the government of such schools. It requires that those pupils pursue the prescribed course of study and submit to the authority of the teachers and others in authority over them. It is submitted that there is an element of disrespect of authority in this matter, about which the [ALJ] did not comment, but which should be addressed in the Commissioner's decision.
>
> (Board's Exceptions, at pp. 10-12)

The Board also argues that by implication the initial decision dismisses as immaterial the Board's motivation in enforcing the class officer's decision with respect to class dues, i.e., it feared that unless a vast majority of the class participated, the costs for the extracurricular events associated with the dues would become so expensive that less financially able students would not be able to participate. It further avers that the ALJ seems to ignore the Board's responsibility to extracurricular events. It states, inter alia, that:

> It is very clear that extra-curricular events are voluntary, but it is also very clear that the Board has the responsibility to ensure that the extra-curricular activities are run properly. By so finding, the [ALJ] implies that a board of education's responsibility to extra-curricular events is limited.
>
> Certainly, an appropriate limit is in the voluntary nature of extra-curriculum, but this case is distinguishable from a mere decision to no longer participate. This is a student who wished to participate, as evidenced by the parents' ala carte payments, but who wishes not to participate the way his class government had established. The [initial decision], as written, seems to impliedly grant a type of anarchic right to a student to determine to what extent he or she will participate in an extra-curricular event. Beyond teaching a poor civics lession, it has an inherent disintegration effect which may ultimately eat away at the extra-curricular activity until it no longer exists.(Id., at p. 17)

Petitioners' reply exceptions reject that John Ballato's refusal to pay class dues may be characterized as a disciplinary problem. It is stated, inter alia, that:

> Mr. Ballato did in fact attend the prom, purchase the yearbook, etc., and paid for them, but, as a matter of [principle], refused to pay the

> unwarranted mandatory dues. In fact, the school administration made it exceedingly difficult for him to participate in these activities. There is absolutely no evidence of a breech of discipline.
>
> It is further argued without authority that this student had a "civic obligation" to appeal to the "student government." His initial appeal was properly to the Board of Education which enforced the "unwritten policy."
>
> Finally, and equally without merit, is the contention that Mr. Ballato had a financial obligation to subsidize less affluent students. This argument appears even more specious when you consider that the net class dues of $10.00 paid for such items as free flowers for prom attendees and that John Ballato paid substantially more than other students for these activities.
>
> The singular issue which counsel fails to address is the constitutional and statutory right of a student to a free education. It is unlawful to impose any penalty, including denial of a diploma, for the reason that a student was unable or unwilling to pay money demanded by the board of education.
>
> (Petitioners' Reply Exceptions, at pp. 1-2)

Upon a careful and independent review of the record, the Commissioner affirms the ALJ's determination that the policy of the Long Branch Board of Education for withholding physical possession of a diploma from otherwise entitled students who decline to pay class dues is invalid. However, the Commissioner reaches this determination based on reasons different from those of the Administrative Law Judge as explained below.

It must first be emphasized that contrary to what the Board urges, students in New Jersey's public schools who meet State and local graduation requirements do in fact have a statutory entitlement to a diploma. N.J.S.A. 18A:7C-4 reads in pertinent part:

> 18A:7C-4. State endorsed diplomas; performance transcripts
>
> All students who meet State and local graduation requirements shall receive a State endorsed diploma; provided, however, that the Commissioner of Education shall approve any State endorsed diploma which utilizes the comprehensive assessment techniques as provided in section 3 of P.L. 1979, c. 241 (C. 18A:7C-3).
>
> Local districts may not provide a high school diploma to students not meeting these standards.***

> Each board of education shall provide, in a format approved by the Commissioner of Education, a performance transcript for each student leaving secondary school. (emphasis supplied)

Consequently, denial of a diploma to a student who meets State and local graduation requirements, even where a transcript is provided as herein*, is clearly a very different issue for analysis than denial of participation in graduation ceremonies since participation in graduation ceremonies is a privilege not a right.

Next to be considered is whether a board of education may establish the payment of class dues as a requirement for the issuance of a diploma. In this regard, the ALJ is absolutely correct in his analysis and conclusions that pupils in New Jersey's public schools have entitlement to a free public education. As such, the ALJ's analysis and conclusions are adopted as they are well-reasoned and accurate. Such determination does not render a nullity a board's right to regulate extracurricular activities as the Long Branch Board would have us believe. Certainly, a board of education may permit class dues as a means to defray the costs of extracurricular activities such as proms or yearbooks. However, such dues must be voluntary. Further, failure to pay same may not serve as a basis for denial of a diploma to a student who otherwise qualifies for one pursuant to the mandates of N.J.S.A. 18A:7C-4.

The instant matter is not the case of a student failing to meet financial obligations for lost or damaged books or equipment. Nor is it the case of a student attending the prom or receiving a yearbook without having paid for those privileges. Rather, it presents circumstances where a student chose a method of payment other than the voluntary fee structure of class dues. Such action is not anarchic as the Board urges since such dues could only be voluntary.

The Commissioner does emphasize, however, that the Board is correct in its concern that the initial decision is overly broad in that it seems to imply that a board may never withhold a student's actual receipt of a diploma if he or she has outstanding financial obligations for lost or damaged school property such as books or equipment. In such circumstances, as opposed to those herein, where the fee in question must be deemed voluntary, a board has entitlement to compensation for the loss or damage of property. The New Jersey State Legislature has mandated in N.J.S.A. 18A:37-3 that parents are responsible for any damage or loss to school property. Thus, in the Commissioner's judgment, it is not arbitrary, capricious, unreasonable or a violation of statute or the constitution for a board to withhold a diploma from a student who is

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* As may be seen in the explicit wording of N.J.S.A. 18A:7C-4, a transcript is an entitlement separate and distinct from that of a diploma.

otherwise qualified if financial obligations exist for loss or damage to property. As correctly argued by respondent, if a board is prevented from doing this, its options for compensation for lost or damaged property are severely limited since the student has completed his/her education in the district.

Accordingly, the recommended decision of the ALJ ordering the issuance of a diploma to petitioners' son is adopted essentially for the reasons stated herein.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2122-89
AGENCY DKT. NO. 10-1/89

BOARD OF EDUCATION
OF BARRINGTON,
Petitioner,
v.
DONALD BEINEMAN,
CAMDEN COUNTY
SUPERINTENDENT
OF SCHOOLS,
Respondent.

M. Allan Vogelson, Esq., for petitioner (Mitnick, Vogelson, Josselson and DePersia, attorneys)

Arlene G. Lutz, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Andrew O. Kaplan, Esq., for participant, New Jersey Association of School Administrators

Record Closed: May 1, 1990 Decided: July 13, 1990

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

The Barrington Board of Education (Board) appeals from a decision of Donald E. Beineman, Camden County Superintendent of Schools, denying the Board's request to establish a dual control organizational structure and directing continuation of unit control. On March 23, 1989, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing was held on May 31, 1989, and hearings were scheduled for August 21, 24, and 25, 1989. Respondent requested adjournment due to reassignment of counsel and late discovery on the part of both parties. Hearings were rescheduled for November 6 and 8, 1989. Petitioner's counsel requested adjournment due to his hospitalization. The case was heard on March 20, 22 and 23, 1990. The parties requested extensions to file briefs. The last brief was received on May 1, 1990, when the record closed. Due to a heavy schedule of emergent matters, the ALJ requested an extension to July 16, 1990 to file the intital decision.

Prior to October 1989, two motions were decided. The New Jersey Association of School Administrators (NJASA) was granted participation on May 19, 1989, and the New Jersey Association of School Business Officials was denied amicus curiae status on September 20, 1989. The reasons for these decisions are set forth in their respective orders.

The Issues:

The case concerns the County Superintendent's discretionary act in disapproving the Board's request for dual control. Dual control is assigning to the school business administrator (SBA) the function of supervision and control of support services for the schools and to the chief school administrator (CSA) the supervision and control of all "education related" functions. Since the business administrator position is certified, however, his evaluation must be performed by the CSA. Both positions report directly to the Board in a dual organizational structure. Respondent argues that the positions cannot be equal when a CSA evaluates an SBA. Moreover, this Board has a variant organization which is not identical to the theoretical model described above, since the CSA's job description has not been amended: it provides that he supervises the SBA. Respondent thus argues that the district is operating in unit control, and its organizational structure should match its operating structure. Petitioner contends no law or rule prohibits the Board from a free choice of organization and that respondent's exercise of discretion was arbitrary in that no rules or guidelines exist to supply standards for its exercise.

The Testimony:

The Board presented Harold Kessler, a certificated, experienced business administrator who served in both unit control and dual control districts and

had no acquaintance with the Barrington district. In his unit control function, he reported to a CSA, but the CSA did not directly supervise or control the support services in practice. In his current dual control function in a Summit district, Kessler is evaluated directly by the Board, not the CSA. His areas of management are the same as in unit control but the CSA "focuses" on educational needs. Both positions report directly to the Board but the CSA and the SBA work together daily as a team. Kessler saw no difference, in practice, between dual and unit control organization. It was probably significant that Kessler had a good personal relationship with the CSA in each district. He had never experienced a situation in which the CSA and SBA disagreed with each other such that each presented a different position to the Board. Kessler would not find acceptable an SBA position in which the CSA rather than the SBA had the duty to draft the budget. Notwithstanding that duty, without full cooperation between the CSA and SBA, it would be impossible for one alone to draft the budget.

Mark Ritter, petitioner's current Secretary, holds SBA certification and has eleven months experience in his position. The district is a very small one. For exapmle, it employs only one person in maintenance and two in financial services. Each month Ritter submits a secretary's report to the Board containing current financial data and proposals for support service needs. The CSA makes an educational report. The two administrators communicate prior to each Board meeting and speak informally every day. He is evaluated by the CSA but he prepares the budget in cooperation with the CSA. Ritter is the fifth to hold the position since 1983. He has never functioned as an SBA in another district.

Stephen C. Crispin held the poistion of board Secretary/BA in Barrington from August 3, 1987 to March 1, 1989. He now holds the same position in a larger district and has worked under both dual and unit control. Crispin saw a difference in the reporting function: under dual control, he would report directly to the Board instead of to the CSA. Crispin saw no difference in day-to-day operations, but felt that he would be more responsible for financial operations under dual control. Crispin stated he never withheld any information from the CSA: the high level of communication and cooperation continued without change during his time in Barrington. Crispin recalled that the Board told him the dual/unit control issue was a philosophical one and that they felt the Secretary/BA should report to only one entity, the Board, rather than reporting directly to the Board as its secretary and to the CSA as business administrator.

Crispin was questioned about the district's 1988-89 audit. He felt that whatever minor problems may have surfaced may have been due to the changeover of personnel during the year resulting in inability to locate some documentation. One problem he was aware of was alleged misuse of a computer terminal in the past year (1987-88). Crispin was not aware of any change in job descriptions although he knew the organizational chart changed. Crispin stayed neutral on the subject. To his knowledge, he did not fail to furnish information and a special education application to the CSA in a timely fashion, did notify employees of their health benefits properly and corrected a situation where a worker did not possess the correct license for boiler work. He testified on these subjects because of complaints made by the CSA of problems with the functioning of the office subsequent to a change to dual control. Crispin testified that in practice only the reporting function was slightly changed. He was personally unaware of whether or not the Board asked the CSA to participate in specific cost cutting meetings. As far as Crispin was concerned, the system worked fine both before and after the change to dual control.

School board member Patti J. Pawling explained the Board's rationale for a change of organization as a simple desire to have each administrator concentrate on subjects in his own area of expertise and report directly to the Board. There was no intention to isolate the CSA or withold information from him. Pawling and several others ran on a platform of reopening a particular school whch the Board had voted to close. She conceived that some conflict could arise under dual control if the CSA interfered with running the business office. If he disagreed with operations there, the CSA would have to bring the problem to the Board rather than exercising direct supervision. Pawling did not observe any situation in which the CSA and SBA failed to work together, thus she found it hard to visualize a conflict situation. The only change under dual control was in the reporting function and the CSA never complained about the working of dual control as far as she was aware.

William G. Nelson, Sr., former president of the Board, served from 1986 to 1989, when he lost a bid for reelection. Wilson had been concerned about the turnover of SBA's. The Board had five in seven years. Wilson and another member talked to two former SBA's, and were told a major problem was the CSA's interference with their subordinates. Thus he supported separating the two offices and removing control of the business office from the CSA. Wilson favored having any disagreements heard by the Board in a greivance process. The former SBA, Steven Crispin, had no problem with the changes; he simply left to get a better job. Respondent Beineman never spoke to Wilson

about any difficulties in the business office although he did ask to meet with the Board to discuss its relationship with CSA Malony.

Petitioner called respondent Beineman as its witness to probe his reasons for denying the Board's request. Respondent Beineman related his concern with the Board's initial provision that it would directly evaluate an SBA, since such activity would be contrary to the regulations. He reiterated his rationale as expressed in documents in the record. He was aware that there was bad blood between CSA Nelson Malony and board members, particularly Wilson. He offered to meet with them to smooth it out. The Board refused. Both sides had faults and it became emotional. In Beineman's opinion, dual control promoted isolation of the CSA from activities he had to know about. A prior SBA did not have a good relationship with Malony. Beineman learned that morale problems arose because the SBA and CSA followed different practices with their office employees and Board members sometimes came to the SBA and gave him directives in conflict with the CSA's position. for example, the Board's financial committee met without either the CSA or SBA, then directed the SBA to put together a draft budget reflecting their views which was to be submitted to the entire Board. The CSA thus got the final draft when the Board did. Under a unitary organization, all information would have come to the CSA first. The fact that in his Board secretary functions the SBA reports directly to the Board is not significant since the secretary's functions are largely ceremonial.

Beineman admitted that if the Board had made its requests to him prior to the adoption of a new regulation after July 1988, he would have had to approve the request. He conceded that no statute or regulation bars a dual organization or mandates unit organization. He knew of no source of applicable criteria and based his decision on individual facts and circumstances. Respondent pointed to a Report of Task Force on Business Efficiency (R-6) which recommended against dual control, but was aware that it was never implemented. He was familiar with it because he participated in the work of the Task Force. It was his firm opinion from fifteen years of experience that separation of powers and functions does not reduce conflict and that with this Board and this CSA, it would create isolation of the CSA, who would be by-passed in his financial and support services functions. Beineman discussed his recommendation with Walter McCarroll, an assistant commissioner of education, who advised him to state his rationale in writing, which he did on August 11, 1988 (P-6).

Under direct examination on his own behalf, Beineman related what he knew about the operation of the Board and the district from his years of experience with Camden County districts. His knowledge of the continuum was much more extensive than that of the Board's witnesses. He knew each of the prior SBA's and still sees many of them. Thus he was aware of the problems in the district and the reasons for frequent turnover in this position. He also attended numerous meetings during the course of his duties and personally observed the interaction of CSA Malony with Crispin and other SBAs. Beineman reviews all filings, audits, complaints and appeals of all kinds and is aware of any disputes which become public through reading the local press. Since I derive many facts in my findings below from Beineman's testimony, I will not reiterate it here. It will suffice to say that the breadth of Beineman's overview of education in the district and county, the precision of his recollection and his observations of the continuum of the district's operation over many years all contribute to the weight of his expert opinion.

Respondent called Superintendent Nelson H. Malony, CSA of the district since 1983, as its witness. Malony related that he had good communications and evaluations from the Board until the summer of 1985 when he recommended that Culbertson School be closed and the Board accepted his recommendation. Malony believes that it was the perception of the community that he was responsible. Reopening the school became the primary election issue. Three new members were elected after a campaign during which adverse comments concerning the superintendent and his salary were circulated. Malony felt that his relationship with the Board deteriorated after that election. The following year three more new members of similar views were elected. Malony felt that his negative relationship with the Baord worsened and he claimed he was reprimanded inappropriately. Malony stated some schools issues were never discussed with him prior to public meetings. During a two-year period Malony received eight or nine reprimands.

Malony testified that in his opinion, he had an excellent relationship with SBAs initially; he worked with three before dual control, one who served during the changeover and one hired less than a year ago. Malony attributed the unusual rate of turnover of SBAs partly to their being placed in an uncomfortable position between the Board and superintendent. Some SBAs left to take a better position. Malony felt he worked well with all of them but after dual control entered the picture, he did not feel as comfortable performing his duties. He was not sure of their perameters. Since their offices were side by side, when the SBA approved his secretary's taking a half-hour lunch and leaving a half-hour early and Malony would not allow his secretary to do the smae, he

was blamed for the disparate standards. The SBA allowed his secretary to take a vacation day the first day of the school year; Malony would not allow his to do so. The workers in contiguous offices had different rules. If Malony suggested certain actions to the SBA, he was unable to supervise to assure the task was done. Although Malony found the current SBA to be cooperative, in his opinion they are not working as efficiently together as they could under pure unit control. Malony was distrubed because he couldn't direct completion of certain tasks and he did not have access to the records. Under the current mixed system, the tasks are not clearly divided: Malony gives direction to the SBA but Malony himself maintains the policy manuals, for example.

Malony felt that the lack of communication after dual control make him look inefficient because the Board would make cuts in the budget at public meetings prior to which he had not been given an opportunity to make his opinion known. He could not get information on proposed cuts in advance of a meeting. He was thus unable to report back to his building principals what the cuts or their justifications were. This situation would not occur under unit control, in his view. Malony also gave a number of examples of items which he felt were not handled appropriately because under dual control he could not supervise the SBA. For example, the surplus crept up to 17%, the employees complained that they were not offered open enrollment for health benefits in a timely fashion, health benefits expense for a deceased worker was paid and other workers were carried on the rolls when they should have been dropped. Malony disagreed with the Board publicly and privately on dual control and complained to the County and State education authorities upon several occasions. He pointed out that as CSA, he was responsible for monitoring the system, and yet if the SBA filed a report late, he got the blame although he had no authority to direct the SBA to act.

Petitioner called William Wilson to rebut some statements made by Malony. Wilson testified that the Board never told Malony not to involve himself with the functions of the business office. Wilson stated that Malony had told the Board many times that if his recommendations were not followed, the district would fail monitoring. The Board responded that Malony should stay away from the SBA's staff. He could discuss staff personnel concerns with the SBA, but if the SBA did not agree, Malony could not force his views on the SBA insofar as his own office staff was concerned. Wilson disputed Malony's statement that a 17% surplus suddenly appeared; he said it had accrued over the years. It was simply uncovered in Crispin's time as SBA when they discovered $200,000 which had been cut, had been double billed and appeared on another line. Wilson denied

that Malony did not know about cuts in advance of the public meeting. Malony was always present when the financial committee met and discussed budget cuts. He also denied that duplicate insurance payments were related to changes in organization; they had occurred during the tenure of two SBAs, under both dual and unit control. In Wilson's opinion, Malony felt the Board should be a rubber stamp and problems arose because the Board did not accept all his recommendations.

The findings below will not detail the minutae of accusations and responses. Many of the alleged inefficiences and errors in my view, could occur under any form of organization. There will always be personality conflicts, fighting for turf, power plays, and political pressures to a greater or lesser degree at different times within any governmental or private corporation. The demeanor of the witnesses and the different points of view revealed in the testimony lead me to conclude that Malony's opinions were not wholly realistic because he overreacted to a perceived hostility on the part of the new board members. He appeared to have a strong need for self-justification and the security of control. This is not to say that many of his observations are not instructive, but rather, that the focus of my fact finding here is intended to be less myopic and more consistent with Beineman's overview.

Findings of Fact:

1. The Barrington School District has a K-8 school population which has been declining from its high of 1,055 pupils in 1975 to a count of less than 700 in 1989.

2. In May 1972, the Board created the position of School Business Administrator who was also to perform the duties of Board secretary within a unit control organizational format. The County superintendent recommended that the position be approved and the State Board approved the position on June 7, 1972.

3. The first SBA (William Marley) held the position from 1972 to 1982. The next SBA, Diane Checks, had no prior SBA experience and served eleven months; the following SBA, John Bigley, was a math teacher before he served one year as SBA. After Bigley, Frank Debaradines, a former guidance counselor, served for two years. The next SBA was John Desirable, an industrial technical teacher with no prior SBA experience who served for one year. Steve Crispin was also a teacher with no prior experience. The current SBA, Mark Ritter, was formerly a biology teacher and had no

prior SBA experience.

4. The Board hired Nelson Malony as Superintendent of Schools in October 1983. Thus Malony served during the incumbencies of at least five SBAs, from Bigley through Ritter, all of whom had been teachers, had no prior experience in an SBA position, and who only stayed for a short time.

5. Although all the SBAs who left ostensibly left to assume better jobs, at the time the question of closing a school arose, when DeBaradinis was SBA, there were signs of problems in the administration. John Desirable articulated a problem of strained relationships with the superintendent and Board and the proposal of dual control organization as a reason for job hunting before he left in July 1987.

6. In August 1987, Malony advised County Superintendent Beineman that the Board proposed to adopt a dual control organization and respondent advised the Board on Augsut 26, 1987 that, pursuant to N.J.A.C. 6:3-1.18, they could not do so without following the approval process used to establish the position. He also advised that under N.J.A.C. 6:3-1.19, the SBA could only be evaluated by the Superintendent.

7. On July 6, 1989, the Board unanimously passed a resolution adoping dual control, with an attached SBA job description and organizational chart showing that the SBA would report directly to the Board and be sole supervisor of all support personnel. (P-1.) Among the duties he was to perform were preparation and submission of the annual budget, auditing accounts and other duties as assigned by the Board. The Board appended a statement of reasons as follows:

> 1. The two pronged approach to the administration of school systems allows educational administrators to concentrate and develop good educational programs and allows business administrators to concentrate on the service functions thus developing a sound business approach.
>
> 2. Since the law provides a non-continuous board of education with new members frequently being appointed or elected, it becomes more important to have a balanced administrational organization.
>
> 3. The business functions of a school system are an integral part of its existence. A good program cannot be developed without either of these phases. They must grow side by side. Education is a big business. No one individual can possibly

have all the skills and knowledge to coordinate all administrative and supervisory activities of the school system effectively without other central office staff sharing in this coordinating responsibility.

4. The business official brings a professional and specialized business skill and knowledge to the system. His skill, training and demonstrated knowledge is in the sphere of business affairs whereas the superintendent's is in the area of education.

5. It is this business skill, training and professionalism of the Business Administrator, reporting directly to the Board, thus freeing up the Superintendent for educational administration, which the Barrington Board of Education seeks to establish by a separation of duties under a dual control structure.

8. Prior to the time of adoptng the resolution, the relationship of the Boad and Superintendent had deteriorated during a rising tide of controversy and political pressures concerning the closing of a school. Personality problems were exacerbated by stress, issue factionalism, and Board member turnover, which necessitated institution of effective communications with different persons and a learning period for them.

9. On August 11, 1988, subsequent to oral discussions, the County Superintendent placed his opposition to the Board's approval request in writing to Assistant Commissioner Walter J. McCarroll. Respondent noted that only the Superintendent was permitted to evaluate the SBA, who is a certified teaching staff member and who must be recommended for his position by the CSA. (P-6.) As respondent stated in his letter to Board counsel in 1987 (P-4), dual control is thus inherently in conflict with the existing regulations and practice controlling the duties and funcations of the CSA and SBA.

10. On July 21, 1988, the CSA wrote to respondent to controvert the Board's rationale in adopting dual control. He stated that the current SBA lacked experience and management skills and had allowed inaccuracies in financial and personnel record keeping and complained that a CSA has ultimate responsibility and cannot perform his tasks wihtout authority to supervise the SBA.

11. On October 7, 1988, respondent stated he would deny approval because dual control is in conflict with sound business practice since the CSA is responsible for the educational mission of the district and cannot perform it effectively without full support and knowledge of fiscal affairs and support services. His second reason was that

the code requires that a CSA evaluate an SBA but the Board's resolution did not indicate how the requirement would be met.

12. On December 5, 1988, the Board amended its resolution to provide that the SBA would be evaluated in the manner required by law. On October 2, 1989, the Board further amended the resolution to show evaluation by the Superintendent and revisions of the organizationl chart to that end.

13. On January 9, 1989, the County Superintendent directed the Board to restore unit control since it failed to file an appeal based on his October 7, 1988 denial letter.

14. On February 7, 1989, CSA Malony wrote a letter to Assistant Commissioner Walter J. McCarroll opposing dual control and attributing the Board's proposal to his difficult working relationship with all the new Board members who were elected on the issue of reopening a school. In illustrating his opinion that dual control was unsound, he listed nine specific recent occurrances which he attributed to the SBA's inexperience and his own inability to supervise the SBA under dual control.

15. On February 16, 1989, CSA Malony supplemented his earlier letter by a complaint that after the Board adopted a budget with changes in it on February 6, he asked the SBA for a revised budget workbook and information on the cuts and had not yet received a response by February 16. Malony stated he had no imput and could not tell staff any rationale for the cuts. He claimed that the Board violated the spirit of the sunshine law based on the Board president's statement at public meeting that he and the finance chairperson visited other Board members at home to explain the budget.

16. While making his decision to deny approval respondent was mindful of a 1978 Report of the Task Force on Business Efficiency of the Public Schools (R-6) which was required to be made and filed with the Legislature and Governor pursuant to N.J.S.A. 18A-7A-31. (L. 1975 c. 22 § 50). Respondeant participated in the work of the task force which reported, in pertinent part, that unit control should be established in all school districts to improve the management and business operations of the public school system. The report advised that the superintendent as CSA must exercise general supervision over all aspects of operations including business and management affairs and financial matters. The report notes: "All too frequently in N.J., when a newly elected school board or board

majority takes office it finds itself frustrated by a tentured CSA who is philosophically committed to the policies of a preceding board... the board is likely to turn to the Board secretary as a surrogate administrator..." The report recommended new legislation. No action was taken on that recommendation.

17. The CSA's job description, in accordance with law and rules, states that his function is to "serve as the professional advisor" to the Board. Giving the SBA a direct reporting duty to the Board conflicts with the CSA's function.

18. The Board did not allow the CSA input in the final budget cuts. Since Malony attends all finance committee meetings, the finance committee worked around him by personally visiting individual board members. The SBA made the final changes in the draft and Malony was not given a copy of it or the rationale for the cuts for at least ten days after the public meeting. The new SBA job description states he is to prepare the budget, rather than assist in preparation. The distinction is crucial: unless the CSA has authority to draw a budget to support the educational program or to direct an SBA to do so, he is prevented from performing his required duties.

19. Within the past two years, audit recommendations were not implemented in a timely fashion. The SBA allowed custodians without the required boiler license to work in schools; employees were not offered open enrollment for health benefits in a timely fashion; payments for benefits were continued a for deceased worker; the budget surplus crept up to 17%; the SBA filed a monitoring report late for which the CSA was blamed; and there was a disparity in personnel practices between the offices of the SBA and CSA.

20. A number of the errors or omissions which occurred during the district's operation in a dual control mode stem from the SBA's lack of experience; close supervision by an experienced superintendent could have curtailed errors.

Discussion and Conclusion:

The seminal legal authority for respondent's duty in this matter is N.J.S.A. 18A:17-14.1:

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

This statute has not been amended since its adoption in 1967, although the regulations stemming from it have changed.

The county superintendent approved the Board's establishment of an SBA position in 1972. Prior to January 16, 1990, when N.J.A.C. 6:3-1,18 was repealed, that rule prescribed the regulatory approval process. N.J.A.C 6:3-1.18(d) provided:

> "All changes or modifications in the original plan concerning the position of school business administrator as submitted to the County Superintendent of Schools, the Commissioner of Education and the State Board of Education must be approved in the same manner as the original plan."

N.J.A.C. 6:3-1.18(b)1 requires:

> "In requesting the establishment of the position of school business administrator, the district board of education shall present to the county superintendent of schools a chart of organization clearly showing relationships of the school business administrator; a well-defined policy outlining duties and responsibilities to be assigned and the proposed salary."

N.J.A.C. 6:3-1.18(b)2 lists major areas of the duties and responsibilities which may be considered by the board as functions of the SBA. The first is in the area of budgeting and financial planning; the SBA may "assist" in the planning and preparaton of the budget. Upon certification by the county superintendent of schools of the necessity for such a position, the Commissioner and State Board may approve the establishment of a SBA position. N.J.A.C. 6:3-1.18(b)4 states that the SBA must be certificated and is a member of professional staff.

N.J.A.C. 6:3-1.18 was repealed at the same time N.J.A.C. 6:11-10.10 stating the requirements for certification of an SBA was adopted and N.J.A.C. 6:11-10.4 stating the endorsement required to perform SBA duties was amended. The summary of the proposed change, at 21 N.J.R. 2915, states that the new rules will upgrade standards for

SBAs and eliminate the need for a procedure by which the State Board must approve local job titles. The rule changes did not eliminate the requirement of approval of necessity for the position by the county superintendent: they could not because to do so would require a statutory change. The summary also states that the practice of local districts was to assign business administration functions to whatever titles they preferred, which titles had to be approved by the State Board "although there are no established criteria upon which the board might disapprove local requests." The summary reveals two aspects of the rationale for the new and old rules: the approval procedure is generally related to the rules requiring approvals of unrecognized titles and secondly, the State Board was conscious of the criticism of lack of criteria. The new rule setting more stringent requirements for all staff performing business functions, albeit with grandfathering, would eliminate the need in an approval process to probe the functions via submission of a job description and organizational chart, as distinquished from considering "necessity."

As counsel for respondent points out, the County Superintendent is a statutory officer under N.J.S.A. 18A:7-1 et seq. who has been given many discretionary duties of approving and monitoring without reference to specific criteria. See N.J.S.A. 18A:39-11; 18A:58-7 (transportation) and N.J.A.C. 6:11-3.6(b) (unrecognized titles); N.J.A.C. 6:8-4.3(a)(7)(i)1 (basic skills plan); and N.J.A.C. 6:8-4.3(a)(7)(ii)1 (special education plan). Respondent bases his action on the facts and circumstances of each case within the context of policy, directives and requirements set forth by relevant regulations. An action committed to agency discretion can only be overturned when it is arbitrary. Gromley v Lan, 88 N.J. 26 (1981). "Arbitrary" means with no national basis. McNeil v. U.S., 422 F 2d 1055, 1057 (5th Circ 1970).

When this case was filed and until January 1990, changes in the SBA job description and organization were controlled by N.J.A.C. 6:3-1.18: a district had to go through the approval process as required therein. Petitioner argues that the hearing before me is de novo and that repeal of the rule has changed the standard, i.e., that the issue is no longer whether or not respondent's denial of approval is arbitrary and unreasonable, but rather, whether or not any rule or statute now constrains the Board from adopting any organizational change and job description it desires. In the definitions of N.J.A.C. 1:30-1.2:

> 'Repeal' means to conduct a rulemaking proceeding to declare void a rule, the effect of which is to terminate the legal effect of such rule prospectively only. Any rule so terminated shall continue thereafter to be enforced in and applied to all proceedings, formal or otherwise, initiated pursuant to rule or to law prior to the effective date of such repeal.

Retroactive application of an administrative rule is not favored. Bowen v Georgetown Univ. Hosp., 488, U.S. 204, 102 L Ed. 2d 493(1988). In the absence of any harm from reliance on a repealed rule, and because the repeal largely concerns a change in procedure rather than substance (statutory necessity for an SBA having been established in 1972), the Commissioner probably has the discretion to apply the repeal retroactively. I do not, however. I **CONCLUDE** the legal effect of the repealed rule is prospective only.

If the Board's position is a valid one, i.e., that it may now change its organization and job description for an SBA absent law or rule to the contrary, then it can simply readopt the resolution reflecting its desires. Then the issue would be whether law, rule or policy precludes the change. In any event, I will have to discuss that issue here in the context of reviewing the respondent's exercise of discretion; a related argument made by respondent is that the Board's actions were improper and inconsistent because CSA Malony's job description reflects unit control, whereas the new SBA job description reflects dual control and since organizational structure must match operating structure, respondent's directive to return to unit control should be affirmed. Of course, there is more than one way to render the structures consistent if the Board is allowed to amend the CSA's job description. Respondent admits that many dual control districts exist in the state. He argues, however, that dual control runs counter to the trends in education today and contradicts the findings and conclusions of the report issued by a legislatively mandated Task Force. On these two specific points, the response is clear. Neither the State Boad nor the Legislature has acted to preclude dual control. Since it has existed for many years, it would probably take action by the Legislature to outlaw it, as the Task Force recognized in its recommendations. It may be that the State Board could do so by a clear cut regulation. It did not choose to do so, but sidestepped the issue in adopting regulations which update SBA requirements and eliminate, for the future, the use of uncertified individuals (including secretaries of the boards) to perform business functions. The State Board did not state in N.J.A.C. 6:3-1.12 (duties of CSA) that a CSA is sole supervisor of all other administrators and employees in the district. Nor did it state in N.J.A.C. 6:11-10.4 to whom the SBA must report in the performance of his or her duties. In fact, by repealing N.J.A.C 6:3-1.18 the State Board eliminated the section

stating that among the major areas of duties of an SBA is that he or she "assists" in budget preparation as distinguished from "prepares" the budget in cooperation with other staff.

Respondent argues that the rules imply that only unit control is appropriate since they clearly require the SBA to be evaluated by the CSA, and thus the two cannot be equal. The NJASA points to the term "Chief" and the duty of "general supervision" given to the CSA as proof that dual control districts are not operating in accordance with law. The NJASA also points to N.J.A.C. 6:8-1.1 et seq. and notes that the CSA is responsible for all operations of a district under T & E law. No matter how much I may agree with respondent and the participant that dual control is not sound business practice, I **CONCLUDE** they address the wrong forum. Under the six factors stated in Metromedia, Inc. v. Div. of Taxation, 97 N.J. 313 (1984), which determines whether an agency action must be rendered through rulemaking, it appears clear that an agency action to bar dual control organization must be by rule rather than adjudication. Barring dual control would apply to all school districts generally, is not inferable from the statutes, would alter a past agency position of permitting dual control, and would constitute the adoption of a general policy. Dual control cannot be adjudicated to be illegal indirectly by interpretations of other rules not addressing the issue. It can only be done by rule and legislation.

We are left, therefore, with determining whether respondent abused his discretion in recommending against approval of the Board's proposal. Among the facts he considered was that the new Board or a majority of the members had a strained relationship with the CSA. Inferences from the testimony show that the Board was trying to work around the CSA by placing the SBA and his functions outside the direct supervision of the CSA and by giving the SBA a direct reporting function. This is the classic fact pattern cited by the Task Force Report recommending against dual control. In this relatively small K-8 district, with a school population which has declined considerably in recent years, the SBA position has been held by five inexperienced individuals all of whom soon left for better paying jobs. In such circumstances it is imperative that the SBA be closely supervised by an experienced superintendent. The CSA, SBA and Board must work closely and cooperataively to achieve their educational mission. Given the recent history of the relationships in this district the dual control proposal will further exacerbate strained relationships and lower efficiency. The various items not handled appropriately over the past several years are symptomatic of a lack of

efficiency. Based on these facts, respondent applied his discretion in a reasonable, non-arbitrary fashion. The rationale given by the Board for its actions is essentially a statement of opinions, many of which do not comport with facts or with current educational policy: for example, unit, not dual control is considered the preferable organization and the Board cites the salubrious effect of an experienced SBA reporting to the Board, but in fact the Board has not hired one with experience for many years.

Petitioner makes two procedural arguments. One is that respondent should have simply forwarded its request to a higher authority. The statute, however, directs that respondent have an approval function. N.J.A.C. 6:3-1.18 similarly prescribes an approval function. This aspect of the directive cannot simply be ignored. Since there must be an opportunity to be heard, the practical solution is to make a record at this level, as has occurred, so that the Commissioner and State Board have a factual record to review. The Board's second argument is that no standard for the granting or denial of approval is embodied in law or rule. The seminal statute speaks to necessity. That term has long been held to be an adequate standard. For example, in public utility and transportation law, one seeks a "certificate of convenience and necessity." Further, I agree with respondent's argument that a rule cannot cover every factor which might surface in considering the characteristics of individual school districts. Finally, there is a suggestion of factors to be considered, albeit indirect, in the original rule. The board is to file "a chart of organization clearly showing relationships of the school business administrator and a well defined policy outlining duties and responsibilities to be assigned. Obviously this requirement is intended to pose for review whether or not the job qualifications, certification and salary are appropriate and whether the relationships and lines of authority are clear. I **CONCLUDE** that respondent had sufficient guidelines to exercise his discretion.

When the Board adoped its SBA job description, N.J.A.C. 6:3-1.18 stated that an SBA could be given the task of assisting in preparing the budget. The Board gave him the task of preparing it, yet it also gave the CSA the task of preparing portions of the budget (R-1, No. 6). The CSA's job description, which was unchanged, gave him direct or indirect supervision of all district employees, yet the organization chart adopted by the Board gave the SBA sole supervision over all support staff. I **CONCLUDE** that the job description of the CSA, SBA and the organizational chart are inconsistant and hence improper.

Having concluded that the respondent properly denied approval within his discretion under N.J.A.C. 6:3-1.18, I **CONCLUDE** that the Board must restore its organization and job description of the SBA to its status prior to the request for approval so as to conform all controlling documents to unit control organization. These conclusions are without prejudice to the Board to make application under the regulations applicable after the repeal of N.J.A.C. 6:3-1.18, since the necessity for the position under N.J.S.A 18A:17-14.1 is not at issue. Should the board opt to make a new application for dual control, however, all elements of the reorganization must be consistent and actual practice must conform to the newly adopted structure. If dual control is to be prohibited, then it must be done by way of statute and/or State Board regulations. I **CONCLUDE** currently existing law does not preclude dual control which has, in fact, existed and continues to exist in many districts.

It is, therefore, **ORDERED** that the respondent use its SBA job description and organizational chart which existed prior to the request for dual control and conform its actual practice to be consistent with the said approved documents.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

July 13, 1990
DATE

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

JUL 17 1990
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

am

BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON, CAMDEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
DONALD BEINEMAN, CAMDEN COUNTY SUPERINTENDENT OF SCHOOLS, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Participant New Jersey Association of School Administrators, (NJASA), acting as amicus curiae, filed timely exceptions pursuant to N.J.A.C. 1:1-16.6(c)3 and 4.

NJASA contends in exceptions that the ALJ erred in concluding that dual control is a legitimate organizational structure under New Jersey Administrative Code and statutes. It challenges the ALJ's conclusion that the issue of dual control cannot be adjudicated as being illegal indirectly by interpretation of other rules not addressing the issue but, rather, can only be done by rule and legislation.

NJASA submits that the statutes do authorize the State Board to develop regulations requiring a unit control organizational structure and, further, that the State Board has already done so. In so claiming, Participant NJASA cites the Code for the activities for which the chief school administrator (CSA) is responsible:

1. for the overall direction and supervision of the district (N.J.A.C. 6:3-1.11 and 1.12)

2. for the evaluation of the school business administrator (N.J.A.C. 6:3-1.19 and 1.21). Note: The school business administrator is a professional certificated staff member and, thus, falls within the definition of a teaching staff member under these rules.

3. for recommending applicants for the position of school business administrator to the local board. The local board may not hire a school business administrator without the affirmative recommendation of the chief school administrator. (N.J.A.C. 6:8-4.3(a) 6 vii)

4. for all operations of the school district under the T&E law (N.J.A.C. 6:8-1.1 et seq.)

(Exceptions, at pp. 2-3)

In this regard, NJASA disagrees with the ALJ's conclusion that the Code does not indicate to whom the school business administrator must report in the performance of his or her duties. Instead, NJASA argues that the Code assigns the CSA responsibility for evaluating the school business administrator (SBA). It submits, as it did in the hearing below, that it would be an absurd result if the rulemakers did not give the CSA the supervisory authority needed to carry out the evaluation function by permitting the SBA to be answerable to the Board rather than the CSA. It cites N.J.A.C. 6:3-1.19 and 1.21 for further support on this point, referring to the format for evaluations and the relationship between supervisor and employee.

Additionally, NJASA claims the ALJ incorrectly held that the Code does not state that the CSA is the sole supervisor of all other administrators and employees in the district. In fact, it claims, the Code precludes the local board from direct supervision of staff, in that N.J.A.C. 6:3-1.19 and 1.21 require that evaluations of staff be conducted by properly certificated persons. It reiterates that to separate the supervision and evaluation functions would create an unworkable organizational structure. It concludes by stating that while the chief school administrator may delegate the direct supervision of staff to others within the organization, he or she is the ultimate supervisor.

Moreover, NJASA contends that the actions of the State Board in making superintendents the chief school administrators responsible for the overall direction and supervision of the district, as well as for the evaluation of all staff, proscribed, by inference, the dual control organizational structure in local districts. NJASA would distinguish Metromedia, Inc., v. Director, Division of Taxation, 97 N.J. 313 (1984) from application to this matter. NJASA submits that the ALJ construed that case to mean that although dual control is not a sound business practice, it can only be determined to be illegal by rulemaking. It contends, however, that the Court in Metromedia stated that rulemaking as an agency determination "(4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization." (Exceptions, at p. 5, quoting Metromedia, at 331) NJASA submits that the enabling statutory authorization under which the State Board acts in this matter is at N.J.S.A. 18A:17-20, which states:

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

Thus, NJASA avers, local boards may give the superintendent additional powers and duties, but local boards may not reduce the superintendent's power to provide general supervision over the

schools. Relying on its post-hearing brief, NJASA further states that general supervision must include supervision of the district finances, business operations and facilities.

NJASA further relies on the above statutes for the proposition that the State Board was authorized to create regulations requiring a unit control organizational structure, which it has done by N.J.A.C. 6:3-1.19; N.J.A.C. 6:3-1.21; N.J.A.C. 6:3-1.11; N.J.A.C. 6:3-1.12; N.J.A.C. 6:8-4.3(a)6(vii); and N.J.A.C. 6:8-1.1 et seq.

Accordingly, NJASA submits the ALJ erred in concluding that dual control is a legitimate organizational structure and that Metromedia, supra, requires a rulemaking procedure to change this alleged status. Instead, NJASA contends dual control is an illegal organizational structure. NJASA submits that the State Board, through the rules mentioned in the exceptions "recognizes that N.J.S.A. 18A:17-20 gives the superintendent the power and duty of supervision over the entire school district and that it is illegal for local boards to attempt to diminish those powers and duties by way of a dual control organizational structure." (Exceptions, at p. 6)

Upon a careful and independent review of the instant matter, the Commissioner affirms the initial decision with the following clarifications and modification.

First, it must be recognized that nowhere in statute or code do the words "unit control" or "dual control" appear. By virtue of such silence, it must be assumed that the statutory and regulatory scheme is neutral regarding such organizational structures.

In the Commissioner's view, it is the educational program and the need for resources required for its implementation that must be the engine driving the budgetary process. To organize a district in such a manner as to have these two vital functions operate in isolation is, as concluded by the ALJ, an inherently unsound practice. There is, however, nothing inherent in a "dual control" system which implies that such a structure necessarily results in fiscal considerations dictating the nature and quality of the educational program. Should such circumstance arise, the county superintendent of schools, as the Commissioner's representative, has the authority pursuant to N.J.S.A. 18A:7A:28 to review every budget for its adequacy and to reject any budget which fails to provide for a thorough and efficient system of education.

Thus, while the Commissioner agrees with the ALJ that a unitary system with its clear and unequivocal lines of authority is to be preferred, he must reluctantly conclude, as did the ALJ, that there is nothing in law or regulation which absolutely precludes a dual control system of management. That is to say, notwithstanding the validity of the regulations cited by NJASA, the duties and responsibilities contained therein do not suffice to infer that boards of education are barred from requiring a school business administrator to report directly to it on matters related to fiscal operations. The Commissioner, as did the ALJ, concludes that such

denial of the authority of a board must arise from direct statutory or regulatory authority. Yet, even conceding that NJASA is correct in its argument that regulations require that only teaching staff members, other than the CSA, be evaluated by persons properly certified to do so, such concession does not preclude the CSA from evaluating the SBA's performance even though that individual reports to the board on matters of finance.

Further, the Commissioner's review of Metromedia, supra, which deals with when an agency directive must be rendered through rulemaking, convinces him that the ALJ was entirely correct in deciding not to use the adjudicative process in the instant matter to establish a rule which has universal application in the field of public school education. The Commissioner concurs with the reasoning of the ALJ which led her to conclude that absent express legislation or regulations adopted by the State Board pursuant to the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. dual control, prohibiting adjudicative rulemaking was not called for by interpreting other rules not specifically addressing the issue.

Accordingly, for the reasons expressed in the initial decision as supplemented herein, the Commissioner finds that Respondent County Superintendent Beineman properly exercised his discretion under the circumstances of this matter at the time the request was made and properly denied approval for changing the reporting mechanism of the School Business Administrator from the Superintendent to the Board as originally approved by the State Board pursuant to the now repealed N.J.A.C. 6:3-1.18.

However, in so concluding, the Commissioner must reject the ALJ's remedy that the Board restore its organization and job description to its status prior to the request for approval sought from the County Superintendent. Under current regulation no application need be made to the county superintendent of schools for permission to alter the reporting mechanism of the School Business Administrator, such requirement having been repealed in the rule adoption effective January, 1990.

To the extent then, that the ALJ speaks to the Board's reapplication to the County Superintendent for permission to change the reporting mechanism of the School Business Administrator, the initial decision is rejected, since no such application is presently required by regulation. Likewise, the Commissioner rejects the ALJ's remedy that the Board revert to its SBA job description and organizational chart which existed prior to the request for dual control insofar as the regulation which required approval of the County Superintendent is now repealed.

Accordingly, for the reasons expressed above, the initial decision is adopted, with modification as to remedy.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

CITY OF JERSEY CITY,	:	
PETITIONER,	:	
V.		COMMISSIONER OF EDUCATION
	:	
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

This matter was opened before the Commissioner of Education by way of a Notice of Intent to Appeal filed by the City of Jersey City (City) dated May 16, 1990 pursuant to the provisions of N.J.S.A. 18A:7A-52(a) which authorizes the governing body of a state-operated school district to appeal the tax levy certified by the State Superintendent. By way of a letter to the parties dated May 18, 1990, the Commissioner outlined the procedures and timelines to be followed by the parties relative to the filing of the Petition of Appeal and Answer to same.* On June 4, 1990, the City formally filed a Petition of Appeal with the Commissioner followed four days later (June 8, 1990) with an Amended Petition, said Amended Petition being received prior to the filing of an Answer by the State-operated School District of Jersey City (District). On June 19, 1990, the District filed its Answer to the Amended Petition setting forth its reasons why the reductions recommended by the City could not be accomplished without impairing the District's ability to provide a thorough and efficient education. Additionally, the District raised two Affirmative Defenses:

> Petitioner has not served its original petition upon Respondent to this date, even after and despite request to do so, and accordingly has not perfected its appeal.
>
> Petitioner filed and served its Amended Petition well beyond the 10-day period set in the Commissioner's procedural order of May 18, 1990. The 10-day period for filing of the petition commenced on Petitioner's receipt of Respondent's budget. Said budget was hand-delivered to Petitioner's attorney on May 24, 1990.
>
> (Answer, at pp. 10-11)

* In addition to timelines the Commissioner's letter directed the Petitioner (City) to indicate by specific line item what could be reduced without impairing the District's ability to provide a thorough and efficient system of education.

Based upon the aforesaid defenses the District requested that the Commissioner dismiss the budget appeal of the City.

Subsequent to the filing of the Answer in this matter, the Commissioner by letter dated June 22, 1990 determined to retain the appeal for hearing in the Department of Education pursuant to N.J.S.A. 52:14F-8 and designated Assistant Commissioner Lloyd Newbaker to hear and decide the matter for him in conformity with the provisions of N.J.S.A. 18A:4-34.

Following a telephone conference call conducted by Dr. Seymour Weiss, Director of the Bureau of Controversies and Disputes, Assistant Commissioner Newbaker issued a pre-hearing order dated June 26, 1990 setting forth matters relating to discovery; establishing timelines for the filing of written submissions; and setting hearing dates for July 27, and July 31, 1990. Hearings commenced at 9:00 a.m. on July 27, 1990 and concluded the afternoon of the same day.

Motions

Pursuant to an affirmative defense raised by the District in its response to the Amended Petition filed by the City, counsel for the District sought dismissal of the Petition of Appeal by way of an oral Motion to Dismiss. The aforesaid motion was predicated upon the District's agrument that the City never served its original petition upon the District and that its Amended Petition, when served, exceeded the 10-day timeline for such filing as established by the Commissioner in his letter of May 18, 1990.

Assistant Commissioner Newbaker heard oral agrument from the parties and denied the Motion to Dismiss citing Board of Education of the Township of Deptford v. Mayor and Council, 116 N.J. 305 (1989) for the proposition that procedural shortcomings should not be the basis for granting summary judgment in cases involving budgetary disputes.

Standard of Review

Prior to considering the position of the parties on the substantive issues in this case the Assistant Commissioner notes that unlike budget appeals brought before the Commissioner pursuant to N.J.S.A. 18A:22-14, 17 or 37 which are initiated by the board of education, budget appeals involving a state-operated district are brought to the Commissioner's jurisdiction by the municipal governing body pursuant to N.J.S.A. 18A:7A-52(a). In light of the fact that the municipality is the petitioner in such matters, it bears the burden of demonstrating by a preponderance of the credible evidence that the reductions it seeks to make in the District's budget can be accomplished without impairing the District's ability to provide a thorough and efficient system of education.

City's Position

In its Petition of Appeal the City seeks a total reduction in the District's budget of $8,435,000 covering some ten line item

accounts and the District's estimated unappropriated free balance.* Testimony at the hearing, however, was limited to three areas; unappropriated free balance, 220 Textbooks and 820 Insurance & Judgments. The parties chose to rely upon their written testimony on all other items in dispute.

Unappropriated Free Balance

The City's written testimony argues that the District should be required to appropriate an additional $4,500,000 from its unappropriated free balance thereby lowering the amount to be raised by taxation by that amount. The City's position is predicated upon its estimate that the District had an unappropriated free balance of $17,700,000 prior to its appropriation of $7,000,000 into the 1990-91 fiscal year budget. It is the City's contention that the appropriation of the additional $4,500,000, based upon its estimate would leave the District with an unappropriated free balance of $6,200,000. In support of its position, the City offered Joel J. Rogoff, a certified public accountant who formerly served as auditor for the Jersey City Board of Education prior to the State takeover.** Mr. Rogoff testified that the free balance figure generally accepted by the State as being exempt from consideration in budget cap waiver cases is 3% of the Current Expense budget. (N.J.A.C. 6:20-2A.12) Accepting the unaudited estimate of the free balance contained within the District's written testimony as being approximately $9,187,737 at the conclusion of the 1990-91 school year, Mr. Rogoff argued that the District could make an additional appropriation of free balance of $3,787,737 and still retain a free balance of 3% or $5,400,000.*** Mr. Rogoff even offered the opinion that a $5,587,000 further appropriation leaving a free balance of approximately $3.6 million, or 2%, of current expenses could be considered reasonable.

220 Textbooks

In its Amended Petition of June 6, 1990, the City recommends that the amount budgeted for textbooks be reduced to $1,035,272. The City's position in this account is based upon the District's assertion that its average allocation per pupil for textbooks is $38. The City arrived at its recommended figure by

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* There is some confusion as to the amount by which the City seeks to reduce the Current Expense budget since its written testimony identifies $7,726,008. This difference seems to have arisen because the City utilized the advertised budget which lists expenditures for special education separately in preparing its written testimony while utilizing the budget document (J-1) in preparing its Petition of Appeal.

** Counsel for the District objected to Mr. Rogoff's testimony on the grounds of conflict of interest but her objection was overruled by Assistant Commissioner Newbaker.

*** This figure is based upon a Current Expense budget of approximately $180,000,000.

multiplying the anticipated pupil enrollment for 1990-91 of 27,244 times the $38. Utilizing that logic, the total reduction the City sought by way of its Petition was $1,197,166.

In its written testimony the City suggests a reduction of $929,273 from the textbook account, the discrepancy apparently arising once again from the utilization by the City of the advertised budget and failure to consider the proposed expenditure for textbooks for special education pupils.

As its witness in support of its position the City introduced Ms. Jane Feigenbaum, its Director of Finance. In arguing for the reduction in the amount budgeted for textbooks, Ms. Feigenbaum testified that she assumed that the $38 per pupil average expenditure for textbooks included expenditures for both replacements and new adoptions. In concluding that the proposed reduction in textbook expenditures by the District could be implemented, Ms. Feigenbaum admitted that her judgment was purely financial and not educationally based. She multiplied the $38 per pupil cost by the 27,244 projected enrollment to arrive at a recommended figure of $1,035,272 for the 220 Textbook Account.

820 Account Dental and Prescription Insurance

In its Amended Petition dated June 6, 1990 at paragraph 16, the City argues that the 64% increase for dental and prescription insurance over the 1989-90 fiscal year budgeted by the District is excessive and recommends a $1,000,000 reduction. The City argues that a 29% increase rather than the 64% budgeted would be sufficient to meet the District's needs.

In its written testimony the City for reasons unexplained by either the written testimony or at the hearing requested a reduction of $971,840.

At hearing the City's witness Mrs. Feigenbaum essentially reiterated her written testimony arguing that the large increase of 76% for dental and 61% for prescription insurance were not in line with risk management figures throughout the State. She emphasized that the City experienced an increase in its plan from $31.21 to $35.00 per person per month.

In addition to the above-cited three line items which were argued by the parties at the hearing, the City in its Amended Petition and written testimony identified a number of other line item accounts which in its view could be reduced. Because of the aforementioned failure on the City's part to distinguish between the adopted budget as contained within J-1 (Blue Book) and the advertised budget there are discrepancies between the recommended reductions in the Amended Petition, based upon the adopted budget, and the recommended reductions in the written testimony which was based upon the advertised budget. This decision will therefore present in tabular form the recommended deductions in each document but will consider the amount recommended for reduction as being that which was contained in the Amended Petition since it is clear from the City's written testimony that it regarded the discrepancies between the adopted budget and the advertised budget to have been voluntary reductions made by the District.

Excluding the line item accounts discussed above, the further recommended reductions cited by the City were:

Account #	Account	Amount of Reduction (Amended Petition)	Amount Reduced (Written Testimony)
211	Principals Salaries	$ 500,000	$381,216
212	Supervisors Salaries	350,000	350,000
215	Clerical Salaries	120,000	92,514
216	Aides Salaries	160,000	160,000
240	Teaching Supplies	75,000	-0-
410	Health Salaries	165,000	121,165
610	Custodial Salaries	165,000	-0-
820	Insurance & Judgments	1,000,000	971,840
1020	Athletic Expenses	200,000	200,000

In regard to the aforementioned line items, the parties agreed at hearing to rely solely upon their written testimony. Therefore this decision shall deal with the arguments submitted in the written testimony in seriatim.

211 Principals Salaries

1990-91 Budgeted	Recommended Reduction*
$5,647,345	$500,000

The City's principal argument is that the number of vice principals budgeted for in the 1990-91 is in excess of the District's needs in that the budget calls for 30 vice principals in a district of 37 schools (32 elementary and 5 high schools) where the smallest school has 180 pupils and the largest being 1,210 with five schools under 400 pupils.

With declining enrollment, it argues that 15 "...high school principals..." are enough.** It further argues that the position of Dean can be eliminated and that the 1989-90 number of 15 vice principals can be retained.

212 Supervisors Salaries

1990-91 Budgeted	Recommended Reduction
$1,947,898	$350,000

The City contends that the alleged 29% reduction of supervisory staff accomplished by the District is not fully reflected in the budgeted salary account.

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* All figures cited here are as per the Amended Petition.

** It is assumed that the identification of high school principals is in error and what is meant is 15 vice principals.

215 Clerical Salaries

1990-91 Budgeted	Recommended Reduction
$3,291,860	$120,000

The City offered no specific reasons for the requested reduction in this account.

216 Aides Salaries

1990-91 Budgeted	Recommended Reduction
$4,172,870	$160,000

The City's argument in reference to this recommended reduction raises no understandable argument

240 Teaching Supplies

1990-91 Budgeted	Recommended Reduction
$2,734,507	$75,000

This account is one of the accounts in which the City utilized the advertised budget rather than the adopted budget and then failed to consider the amount of funds appropriated for teacher supplies for special education classes. Thus, its written testimony calls for no further decrease while its Amended Petition calls for a decrease of $75,000. No reasons for the reduction are set forth by the City.

410 Health Salaries

1990-91 Budgeted	Recommended Reduction
$2,164,490	$165,000

This account is another in which the recommended deduction is understated in the written testimony due to utilization of the advertised budget figures. The reduction is recommended because there is no indication of the number of employees in each category.

610 Custodial Salaries

1990-91 Budgeted	Recommended Reduction
$11,311,359	$165,000

This is still another account in which the City utilized the advertised budget rather than the adopted budget. Therefore, having misunderstood the difference between the adopted budget and the advertised budget as being a reduction, the City offers no reasons in its written testimony.

1020 Athletic Expenses

1990-91 Budgeted	Recommended Reduction
$820,000	$200,000

The City argues that the 1990-91 appropriation at 49.3% above that of the 1989-90 school year is excessive.

District's Position

Unappropriated Free Balance

In response to the recommended reduction of the District's unappropriated free balance by an additional $4,500,000, the District sets forth the following as to the extent of its unappropriated free balance at the time of the hearing:

1.	1988-89 audited unappropriated balance =	$11,187,737
2.	Appropriated 1990-91 Budget	- 7,000,000
		$ 4,187,737
3.	Anticipated 1989-90 Balance	$ 5,000,000
	Anticipated Total Free Balance	$ 9,187,737

Initially, the District argues that reduction of the free balance through appropriation into the 1990-91 budget would only accomplish a savings of $.57 for every dollar appropriated because the district receives aid at the 43% level. Thus, the $.43 lost in state aid would be shifted to the tax levy.

The District argues that the free balance advocated by the City would leave the District with a reduced capacity to meet emergencies.

In its filed written testimony and at hearing, the District raised the issue of cash flow difficulties arising from the City's alleged tardiness in remitting local tax revenues.

In his testimony at hearing, the District's sole witness and Business Administrator, Victor R. Demming, reiterated the argument for maintenance of the existing free balance $9,187,737 by indicating that the City owed $30,000,000 in tax revenues not turned over to the District. Mr. Demming contended that he had to defer payment to vendors in order to meet the July 31st payroll. Thus, he anticipated considerable cash flow problems if the District were limited to a 3% unappropriated free balance.

220 Textbooks

In response to the recommended reduction of $1,200,000 proposed by the City in its Amended Petition, the District argues that the City misperceives the purpose of the announced $38 per pupil expenditure. The District in both its written testimony and in testimony by Mr. Demming contended that such allocation merely

sufficed to replace lost, stolen and vandalized books and provide those additional books necessary to implement the existing curriculum. In support of its position, the District cites the repeated criticism of the District by the State in its Level I, II and Level III Comprehensive Compliance Investigation for its failure to provide common textbooks for all grade levels in all schools across the District and, thus, contributing to educational chaos when pupils transferred from one school to another.

The District contends that the additional $1,197,166 budgeted for the purchase of textbooks is necessary in order to purchase new textbooks to conform to the revisions adopted into the curriculum. It is the position of the District that the approximately $1.2 million budgeted for new adoptions contained within its 1990-91 appropriation is conservative given the high cost of textbooks. In fact, the District argues that the nonexpended surplus from the 1989-90 budget was planned by the District to permit it to utilize such funds to help offset the cost of the new adoptions.

820 Insurance and Judgments

In response to the recommended $1,000,000 reduction in the area of Dental and Prescription Insurance, the District contends that its budgeted amount in this line item account is not speculative but based upon concrete quotations of the increase in premium necessary to fulfill its contractual obligations. In its written testimony the District contends that the percentage increases complained of by the City were due to circumstances beyond its control. The District contends in establishing its budgetary figures for this account it relied on specific quotations of a 46% increase in prescription plan premiums from Blue Cross and 76% increase in premiums from the Delta Dental Plan beginning in January 1990. The actual average percentage increase of the two plans combined was 61%.

In response to the City's expressed concern over the excessive cost of its insurance plans, the District expressed equal concern and indicated its desire to actively explore alternatives including realistic options suggested by the City. In the interim, however, the District contends that its contractual obligations require the current range of coverage.

211 Principals Salaries

In defense of its budgeted increase in the area of Principals Salaries, the District points out that during the 1989-90 school year the schools were staffed with 13 Vice Principals and 17 Deans a combined total staff of 30 persons assigned to assist the principals with administrative, managerial and disciplinary responsibilities. The District points out that although the number of vice principals will be increased from 13 to 23 the total number of positions assisting the principals will be reduced from 30 to 23 by virtue of the elimination of the 17 Deans.

The District argues that the better educationally qualified vice principals will provide greater assistance in dealing with the social, emotional and psychological problems needing to be addressed within the Jersey City Public Schools.

212 Supervisors Salaries

In response to the City's argument that the supervisory salary account should reflect the same percentage decrease as the percentage decrease in the number of supervisory positions, the District points out that such an argument assumes that all supervisors receive the same salary by virtue of being on the same salary step.

The District contends its salary line item account was arrived at by taking the actual salaries of the 24 supervisory positions in existence on December 16, 1989 and projecting the percentage of salary increase for each individual based upon the negotiated agreement.

216 Aides Salaries

The District defends its appropriation in this account by pointing out the error of the City's utilization of the advertised budget and, thus, failing to consider the $3,341,752 necessary for providing aides in the area of special education.

240 Teaching Supplies

These supplies, argues the District, are essential to purchase consumable supplies necessary for instruction. The District points out that deficiencies in teaching supplies were pointed out in both the Level II and Level III Comprehensive Compliance Investigation. The amount budgeted for in the 1990-91 school year represents only a 9.3% increase which the District attributes largely to inflation.

410 Health Services Salaries

The District points out that the City, while recommending a reduction of $121,165 in this account, offers no reason for such reduction. The District points out that no increase in the number of personnel is requested and therefore the budgeted amount was arrived at by adding the negotiated increase to the actual salaries of the persons employed.

610 Custodial Services

The District supports the 5.01% increase in this line item by pointing out that it includes an amount to fund 11 new custodial positions of which three are required to provide custodial services at a new school to be opened in September, two are planned for boiler operation to relieve regular custodial personnel from this responsibility and the remaining six are security guards. . The District argues that the Level III Comprehensive Compliance

Investigation found the District's buildings to be poorly maintained and lacking in effective security. The District points out that it experienced property losses of $87,000 in 1987-88 and $32,500 in 1988-89 due to pilferage, thus, justifying the $75,185 for six new security guards.

1020 Athletic Expenses

The District points out that the City offers no rationale for its recommended reduction in this account other than that the increase in the amount budgeted over 1989-90 is significant. The District contends that the increase is necessary to fund an after school sports activities program for elementary pupils who require a structural outlet for productive use of after school time.

The need for such a supervised recreational activity is deemed to be an essential element in assisting students develop pride, teamwork and feelings of self worth, as well as to provide a means of keeping children off the streets during the time between their release from school and the return of working parents.

Assistant Commissioner's Decision

Prior to setting forth his conclusions in this matter, the Assistant Commissioner notes that the record was supplemented at his request to provide for documentation from the District relating to the following:

1. District cash flow problems.

2. Actual Premium Costs of the Dental and Prescription plans.

3. Breakdown of the manner in which the budgeted amount for textbooks was to be utilized and an indication of the new adoptions.

The City was afforded an opportunity to respond to the written supplement to the record.

The Assistant Commissioner has carefully reviewed the entire record in these proceedings, as well as the supplemental data provided by the parties. Based upon the aforesaid review, the Assistant Commissioner shall address each area of recommended reduction in the same order as presented in the summary of the arguments of the parties.

Unappropriated Balance

The Assistant Commissioner has carefully weighed the arguments presented in written form and at hearing, as well as those presented in the supplemental data requested. By way of affidavit of Mr. Arthur Demming dated August 1, 1990, the District in support of its contention of cash flow problems contends that $22,706,962.50 was still due and owing the District in tax levy as of July 31,

1990. Mr. Demming further provides as evidence of cash flow difficulties experienced by the District Exhibit C which was a projection of Anticipated Revenues and Anticipated Expenditures for the period from May 1990 to August 1990 prepared in April of 1990. Exhibit D presents a revised projection prepared at the end of May 1990 designed to demonstrate the failure of the City to meet its obligation to deliver tax revenues in accord with the required schedule and to illustrate the narrow margin of safety which purportedly existed between Anticipated Revenues and Anticipated Expenditures.

By way of its own affidavit from Ms. Feigenbaum, the City seeks to rebut the contention of Mr. Demming that there was $22,706,962.50 due and owing as of July 31, 1990.

By way of her own figures and calculation, Ms. Feigenbaum contends that the actual shortfall as of August 1, 1990 is $11,406,962.50 and not the $22,706,962.50 as contended above by Ms. Demming, the difference between the two figures being an amount of $11,300,000 restored by the Commissioner in a budget appeal for the 1989-90 year which had, by way of agreement between the City and the District, been deferred to the succeeding tax year.

After carefully weighing the arguments as presented by both parties, the Assistant Commissioner finds that the City has not met its burden in demonstrating that the unanticipated free balance in excess of 3% maintained by the District is not warranted. Notwithstanding the fact that the City claims its payments in arrears are only half those claimed by the District, the fact remains that the City has by its own admission stated as follows:

> ***The City had not paid off its liability to the School district by June 30th of each school fiscal year for many years. For example, in the 87/88 school year, the City tax liability was fully paid on December 7, 1988. In the 88/89 School year the final payment was made October 30, 1989.
> (Feigenbaum Affidavit, August 9, 1990, at p. 2)

Ms. Feigenbaum goes on to state:

> This is not to discount the fact that the City is obligated to pay the School District on a timely basis as cash is needed. It is just to state that prior to State takeover the District did not need its tax revenue fully paid by June 30th.(Id.)

While the Assistant Commissioner is aware that the foregoing argument presented by the City was meant to demonstrate that the District has in the past survived the practice of delinquent payments, it is in his view an inadequate argument given the circumstances which prevailed in the district of Jersey City prior to the State takeover of that District.

It is clear in the Assistant Commissioner's mind that the State-operated District wishes to establish a clear and firmly defined policy that it anticipates its tax revenues as required and to which it is entitled under law. Until the City has demonstrated by its strict adherence to the schedule required by law, the Assistant Commissioner believes the District has demonstrated its need to exceed the 3% figure. Future action by the City may alter this perception and at that time stricter adherence to the 3% guideline would be in order.

The recommended reduction is denied.

220 Textbooks

In rendering his decision as it relates to this line item account, the Assistant Commissioner is particularly and acutely aware of the deplorable state of affairs which has existed in the Jersey City Public Schools in the past as it related to textbooks. Both the Level III Comprehensive Compliance Investigation and the record of the proceedings in the matter of Walter McCarroll v. the Board of Education of the City of Jersey City bear stark testimony to the failure of the former board and its administration to ensure both adequacy and uniformity of textbooks. (Exhibit R-1, at p. 43) Consequently, the Assistant Commissioner is sympathetic to the argument set forth by the District that the $38 per pupil allocation cited in earlier portions of this decision and the $1,035,272 generated by that allocation is merely sufficient to replace books lost or damaged and to purchase textbooks necessary to provide uniformity for the existing curriculum while curriculum revision is ongoing.

While mindful of the argument raised by the City in regard to the unexpended balance in the 1989-90 budget for textbooks existing in the District as of May 31, 1990 and the $1,197,166 above and beyond the $38 per pupil allocation, the Assistant Commissioner is persuaded that the needs of the District for curriculum evaluation, development and implementation as defined by the State Superintendent and her staff are so great that the funds allocated for 1990-91, combined with those remaining deliberately unexpended in the 1989-90 school year, are required to address those needs. In so concluding, the Assistant Commissioner has carefully reviewed the very ambitious curricular review cycle set forth on pages 47-73 of the School District Budget (Exhibit J-1). The curriculum review activity which has already taken place in the 1989-90 school year and that which is scheduled for the 1990-91 school year will generate extraordinary requirements for textbooks to implement the new and revised curriculum being developed. As evidence of the heavy requirements in textbook expenditure, it is to be noted that the relatively few new adoptions already accomplished and as set forth in Attachment #11 of the District's supplemental submission of August 1, 1990 have already required the expenditure of $217,926.32. A comparison of that short list of adoptions with the ambitious curricular review requirements set forth in Exhibit J-1 more than justifies the need for the entire amount budgeted in the 220 Textbook account.

Providing the textbook funds necessary to implement new curriculum as it is developed during the 1990-91 school year will ultimately relieve textbook requirements for future years and permit the establishment of a systematic and cyclical review of curriculum and textbook needs and minimize the impact of curriculum revision in any given year.

The requested reduction in the Textbook account is denied.

820 Account Dental and Prescription Insurance

Based upon the documentation provided by the District in its filed supplemental data dated August 1, 1990 which provides documentation that the Blue Cross-Blue Shield Prescription Plan would increase in cost by 59.10% (up from an earlier estimate of 46.67%) and the Delta Dental plan ultimately adopted represented an increase of 76% (as opposed to an 84.98% increase as granted by Blue Cross), the Assistant Commissioner determines that the City has failed to meet its burden of demonstrating that the amount budgeted for the Dental and Prescription Plans contained within the 820 Insurance Account should be reduced. (See August 1, 1990 Supplement at pages 1-3.)

The Assistant Commissioner further notes that while the response to the District's supplemental documentation from the City decries the "...unprecedented dental plan...," it offers no rebuttal other than to argue that the money for such plan be obtained by reductions in other portions of the budget. (See City's Reply Letter of August 9, 1990.) The recommended reduction is denied.

211 Principals Salaries

The Assistant Commissioner finds and determines that the City has failed to demonstrate that the increase in the number of vice principals from 13 to 23 is unjustified. In so concluding, the Assistant Commissioner finds the argument of the District persuasive in that the elimination of the 17 Dean positions and their replacement by 10 additional vice principals provide greater administrative and disciplinary assistance by better qualified persons at a lesser total number of persons assigned. The City's requested reduction is denied.

212 Supervisors Salaries

Once again, the Assistant Commissioner finds that the position of the City in requesting a reduction in this account is not supported. Since the City recommends no further reduction in the number of supervisors but merely a budgetary reduction reflective of the 29% reduction in supervisory positions, the District's argument that no such 1 to 1 relationship in the amounts budgeted can be accomplished is convincing since each supervisor's salary is based upon his/her individual position on the salary guide. The contention of the District that its budgeted amount was based upon adding the percentage increase in salary per the negotiated agreement to each individual supervisory salary seems eminently justified. The recommended reduction is denied.

215 Clerical Salaries

The recommended reduction is denied in that the City has not provided specific reasons for such reduction.

216 Aides Salaries

The recommended reduction is denied since no cognizable argument is provided.

240 Teaching Supplies

The recommended reduction is denied in that the amount requested to be reduced in the Amended Petition provides no justification for such reduction.

410 Health Salaries

The recommended reduction is denied. No reasons for the reduction are advanced by the City and the District points out that its figure is based upon the negotiated increase as applied to the salaries of personnel employed.

610 Custodial Salaries

The recommended reduction is denied in that no reasons for the reduction are provided while the District has provided sufficient rationale to justify the budgetary increase. Of particular note are the arguments presented by the District in support of the increased number of security guards.

1020 Athletic Expenses

The recommended reduction is denied. The City's sole argument is its belief that the increase is excessive. The District has provided a persuasive argument in regard to the importance of an after school supervised sports program. The Assistant Commissioner agrees that the benefit to be derived from providing students with working parents a healthful and positive outlet for their energies removed from the atmosphere of the city streets far outweighs any possible monetary savings which may be realized by reducing a budget of that size by $200,000.

Conclusion

After careful consideration of the total record and the arguments presented by the parties in writing and by way of testimony at the hearing, the Assistant Commissioner concludes that the City has failed to meet its burden in demonstrating that the budget as prepared by the State Superintendent may be reduced without impairing the District's ability to provide for a thorough and efficient system of education. Indeed, the budget document for 1990-91 representing a 6.78% increase, the smallest increase in five years, is a well-prepared and fiscally prudent attempt to overcome the decades of neglect and failure which have characterized the operations of the Jersey City Public Schools as vividly borne out by

the matter of Walter McCarroll v. Board of Education of the City of Jersey City which is contained herein as part of the record as Exhibit R-1.

The tax levy certification by the State Superintendent of the amount necessary for the support of the Public Schools of Jersey City of $87,993,944 is affirmed. In support of the characterization by the Assistant Commissioner of the prudent nature of this budget is the fact that the local tax levy for the 1990-91 school year represents a 3.74% decrease over the tax levy of the previous year.

COMMISSIONER OF EDUCATION

Pending STate Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2652-90
AGENCY DKT. NO. 40-2/90

WILLIAM J. JORDAN,
Petitioner,
v.
BOARD OF EDUCATION OF
BURLINGTON COUNTY VOCATIONAL
TECHNICAL SCHOOL,
Respondent.

Frederick W. Hardt, Esq., for petitioner

John E. Queenan, Jr., Esq., for respondent

Record Closed: June 7, 1990 Decided: July 18, 1990

BEFORE **NAOMI-DOWER LA BASTILLE**, ALJ:

William J. Jordan, a tenured employee under contract as a principal in 1989-90, claimed that the Board violated his tenure rights by failing to place him on step 8 of the salary guide, questioned the propriety of establishment of the current salary guide, and claimed violation of his civil rights under 42 U.S.C. §1983. On April 4, 1990, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

Prior to transmittal, the Director of the Bureau of Controversies and Disputes directed counsel to file a brief or memorandum setting forth their positions on why the matter should not be dismissed, pursuant to N.J.A.C. 6:24-1.9, for failure to state a cause of action. Petitioner requested extension to file and filed a brief with numerous exhibits. When I received the file, it included no brief from respondent. On May 7, 1990, I asked respondent to send me a copy of his brief, if any. Having received no additional material, I closed the record on June 7, 1990.

The facts are those admitted in the pleadings and exhibits and not controverted. The history of prior litigation contains only one useful fact in this case (OAL DKT NO. EDU 1002-82, AGENCY DKT. NO. 10-84, Commissioner's decision January 12, 1984). The Board raises affirmative defenses of untimeliness, failure to state a claim upon which relief can be granted and failure to state a cause of action, inter alia. The operative facts are as follows:

1. Petitioner is a tenured principal who had reached the maximum salary of $39,000 on a five-step salary guide for 1982-83, as previously adjudicated by the Commissioner in EDU 1002-82.

2. Petitioner remained at the maximum ($39,000) in 1983-84.

3. Although there was a new guide, petitioner received $39,000 in 1984-85 and 1985-86 (step 3) due to increment denials which he did not appeal.

4. In the 1986-87 school year, he moved to step 4 at a salary of $42,780 on the guide for that year.

5. In 1987-88, there was a negotiated agreement reducing the steps on the guide from 7 to 6 which placed petitioner on step 3 of Rank 1A of the new guide with a salary of $46,202. Petitioner did not repudiate the actions of his union representative and accepted his contract.

6. Petitioner advanced on the new guide to step 4, Rank 1A at $50,360 for 1988-89. The steps increased from 6 to 7 that year.

7. Petitioner advanced to step 5, Rank 1A at $54,892 for 1989-90. The steps increased from 7 to 8 that year. He filed a petition on February 13,1990, claiming that he should have been placed on the highest step, step 8.

CONCLUSION AND DISPOSITION

N.J.A.C. 6.24-1.2(b) requires that a petition 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 which is the subject of the requested contested case hearing. Appeals are available when a salary increment is withheld N.J.A.C. 6:24-4 1. Petitioner was paid the same salary of $39,000 in 1984-85 and 1985-86, over four years before he filed his petition in 1990. I **CONCLUDE** that petitioner is precluded by the rule of limitation from litigating the issue of increment withholding.

Petitioner moved from step 3 to step 4 on the 1986-87 guide at $42,780 In 1987-88, there was a negotiated agreement which resulted in the placement of petitioner on step 3 of Rank 1A at $46,202. It is obvious that the Board is bound by a negotiated agreement. Any claim that the contract was improper, illegal, or unfair as applied to petitioner should have been filed with PERC, since the Commissioner does not have jurisdiction over such contracts as to salary levels and numbers of steps, so long as there is no violation of statute or rule. Salaries are the very core of PERC jurisdiction. The negotiated agreement went into effect over two years ago Petitioner did not make timely appeal of any allaged illegality to the Commissioner I **CONCLUDE** that he cannot litigate the issue due to the rule of limitation and, in fact, there was probably no jurisdiction with respect to the contract.

From 1987-88 to school year 1989-90, petitioner has moved up each year to the next step on the guide. There is no statute or rule which mandates that a negotiated contract guide must always contain the same number of steps each year and none has been cited. Indeed, it is quite common for the number of steps to increase or decrease as a result of negotiation. N.J.S.A. 18A:29-4.1 requires that a guide and schedule be binding for two years except for changes which provide for higher salaries. The Board's guides did provide for higher salaries each year. At no time has petitioner been reduced in salary or failed to advance to the next step on the guide between 1987-88 and 1989-90. Prima facie, the Board has not violated the Tenure Act, N.J.S.A. 18A:28-1 et seq., which prohibits reduction in salary except for cause. I, therefore, **CONCLUDE** as to Count I, that petitioner is precluded from litigating the

issues of increment withholding and negotiated contract by the rule of limitation, N.J.A.C. 6:24-1.2(b). He fails to state any claim of action for the Board's conduct between 1988 and 1990.

As for the second count, claiming that the Board failed to properly maintain a salary guide, petitioner does not allege any law or rule as a basis for the claim nor does he describe the exact manner in which the guide is improper. He appears to be saying that it is unfair for employees performing similar duties to receive different pay. Such a theory would be directly contrary to N.J.S.A. 18A:29-9, which provides that a Board and a new employee in a position may negotiate initial step placement. I **CONCLUDE** that he fails to state a claim of action.

Petitioner's third count alleges a civil rights violation under 42 U.S.C. §1983 In no way does petitioner indicate the specific constitutional right violated or the facts on which such a violation is based as he is required to do under N.J.A.C. 6:24-1.3. He claims only that the salary guide and manner in which it is used violates his constitutional rights. Furthermore, the Commissioner of Education does not have jurisdiction to hear a §1983 civil rights case and award damages and attorneys fees thereunder. Jurisdiction is in courts of competent jurisdiction, both State and federal, and in other agencies specially granted such jurisdiction. I **CONCLUDE** that such claim as the petitioner might state is one on which relief cannot be granted in this agency jurisdiction.

It is, therefore, **ORDERED** that the petition of William J. Jordan be **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis does not so act in forty-five 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(c).

I hereby **FILE** this initial decision with **DR. JOHN ELLIS** for consideration.

July 18, 1990
Date

NAOMI DOWER-LA BASTILLE, ALJ

Receipt Acknowledged.

Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 20 1990
Date

OFFICE OF ADMINISTRATIVE LAW

It

WILLIAM J. JORDAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL AND TECHNICAL SCHOOLS, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have timely exceptions filed by petitioner pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, petitioner first argues that his appeal is timely because, even though he did not challenge his salary guide placements between 1984 and 1989, his employment with the district entitled him to top placement on those guides and his 1990-91 placement at three steps below maximum therefore reiterates the violation of his rights creating a new cause of action. Petitioner further notes his illness during much of the period in which he did not challenge the Board's actions and questions whether a statute of limitations should be deemed to have been running under such circumstances; if so, he argues, summary disposition was inappropriate and a hearing should be held to ascertain the factual basis for delay.

Petitioner next distinguishes his concerns from those properly before PERC, arguing that:

> ***salary guides to have any meaning must involve a system under which steps are created to afford an employee through time the ability to reach the top rung. The system is "time driven". Given [his] longevity, there is no basis for concluding that Mr. Jordan should not have been in the top of any salary [guide used]***. ***As of 1990, Mr. Jordan had 22 years with the district, 16 as principal. To suggest that he is not at the top of a six [sic] step guide while others who started at a lower step are now at a higher step, makes a mockery out of the guide.
>
> (Exceptions, at p. 2)

Finally, petitioner contends that the Commissioner is not precluded from hearing a Section 1983 Civil Rights matter when it arises during the course of his review of a contested case. In this instance, petitioner reasons, the Board's conduct violated his State protected rights, rights which in turn give him a protected status under the Federal Constitution such that his State rights may not be invaded except in a constitutionally permissible manner. Since petitioner's status arises from rights created under State education law, he claims, the Commissioner has jurisdiction to resolve his allegations of constitutional infringement by denial of substantive due process. Moreover, federal claims are not barred by procedural rules of limitation such as N.J.A.C. 6:24-1.2, but are governed instead by the appropriate contract limitations of N.J.S.A. 2A:14-1 et seq. Therefore, and for the additional reasons summarized above, petitioner urges that this matter be remanded to OAL for a full hearing on the merits.

Upon careful and independent review, the Commissioner concurs with the ALJ that any cause of action cognizable before the Commissioner in this matter arose long before filing of the present petition, so that petitioner's appeal is plainly out of time. The Commissioner finds no merit in petitioner's argument that each new year embodies a continuing violation representing a new cause of action in matters of this type, that contention having been specifically rejected by the Supreme Court in North Plainfield Education Association v. Board of Education of North Plainfield, 96 N.J. 587 (1984). Nor does he see the need for a full hearing to determine whether relaxation of the 90-day rule is warranted, as, regardless of any illness, it strains belief beyond all bounds to hold that some type of appeal could not have been filed at any time since 1984.

Having so determined, the Commissioner declines to reach to petitioner's constitutional claims regardless of any ability on the part of the Commissioner to consider such claims in the course of reviewing matters arising under the education laws. Alleging constitutional violation as an ancillary issue in a school law matter does not alter the fact that the matter itself was untimely brought before the Commissioner, and such allegations cannot be used as a means of extending the time limitations otherwise applicable in this forum.

Accordingly, the initial decision of the Office of Administrative Law is affirmed and the instant Petition of Appeal dismissed.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF UNION CITY, PETITIONER, V. MAYOR AND COMMISSIONERS OF THE CITY OF UNION CITY, HUDSON COUNTY, RESPONDENTS.	COMMISSIONER OF EDUCATION DECISION

Louis C. Rosen, Esq., for petitioners (Patino-Treat and Rosen, attorneys)

Lane J. Biviano, Esq., for respondents (Scarinci & Pelio, attorneys)

This matter was opened before the Commissioner of Education by way of Petition of Appeal filed by the Board of Education of the City of Union City (Board) on June 13, 1990 appealing a reduction of $3,900,000 in the current expense levy for the 1990-91 school year and a $100,000 reduction in capital outlay which it contends is necessary for the district to provide a thorough and efficient system of education to its students.

The aforesaid reductions in the proposed tax levy were imposed by the Mayor and Commissioners of the City of Union City (City) after consultation with the Board pursuant to N.J.S.A. 18A:22-37 as a result of the voters' rejection of the Board's proposed tax levy for current expense and capital outlay on April 24, 1990. The proposed 1990-91 budget and reductions are set forth below:

1990-91 BUDGET APPEAL

	Proposed by Board	Certified by Governing Body	Tax Levy Rejected by Voters	Tax Levy Certified by Governing Body	Difference in Contention
Current Expense	$48,091,389	$44,191,389	$18,720,983	$14,820,983	$3,900,000
Capital Outlay	$ 600,000	$ 500,000	$ 468,383	$ 368,383	$ 100,000
				TOTAL	$4,000,000

On June 22, 1990 the Commissioner of Education determined pursuant to N.J.S.A. 52:14F-8 and N.J.A.C. 6:24-7.7(b) to retain the matter for hearing within the Department of Education, designating Dr. Walter J. McCarroll, Assistant Commissioner for County and Regional Services to hear and decide the matter as authorized by N.J.S.A. 18A:4-34.

On July 13, 1990 an Answer to the Petition of Appeal was filed by the City, thus the pleadings were joined. A pre-hearing telephone conference established timelines for the filing of submissions pursuant to N.J.A.C. 1:6-10.1. The hearing of the matter was held on August 9, 10, and 13, 1990. The record closed on August 27, 1990 so as to accommodate the request of counsel to submit post-hearing summations.

Initially, the Assistant Commissioner takes note of the fact that the City of Union City School District is in Level III of the State monitoring process, having failed to achieve certification after two prior levels of monitoring.

Its proposed 1990-91 budget was reviewed by the Hudson County Superintendent of Schools, Louis A. Acocella, and conditionally approved on April 2, 1990. (Exhibit P-2) The conditional approval reads in pertinent part:

> One (1) copy of your revised 1990-91 School District Budget Statement, which was adopted by the Board of Education after advertising and at its public hearing, is being returned with my conditional approval dated April 9, 1990, since the revisions did not effect (sic) the Level III Corrective Action Plan. The conditional approval is based upon the preliminary review and is subject to further assessment and possible modification by the Board of Education as directed by the County Superintendent of Schools.
>
> Moneys which have been appropriated to address the district Level III Corrective Action Plan cannot be reduced and an audit trail must be maintained. (emphasis in text)

Given that brief factual background, the Assistant Commissioner will now consider individually each of the line item reductions and the arguments of the parties. Before undertaking that examination, the Assistant Commissioner notes for the record that the City's opening statement at hearing, its written testimony and post-hearing submission place heavy emphasis on the issue of municipal overburden and the plight of its taxpayers, issues addressed by the New Jersey Supreme Court in its recent decision in Abbott v. Burke, 119 N.J. 287 (1990). At the commencement of the hearing, the Assistant Commissioner made it clear on the record and he reiterates here that although municipal overburden and taxpayer plight are understandably genuine issues of concern to the City and notwithstanding the Supreme Court's recent decision in Abbott, the

standard of review that must prevail in the instant matter relative to the financing of the Union City school system for the 1990-91 school year is whether or not the amount of monies available to the Board as the result of the City's budget reduction is sufficient for the provision of a thorough and efficient education to the pupils of that school district. The Assistant Commissioner also points out, however, that the relief directed by the New Jersey Supreme Court in Abbott will be provided to the City of Union City School District and municipality through implementation of the Quality Education Act of 1990, Chapter 52 of the Laws of 1990. The increased monies generated by that law to which Union City may be entitled will flow to Union City at the beginning of the 1991-92 school year, the same time at which any restoration of funds which may be ordered by the decision in this matter should impact upon the local tax levy.

1. **New Positions and Salary Increases**

Account/Line Item	Reduction
110 (1) Salaries Admin. - Bd. Sec. Office	$ 32,000
110 (5) Salaries Admin. - Superint. Office	18,000
211 Salaries Principals	132,000
212 Supervision of Instruction	67,000
213 Salaries Teachers (New Positions)	631,000
Salaries Teachers (Negotiated Contract)	1,100,000
214 Guidance Personnel	108.000
215 (2) Salaries Secretarial/Clerical: Supervisor Clerks	112,000
216 Other Salaries Instruction: Instructional Aides	63,000
310 Attendance Officer Salaries	13,000
610 (1) Custodial Staff Salaries	112,000
710 Maintenance Salaries	70,000
910 Food Services Salaries	43,000
Total	$2,501,000

The Board urges that full restoration for the reductions made by the City is necessary for it to provide a thorough and efficient system of education and to meet the mandates of the Level III Corrective Action Plan. More specifically, the Board avers that the monies sought in Account 110(1) and (5) and Account 215(2) are necessary to address severe secretarial/clerical needs so as to allow professional staff members to focus more time on their professional duties rather than clerical ones caused by either the absence of or insufficiency of support service, in particular the child study team, and four supervisors of instruction and pupil services. The $18,000 for clerical staff in the superintendent's office is necessary, according to the Board, in order to upgrade a 10 month clerical position to 12 months and to hire one new clerk at $14,000 in order to meet the demands of Level III monitoring reports. The eight new clerical positions sought in Account 215(2) are needed to implement directives of the Level III Review Report. (Exhibit P-12)

The City on the other hand urges that the increases in Account 110(1) and 110(5) have not been recommended in the Level III Review Report and they do not impact on student/teacher ratio. It also contends that the increases in Account 110(5) and Account 215(2) would be more appropriately applied to instruction, textbooks, or at least phased in over more than one fiscal year.

The increase in Account 211 represents the funding of one new assistant principal position ($65,000) for the Washington School which has 1,000 students and no assistant principals. According to the Board, the creation of this position is consistent with the directive of the Level III Report to reduce administrator-teacher ratio and also to provide improved administration of the school. Further, it is the testimony of the Acting Superintendent that a need actually exists for two assistant principals in that school but budgeting was able to be made for only one.

Another $67,000 in Account 211 is for the replacement of a principal who will be on sabbatical leave for the 1990-91 school year at half pay.

The City urges that the reductions in Account 211 are not necessary as the Level III Review Report does not mandate the new positions nor do they reduce the teacher-student ratio.

The Board appeals the $67,000 cut by the City from Account 212 as it provides funds for a supervisor of adult education, a position unbudgeted last year, and the duties of which were performed on an uncompensated basis by the executive director of physical facilities planning. The Acting Superintendent testified that adult education is a large and important component of the district's instructional program which needs to be expanded, both for the day and evening programs, in order to improve adult literary and high school equivalency and also to provide instruction in English as a Second Language as the district has a very large Hispanic population.

Account 214, which was reduced by $108,000 by the City, is deemed essential by the Board because it funds two elementary guidance counselor positions. The district presently has no guidance counselors at the elementary level, notwithstanding the fact it has two elementary schools each having 1,000 pupils or more. The counselors will provide services to at risk students. The Acting Superintendent testified that it is anticipated that the counselors will be hired from within the ranks of the district's teaching staff. The individuals selected will probably have at least 8-10 years of teaching experience and, given the additional stipend counselors receive, $54,000 is a reasonable projected salary. The City disagrees that the new counselor positions are necessary, urging that they are part of a 33.7% increase over the previous year's budget, part of which has been due to the Board's adding summer employment for counselors and the newly negotiated contract.

The $631,000 reduction in Account 213 eliminated approximately 27 teacher positions. The Board avers that these positions are necessary to meet specific directives of the Level III Review Report to increase teacher-pupil contact time. The monies will also fund such instructional positions as (1) special subject teachers in health and science in the lower grades in order to permit teacher preparation time at the elementary level, (2) computer instruction for the intermediate and upper levels, and (3) vocational education, business, and science at the high school level. The City agrees that instruction should be an educational focus but contends that there has not been an increase in students to warrant the number of new teachers proposed. As such, the City urges that the positions should be phased in over a period of at least two years, particularly in light of the salary increases negotiated by the teachers which have already placed a heavy burden on the City's taxpayers. The Board argues that the $1,100,000 cut made by the City for teacher salary increases must be restored because of the negotiated contract between the Board and teachers which can not be altered unilaterally. The City urges, however, that a portion of the salary increases should be deferred until next fiscal year; a suggestion the Board deems utterly unfeasible.

The reduction of $63,000 in Account 216 eliminated six teacher aide positions which the Board avers are necessary for such programs as a pre-school class at the Edison School, many pupils of which are in need of English as a Second Language (ESL) instruction; a pre-school class for the handicapped and certain kindergarten classes which because of their enrollments must by law have an aide; and various other classes for the handicapped throughout the district deemed to be a priority. The City maintains that the positions are not required by the Level III Review Report and that they neither improve the teacher-student ratio nor add to the quality and number of textbooks. Moreover, it is the City's position that the kindergarten enrollments are declining, not increasing, thus, aides should not be necessary as claimed by the Board.

The reduction in salary Account 310 eliminates an attendance officer position which the Board deems essential since in the past there have been five such positions and now there are only three in a district of more than 7,000 students. The Board maintains that while overall pupil attendance is satisfactory, there are individual students with high absenteeism and students illegally attending Union City schools. As to this, the City reiterates its argument that the position is not mandated by Level III directive nor does it improve instruction.

The reductions in salary Account 610 and 710 would eliminate eight new custodial staff positions and five new maintenance positions which the Board believes are essential to the cleanliness and upkeep of its schools, the average age of which is 76 years. According to the Board they are in disrepair as demonstrated by the Level III Review Report which is replete with references to needed repairs and maintenance. The City urges that there is no state mandate for the new positions in either line

item. Moreover, Account 610 represents an increase of 21.8% over last year's budget and, according to the City, the positions could at a minimum be phased in over three years. It objects to the increases in Account 710 (Maintenance) because the positions are long term while the repairs are short term and certain capital projects may preclude the need for one or more of the positions. It also avers that the Board has failed to consider contracting out some services of the custodial and maintenance areas. Moreover, the City urges that there are already 103 custodial staff for nine buildings and perhaps getting more work out of existing staff is the solution to custodial problems, not more hirings.

In addition to the above, the City cut $43,000 from Account 910, Food Services Salaries, contending that the sum appropriately belongs as a revenue item. The Board on the other hand avers that the City has erred in its analysis because the monies fund three employees of the Board (a secretary and two food service staff) whose salaries must be reflected in the budget. Moreover, the Board argues that any reimbursement that may be forthcoming at the end of the year for the three positions is reflected as an expenditure credit.

The Assistant Commissioner has carefully considered the arguments of the parties, both by way of written and oral testimony, and the portions of the budget relative to the issues presented. Such review leads to the following determinations:

1. The support services which would be funded through restorations of cuts effectuated by the City in Accounts 110(1), 110(5), and 215(2) have been demonstrated by the Board to be necessary for improved operation of the support service system. However, given that some of these positions have not as yet been filled by the Board, economies may be realized through proration of salaries. Thus, it is ordered that $45,000 be restored to the two Account 110 line items and that $100,000 be restored to Account 215(2).

2. The record supports the need for an assistant principal for the Washington School. However, since the principal who is on sabbatical is being compensated half pay, the need for more than $33,500 for the replacement has not been justified. Thus, it is ordered that only $98,000 be restored to Account 211.

3. The Board has demonstrated the need for the new instructional positions eliminated by the reduction of $613,000 in Account 213 to be restored in order to provide a thorough and efficient system of education. The positions are consistent with priorities set

by the Board to achieve compliance with the Level III Review Report and the granting of preparation time to elementary staff is an appropriate managerial decision. Therefore, $631,000 is to be restored to Account 213. Moreover, the $1,100,000 reduction made by the City for increases in teacher salaries is to be restored. The monies are for negotiated salary increases and the Assistant Commissioner agrees with the Board's position that deferral of those increases is unfeasible.

4. The need for the six instructional aides has been shown to be necessary to meet regulatory requirements for special education and kindergarten classes and for the pre-school class for at risk children at Edison School. Consequently, $63,000 is to be restored to Account 216. However, the need for a fourth attendance officer has not been sufficiently demonstrated to warrant restoration of the $13,000 reduction in Account 310.

5. The Board has met its burden that the two elementary guidance counselors (Account 214) and the adult education supervisor position (Account 212) are necessary for the provision of a thorough and efficient system of education. Two elementary guidance counselors for a district of 7,800 students represents "bare bones" budgeting. The need for a compensated full-time supervisor of adult education has also been shown, given the breadth and diversity of the Board's current and anticipated offerings to its constituents. However, proration of the counselor positions is possible as those individuals have not as yet been hired. Therefore, restoration of $100,000 to Account 214 is ordered.

6. There can be no question that improvements in the custodial and maintenance areas are necessary. However, the Boards' presentation was not sufficient to demonstrate that all eight custodial and five maintenance positions must be funded immediately; therefore, it is concluded that two custodial and one maintenance positions may be deferred until next school year. Accordingly, $56,000 is ordered restored to Account 710 and $84,000 to Account 610.

school-based budgeting process and is necessary
increases in custodial and maintenance staff and servic
objects because the allocation represents a 53.5% increas
year's budget and even with the $25,000 reduction it maiected
remains a 22.3% increase to address the Board's concerns. -ity

The City also argues that the $25,000 it cut from Acco
730c(4), New Equipment Purchases, should be sustained since th
forklift and van budgeted by the Board can be deferred for a year.
The Board's written testimony does not address this account nor was
the issue raised by it on direct examination of its witnesses. The
same is true of the $5,000 reduction in Account 840, Interest on
Loans. On direct examination by the City, however, the Board
Secretary testified that the monies were needed in Account 730c(4)
to replace a 1977 van which has become too costly to repair.
Further, the interest on loans would be more than $120,000 but not
as high as the $125,000 which was budgeted.

The reduction of $20,000 in Account 1020, Athletic
Equipment, is deemed necessary by the Board to replace broken and
worn equipment and band uniforms, as well as to expand its offerings
to include girls' volleyball. In support of this, it points out
that athletics is a highly important aspect of the school programs
for the students of Union City. The City avers, however, that even
with the $20,000 reduction it made, the budget allows for a 27.3%
increase over last school year and that the Board offers no
documentation to justify the 45.6% overall increase it budgeted.

As to Account 120(b), the Board urges that the amount
allocated for legal fees does not represent a $40,000 increase over
last year as alleged by the City and that elimination of the
in-district counsel position the Board has effectuated resulted in
savings of $74,920 for salary, health benefits, and secretarial
costs associated with the position.

Account 720(2) was reduced $91,000 by the City. This line
item had $183,000 allocated for purchase and installation of an
intercom clock system. In the appeal of the 1989-90 school year
budget, the Assistant Commissioner ruled that the Board should phase
in the intercom clock system over that school year and 1990-91.
According to the Board's witnesses, the demands of Level III
monitoring prevented the district from using the 1989-90 allocation
of $91,500 for the work. The Board now seeks the full cost for the
system for the 1990-91 budget. It avers that the system is
important for the safety and welfare of students since there is no
direct communication between classrooms and the main office in the
schools necessitating that a teacher get coverage from another
teacher in order to go to the office.

Upon review of the record, the Assistant Commissioner
determines that the Board has borne its burden of demonstrating the
necessity for restoration of $50,000 in the teaching supplies line
item (Account 240). It has also demonstrated that restoration of
monies for fuel in Account 630 is necessary given actual
expenditures for heat last school year and the precarious oil
situation which exists globally at this time which the Assistant

Commissioner believes cannot be ignored in rendering his decision. Therefore, it is determined that $50,000 is a reasonable sum to restore to permit sufficient funds for possible adverse impact from the price of oil and from severe weather.

The Assistant Commissioner further concludes that the Board's presentation regarding the accounts cited below was unpersuasive that the monies cut by the City are in fact necessary for a thorough and efficient system of education, with the exception of the need to replace the 1977 van. It has thus failed to meet its burden of proof. Accordingly, the following reductions are sustained:

Account/Line Item	Reduction Sustained
520 (1) Transportation	$ 25,000
650 (1) Custodial Supplies	25,000
730c (4) Purchase New Equipment	10,000
840 Interest on Loans	5,000
1020 Athletic Equipment/Supplies	20,000
120 (b) Legal Fees	15,000
Total	$100,000

Finally, the Assistant Commissioner finds and concludes that the $91,000 cut from Account 720(2) should be sustained. For reasons only generally alluded to by the Board, it determined that the $91,500 approved by the Assistant Commissioner last year for installation of the intercom clock system could be better spent on other obligations. Such action belies the persuasiveness of its argument that phase in of the system is not possible and that all the system must be funded this year. If the system were as vital as the Board implies, it should, in the Assistant Commissioner's judgment, have expended the monies as restored to it last year for that purpose.

IV. Capital Outlay

The Board urges that the need for roof replacement and asbestos abatement compels restoration of the $100,000 cut by the City from the capital outlay budget. It cites in support of the need for the full $600,000 it has budgeted Exhibits P-19 and P-20, reports from external consulting firms which detail the roofing and asbestos needs to be addressed by that capital budget. The City urges that the amount budgeted by the Board is only an estimate for which no plans or architectural estimates have been submitted. While it does not question the need for the upgrading specified by the Board, it avers that the estimates may not be accurate given the absence of precise specifications and competitive bidding.

At hearing the Assistant Commissioner requested that the Infra-Red Roof Test report and the roofing bids submitted to the Board he provided to him for review. Review of this material and the record leads readily to the conclusion that the $100,000 reduction to the capital outlay budget must be restored for sorely needed repairs to roofs and for asbestos abatement.

V. Summary

As a result of the Assistant Commissioner having conducted a thorough, comprehensive review of the record and the arguments of the parties, the following restorations to the City of Union City 1990-91 budget are to be effectuated and reductions sustained.

Account/Line Item	Reduction Sustained	Amount of Restoration
110 (1) Board Secretary Office and (5) Superintendent's Office	$ 5,000	$ 45,000
120 (b) Legal Fees	15,000	-0-
211 Principals Salaries	33,500	98,500
212 Supervision of Instruction	-0-	67,000
213 New Positions Teachers	-0-	631,000
Teacher Salary Increases	-0-	1,100,000
214 Guidance Personnel	8,000	100,000
215 (2) Secret'l/Clerical Supervisor Clerks	12,000	100,000
216 Instructional Aides	-0-	63,000
240 Teaching Supplies	-0-	50,000
310 Attendance Officer	13,000	-0-
520 Contracted Services: Transportation	25,000	-0-
610 Salaries: Custodial	28,000	84,000
630 Heat	50,000	50,000
650 (1) Custodial Supplies	25,000	-0-
710 Salaries: Maintenance	14,000	56,000
720 (2) Contracted Services Intercom Clock System	91,000	-0-
730c(4) Purchase New Equip. (Van and Forklift)	10,000	15,000
810 (4) F.I.C.A./Social Security	3,000	32,000
820 (2) Employee Insurance	16,000	992,000
840 Interest on Loans	5,000	-0-
910 Salaries: Food Service	-0-	43,000
1020 Athletic Equip/Supplies	20,000	-0-
Total	$373,500	$3,526,500

Further, the capital outlay reduction of $100,000 shall be restored.

Accordingly, the Assistant Commissioner determines that the Hudson County Board of Taxation be directed to strike a tax rate which shall add an additional $3,526,500 to the 1990-91 current expense tax levy and $100,000 to the capital outlay tax levy. The aforesaid increase shall raise the 1990-91 tax levy for current expense and capital outlay to $18,815,866 as set forth below:

	Tax Levy Certified By Governing Body	Amount Restored	Tax Levy After Restoration
Current Expense	$14,820,983	$3,526,500	$18,347,483
Capital Outlay	$ 368,383	$ 100,000	$ 468,383
		Total	$18,815,866

COMMISSIONER OF EDUCATION

... to one of the

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3556-90
AGENCY DKT. NO. 104-5/90

IN THE MATTER OF THE ELECTION
INQUIRY IN THE LITTLE EGG
HARBOR TOWNSHIP SCHOOL
DISTRICT, OCEAN COUNTY

Eileen F. Doocey, petitioner, pro se

Edward J. Naughton, Esq., for the Board

Record Closed: July 14, 1990 Decided: July 27, 1990

BEFORE DANIEL B. MC KEOWN, ALJ:

INTRODUCTION

Eileen Doocey (petitioner), a write-in candidate for membershi
Egg Harbor Township Board of Education (Board) who was defea
school election conducted April 24, 1990 requested an inquir
the election pursuant to N.J.S.A. 18A:14-63.12. Petiti
announced results of the election set aside and an Ord
of Education for a new election in the district.

After the matter was transfer... were being
contested case under the n... conducted
scheduled and cond... simultaneously and the
Courtroom, T... regional high school
several ... education ... one,
... this contested

OAL DKT. NO. EDU 3556-90

two available vacancies. The evidence shows petitioner had the encouragement and strong support of various civic organizations and she of course, had to mount a write-in campaign. Towards that end, petitioner had prepared and distributed 7,750 fliers announcing her write-in candidacy and stickers with her name imprinted thereon for use by voters during the election in order to avoid voters having to write her name in the relatively small slots of voting machines. In addition, petitioner also insured that instructions were distributed in equal magnitude on how to cast write-in ballots

...ection petitioner received 315 votes.

expose a paper roll upon which voters were to place stickers, or write in her name, had they intended to vote for petitioner.

Karen Kopec, a challenger for one of the formally declared candidates, testified she observed many voters in the polling place waiting to cast ballots and she observed much confusion. As examples, Ms. Kopec testified that she saw people standing in the wrong line in order to cast ballots at both elections; she observed one election worker open the machine curtain to tell the voter not to use stickers; she observed many stickers on the machines and Ms. Kopec believes that the voters who placed them there probably thought they cast their write-in ballots properly. Peter Kopec, who was a challenger at the high school polling place, agrees with his wife that there was a huge turnout with mass confusion. In the view of Mr. Kopec, election officials were not certain how to tell voters to use stickers and he notes the absence of instructions outside the voting machine on how to cast write-in ballots.

Russell Miller observed 250 to 300 persons waiting to cast ballots at the polling place. One voter he observed asked instructions on how to use the stickers to cast a write-in ballot and he observed an election official go into the booth with that voter. In Mr. Miller's instance, he explained that there was no paper roll in the voting machine he used so he lifted the slot where write-in ballots are to be cast and he simply dropped the sticker in the slot. Mr. Miller also observed a number of voters exit voting machines with stickers in their hands and he believes that they had intended to cast write-in ballots for petitioner but because of a lack of instruction became frustrated and failed to cast write-in ballots in the manner they intended. Florence Miller, Mr. Miller's wife, testified that the election was very confusing in the absence of instructions on how to cast write-in ballots. Ms. Miller does acknowledge that the election officials told her that instructions on how to cast write-in ballots were on the inside on the face of the machine which she saw but she testified she could not figure out how to cast a write-in ballot despite the instructions. She made her exit from the voting machine in order to get clearer instructions and then was told she could not return to the voting machine because the counter had already registered. In Ms. Miller's view she lost her right to vote through no fault of her own.

Grace Egan testified she was in line to vote in the elementary school polling place when she observed a woman exit a voting machine and exclaim she did not know how to use the sticker to cast a write-in ballot. Ms. Egan further explained that she then observed an election worker take the sticker from that woman's hand,

crumple it and drop it on the floor and exclaim to that woman "you now lost your vote."

Thomas S. Lynch testified he cast his ballot at the elementary school polling place at approximately 4 p.m. He observed several long lines of voters waiting to cast their ballots and he also observed much confusion. He observed an absence of signs or instructions on how to use the stickers in order to cast write-in ballots for petitioner. He inquired of an election official at the voting machine how to use the stickers to cast write-in ballots and was advised that the election official was not allowed to instruct voters how to cast write-in ballots. Mr. Lynch explained he saw no specific instructions inside of the voting machine on how to cast write-in ballots, although Mr. Lynch did testify he did cast a write-in ballot. Nevertheless, as Mr. Lynch explained he still is not certain whether he cast his ballot properly. Mary B. Lynch, Mr. Lynch's wife, specifically testified that she was disenfranchised because there was much confusion and chaos because of the absence of instructions on how to cast write-in ballots. When she entered the voting booth to cast her ballot, she observed pasters stuck on the machine and scattered on the floor. She cast her ballot for one person and made her exit from the voting booth. Ms. Lynch feels that there was planned chaos at this election, although she did not identify who was to have planned the chaos and for what purpose. Ms. Lynch identified the real problem during this election as the absence of knowledge by the voters on how to cast write-in ballots.

Theresa Yagiello, a challenger in the election, testified that the board's designation of the elementary school as a polling place, a change from prior elections, led to the chaos. While Ms. Yagiello testified her husband who was waiting in line to cast his ballot had to leave for an appointment without casting his ballot, he did return and cast his ballot later on. Ms. Yagiello acknowledges that there were paper rolls in all voting machines although she testified that one machine was jammed. Ms. Yagiello acknowledges that the jammed machine occurred at the regional high school district election; not at this contested election.

John W. Loomis testified he reported to vote at the elementary school polling place only to be told he had to cast his ballot at the regional high school polling place. When Mr. Loomis entered the voting booth, he observed three stickers on write-in slides for petitioner.

Eleanor Yusko testified that as she waited in line to cast her ballot she gave her stickers for petitioner to the lady in front of her and explained to that person how to use the sticker. Ms. Yusko cast her ballot for petitioner by writing in petitioner's name Ms Yusko also saw stickers on the exterior of the voting machine. Michael Yusko testified that in his view the elementary school polling place was entirely too small for the number of people who cast ballots.

Josephine Stanton testified there was much confusion as the result of the change in the polling place to the elementary school. Ms. Stanton testified she observed a voter who needed help while inside the voting booth. The election official refused to enter the voting booth with the voter still present; consequently, the voter opened the curtain and proceeded to lose their right to cast a ballot. Ms. Stanton cast a write-in vote by opening the third slot on the voting machine.

John Renner testified that in his view chaos resulted from the Board's designation of the elementary school as a polling place. Mr. Renner when he first appeared at the polling place got in the wrong line until someone told him which line to get into. Mr. Renner did cast a write-in ballot by trying unsuccessfully the first and second slots only to find that the third slot opened and he cast his write-in ballot and left

John Culla testified that there were no instructions on how to cast write-in ballots at the polling place. An election official instructed him on how to cast ballots, but not how to cast write-in ballots. Mr. Culla did not realize he had to vote in two separate elections at one polling place.

Lisa Jensen, one of the two successful candidates at the election, testified that in her view individual voters were not aware how to use stickers in order to cast write-in ballots for undeclared candidates. Furthermore, Lisa Jensen testified that she is convinced individual voters were not aware that they had to vote in two separate elections.

Elizabeth Story, the Little Egg Harbor Township Board Secretary since February 1971, testified that she held training sessions in conjunction with the Pinelands Regional High School District Board Secretary, with election officials. The training was based upon written instructions she received from the Ocean County Superintendent of Schools. During that training session, the procedure to be used by voters in order to cast write-in ballots was thoroughly explained to election

officials In regard to the complained of lack of space at the elementary school polling place, Ms. Story testified that the elementary school facility provided sufficient room for all voters In regard to the slots for the irregular ballots, or write-in ballots, to be cast at this election, Ms. Story explained that the first two write-in slots were available for use by the candidates.

Petitioner also submitted affidavits from the mayor of Little Egg Harbor Township and other citizens regarding the perceived confusion and lack of direction in the polling places during this election. Some affiants attested to their observation regarding the improper placing of stickers, the lack of understanding by voters on how to cast write-in ballots, and the absence of written instructions outside the voting booth on how to cast write-in ballots.

ANALYSIS

School board elections are conducted by authority at N.J.S.A. 18A:14-1, et seq. In order to set aside the announced results of a school election as is sought here, the party seeking such relief, petitioner, must show that election irregularities result from a degree of gross negligence or inattention to duty that the will of the electorate was thwarted. In this case, there is a complete lack of evidence to show the election workers engaged in gross negligence or inattention to duty, much less sufficient evidence to show the will of the electorate has been thwarted. While it is true that those voters who testified before me were uncertain how to cast write-in ballots during this election, the election workers cannot be faulted in the absence of any evidence of misconduct on their part.

When voting machines are used in school elections, N.J.S.A. 18A:14-42 provides that the school board election officers shall perform the same duties regarding voting machines as are required when voting machines are used in elections held under the authority of Title 19, Elections, with certain exceptions not relevant here. N.J.S.A. 19:50-3 provides in part as follows:

> For instructing the voters on any [school] election day there shall, so far as practicable, be provided by the county board of elections or the superintendent of elections * * * having custody of voting machines, for each polling place a mechanically operated model of a portion of the face of the machine. Such model, if furnished, shall, during the election, be located on the district election officers' table or in some other place which the voters must pass to reach the machine, and each voter shall, before entering the voting machine booth, be instructed regarding the operation of the machine

> and such construction illustration on the model, and the voter given opportunity to personally operate the model. The voter's attention shall also be called to the diagram of the face of the machine so that the voter can become familiar with the location of the questions and the names of the officers and candidates. If any voter, before entering the voting machine booth, declares under oath, and establishes to the satisfaction of a majority of all the members of the district board that by reason of an inability to read or write, blindness or other physical disability he is unable to cast his vote without assistance, he shall have the assistance of two [election officers] * * * such [election officers] shall retire with such voter to the booth and assist him * * *.

In this case, there is evidence that a mechanically operated model of a portion of the face of voting machines was available at each polling place. There is also evidence that the voting machine itself contains instructions on how to cast write-in ballots, or irregular ballots, if the voter so chooses. There is also evidence that the election officials did provide instructions to voters on how to cast write-in ballots, and the use of pasters, during the election. While the evidence is clear that some voters were thoroughly confused on how to cast write-in ballots, despite having been given instructions and despite instructions on the voting machines, that confusion is not due to the negligence of the election officials.

The evidence is clear that the election officials in charge of this election were trained by the board secretary upon written instructions from the Ocean County Superintendent of Schools on the proper procedures to be used during the entire election, including the casting of write-in ballots. I am not persuaded by any of the testimony I heard that any election official engaged in deliberate mis-instruction to any voter regarding the casting of write-in ballots nor am I persuaded that whatever confusion exists in the minds of voters on the proper casting of write-in ballots is due to any conduct by election officials. The use of stickers or pasters during an election for write-in candidates creates a greater risk of the election results being contested than in an election without write-in candidates.

Finally, with respect to the testimony of Mr. Miller that there was no paper roll in the machine he used, so he just dropped a paster inside the slot, is inconsistent with the overwhelming evidence in this case. First, there is no corroborating evidence from any source that any voting machine used in this election was absent paper rolls. Next, in order for petitioner to have accumulated 315 votes there had to be paper rolls in the machines which were used in this election. Ms. Yusko specifically testified she cast a write-in ballot for petitioner by writing in petitioner's

name That had to occur on a paper roll. Consequently, the testimony of Mr. Miller in this regard is rejected.

Petitioner Doocey was apparently a popular candidate to take the place of the deceased formerly announced candidate and petitioner Doocey was supported by various civic organizations. Nevertheless, the candidate who determines to mount a write-in campaign for election to board membership also assumes some risk of insuring that the message get out to potential voters on how properly to cast write-in ballots for their candidacy.

In this case, I must **CONCLUDE** that there is an absence of evidence to show gross negligence, indifference to duty, or any suggestion that the will of the electorate has been thwarted. Consequently, there is no basis upon which to grant petitioner's requested Order for the conduct of a new election in the school district of Little Egg Harbor Township. The petition, therefore, must be and is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis does not so act in forty-five 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 **DR. JOHN ELLIS** for consideration.

July 27, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 0 6 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
LITTLE EGG HARBOR, MONMOUTH	:	
COUNTY.	:	
_____	:	

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

Upon careful consideration, the Commissioner concurs with the ALJ that, despite apparent confusion on the part of several voters regarding polling locations and the casting of write-in ballots, no showing was made of fraud, negligence or knowing misconduct on the part election officials. He further concurs with the ALJ that the will of the electorate does not appear to have been thwarted.

Accordingly, for the reasons stated in the initial decision, the Commissioner affirms the April 24, 1990 election of Lisa Marie Jensen and Kathie M. Sink to three-year terms on the Little Egg Harbor Township Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7139-89
AGENCY DKT. NO. 267-8/89

THE COUNCIL OF PRIVATE SCHOOLS
FOR CHILDREN WITH SPECIAL NEEDS, INC.,
COASTAL LEARNING CENTER, INC., AND
RONALD BOEDART,
Petitioners,
v.
STATE OF NEW JERSEY, STATE BOARD
OF EDUCATION, DEPARTMENT OF EDUCATION,
AND THE COMMISSIONER OF EDUCATION,
Respondents.

Timothy B. Middleton, Esq., for petitioners (Apostolou, Middleton & Buonopane, attorneys)

Nancy Kaplan Miller, Deputy Attorney General, for respondents (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: June 1, 1990 Decided: August 8, 1990

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

INTRODUCTION

This case challenges the validity of certain regulations adopted by the State Board of Education on May 15, 1989 regarding changes in corporate structures or governing bodies at approved private schools organized under N.J.S.A. 18A:46-14(g) which offers educational services to physically, mentally, and emotionally handicapped

youngsters in New Jersey. After the Commissioner of Education transferred the matter September 21, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted during which the issues presented by the pleadings were agreed upon. Thereafter, respondents moved to dismiss the Petition upon the grounds the Petition fails to state a cause of action, petitioners do not have standing with respect to the allegations, and petitioners' claims are barred by the principle of ripeness. The record on the motion to dismiss consists of the pleadings, a certification in lieu of affidavit filed by petitioner Ronald Boedart in opposition to the motion, and the filed letter memoranda. After the parties filed respective letter memoranda in support of their positions, the record closed June 1, 1990. Extensions of time within which to file this initial decision were granted.

The conclusion is reached in this initial decision that the Petition of Appeal must be dismissed for failure to state a claim sufficiently ripe upon which relief could or should be granted.

FACTS

The facts of the matter are as follows. The dispute arises from the adoption of regulations by the State Board of Education (State Board) during April 1989. Pursuant to Executive Order No. 66 (1978), the regulations governing the education of handicapped children were due to expire on June 1, 1989. 21 N.J. Reg. 239 (Feb. 6, 1989). Those regulations address, in part, the approval of private schools for the placement of public school students who are handicapped. N.J.A.C. 6:28-7.1, et seq. The subchapter regarding private school approval was readopted with amendments which became effective on May 15, 1989. 21 N.J. Reg. 1385 (May 15, 1989).

On August 11, 1989 petitioners filed to the Commissioner a Petition challenging the validity of an amendment to those regulations which was adopted. Petitioner Council for Private Schools for Children with Special Needs is a New Jersey Corporation organized not for-profit. It consists of approximately 17 private for-profit schools for the handicapped. These private for-profit schools operate pursuant to statutory authority at N.J.S.A. 18A:46-14. Petitioner Coastal Learning Center, Inc., is a

for-profit private school for the handicapped with campuses located in Howell Township and Morganville, New Jersey. It is organized pursuant to Title 14 of the New Jersey statutes which, of course, controls the incorporation and governance of New Jersey corporations. Both campuses, which have been in operation since 1974, specialize in teaching emotionally disturbed children. The corporation has five shareholders, one of whom is petitioner Dr. Ronald Boedart, who is also the director of the Morganville campus. Each of the other four shareholders is also employed by the corporation, and all five shareholders sit on its Board of Directors. The corporation's Board of Directors, it is noted, is identical in number and identity to the five shareholders, it supervises and control the overall operation of the school business including the hiring and firing of employees and the declaration and issuance of dividends.

Petitioners specifically challenge the validity of N.J.A.C. 6:28-7.1(g) which provides in part:

> When an approved private school has a change in corporate structure or changes the structure of its governing body from that which was approved in the prior year, the composition of the board shall be according to N.J.A.C. 6:28-7.2(e)6iii(1) and (2).

N.J.A.C. 6:28-7.2(e)6iii(1) and (2) provides that the Board of Directors (1) shall be comprised of at least six members, 50 percent of whom shall be disinterested parties and not related to employees of the private school; and (2) may include the director of the private school in a nonvoting capacity, but no other employee or officer of the school.

Petitioners allege that the regulation is unconstitutional on its face and as applied because it violates the Fifth Amendment of the United States Constitution and the New Jersey Constitution by usurping control of the private school without just compensation, that the regulation is arbitrary and capricious and that the regulation is vague and unclear on its face. Subsequent to the time the matter was transferred as a contested case, petitioners advised the deputy attorney general and this judge of the their determination to sever facial challenge from the complaint in order to transfer that issue to the New Jersey Superior Court. Nevertheless, petitioners insist that the as applied challenge proceed to a plenary hearing here while the facial challenge is pending in Superior Court.

Thereafter, respondents moved to dismiss on the basis that the challenged regulation is prospective in application and is activated only when a change in corporate structure or the approved governing body occurs and because there is no change in the corporate structure of Coastal Learning Center the regulation is not applicable to it and as such the challenge is premature and must be dismissed.

Petitioners claim that the affidavit of Ronald Boedart refute the ripeness argument of respondents; that the current operation of Coastal Learning Center is affected because the regulation is ambiguous and therefore its decision-making is affected; that the regulation constitutes a lien on shares of stock held by the shareholders of Coastal Learning Center; that it is not prudent to postpone a consideration of the as-applied issue until actual enforcement occurs because once the regulation is applied the harm is already done; that Coastal Learning Center and all schools which comprise the Petitioner Council will be significantly affected should such a vague and unclear regulation be applied to any or all of them; and, finally, petitioners seek to amend the petition to allege a proper claim for declaratory relief under the Declaratory Judgment Act, N.J.S.A. 2A:16-50, et seq.

It is noted that Dr. Boedart, in his certification filed in lieu of affidavit, states as follows:

1. I am a Petitioner in the above entitled action and I am fully familiar with the facts set forth herein.

2. I am a shareholder of Coastal Learning Center, Inc. Coastal Learning Center, Inc. is a for-profit private school for the handicapped with school campuses located in Howell Township and Morganville, New Jersey.

3. I helped found Coastal Learning Center, Inc. in 1974 with Joseph Scalabrini, John Bruening, Frank D. Viscomi and Robert Viscomi. We are all equal shareholders of Coastal Learning Center, Inc.

4. We founded Coastal Learning Center, Inc. pursuant to the "Beadleston Act Amendment" which was passed in 1973. This permitted for-profit private schools for the handicapped to accept handicapped children from public schools with public funds.

5. All the shareholders of the corporation, including myself are presently employed and have been employed by Coastal Learning Center, Inc. since 1974. I am the Director of the Morganville campus.

6. All the shareholders, including myself sit on the Board of Directors of Coastal Learning Center, Inc. Pursuant to the bylaws, of Coastal Learning Center, Inc. the Directors are elected by the shareholders of the corporation. The Board of Directors of Coastal Learning Center, Inc. supervise and control the overall operation of the school enterprises. The day-to-day activities of the school operation are controlled by the employees/officers of the corporation. The Board of Directors of the corporation also control actions such as issuing dividends.

7. It should be specifically noted that in order to accommodate the cash flow requirements of the school business, the corporation has a line of credit of $400,000.00 with Midlantic Bank. In this regard, the corporation as well as all five (5) shareholders personally guarantee this line of credit.

8. The Board of Directors of the corporation are currently considering two (2) separate transactions which might trigger the regulation. First, the Board of Directors is considering expanding and opening up another school operation. Secondly, the Board of Directors are considering an "I.R.S. 355 Spin-Off" of the Morganville Campus. Based upon my own reading of the regulation and upon advice of competent legal counsel, I am not quite sure whether or not either or both transactions trigger the regulation.

9. The Board of Directors and shareholders of the corporation do not want to trigger the regulation for several reasons. First, the effect of the regulation is to take control of the corporation from the shareholders and give it to third parties. These third parties cannot be employees of the corporation or even related to employees of the corporation.

10. In addition to currently effecting two (2) present situation confronting the corporate Board of Directors, the regulation also affects the corporation's day-to-day activities.

11. On its face, the regulation is ambiguous. What exactly constitutes a change in corporate "structure" or change in the governing body of the corporation is not clear. Therefore, I, nor the other Board of Directors am quite sure, if, for example, a transfer of stock upon the death of a shareholder to the shareholder's estate would trigger the regulation.

12. Needless to say, I file this Certification in support of the brief opposing the State's Motion to Dismiss the as-applied aspects of the case. I also file this Certification in support of a Motion to Amend our Petition for Declaratory Relief.

ANALYSIS

Initially, it is noted that with respect to petitioners' application to amend the petition to seek a declaratory ruling, N.J.A.C. 6:24-2.1 provides in part that "The determination to entertain such petitions for declaratory judgments shall be within the sole discretion of the commissioner * * * ." Consequently, neither the Office of Administrative Law nor individual administrative law judges have authority to entertain applications for declaratory rulings in the first instance without such application having been approved by the Commissioner. Therefore, to the extent that petitioners make such an application in this forum such application must be and is rejected.

As pointed out by the deputy attorney general, because petitioners have conceded that the appropriate forum for the constitutional adjudication of the facial validity of the challenged regulation is in New Jersey Superior Court and have stated their intention to transfer that portion of the petition there, the only question remaining here is whether the regulation is constitutionally invalid as applied. In order to reach that issue, an assessment of how the regulation affects petitioners when applied is necessary. But, the regulation has not been applied to petitioner's individually or collectively.

N.J.A.C. 1:1-2.1 defines an administrative contested case as an adversary proceeding in which the legal rights, duties, obligations, privileges, benefits or other legal reglations of specific parties are required by constitutional right or by statute to be determined by an agency. The issue to be resolved must be in a concrete context and may not be speculative, conjectual, or premature. See, Trombetta B. Atlantic City, 181 N.J. Super. 2203 (Law Div. 1981) aff'd. 187 N.J. Super. 351 (App. Div. 1982). In short, there must be a showing that the issue being presented is ripe for consideration.

In Trombetta, the court identified two elements to consider in determining whether a matter is ripe:

> (1) In view of the issues presented herein, whether further delay in bringing the action would assist this [forum] materially in understanding the issues;
>
> (2) Whether the interpretation of the challenged [regulations] or the

> manner in which they are being applied, is ambiguous or uncertain because the facts have not yet progressed to the point that actual enforcement has taken place or the practical impact of the [rule] clarified by experience. Trombetta, Super., 181 N.J. Super. at 223.

Keeping in mind that the facial attack of the regulation shall be presented to New Jersey Superior Court, Appellate Division, pursuant to R. 2:2-3(2), it may well be that the rule may never be applied if petitioners challenge to its facial validity prevails. Contrariwise, if the facial validity of the rule is upheld this judge agrees with respondents that that court may well clarify ambiguities or questions of interpretations of the rule which would influence the nature of the proceedings ensue on the as-applied challenge.

Petitioners acknowledge that the rule has not been applied to any of the 17 members of the Council, nor to Coastal Learning Center, nor to any interests which petitioner Boedart may have. Consequently, to proceed with the as-applied challenge now would result in an inability to assess the impact of the regulation as it shall be applied by the Department in the future on any one of the named petitioners. Consequently, a ruling on the as-applied challenge given the circumstances would be purely speculative and conjectural and, at best, an inefficient use of time.

Therefore, I must conclude that the as-applied challenge to the rule is not ripe for adjudication. That being so, no one of the named petitioners have standing to bring such an issue at the present time. However, that does not mean that when and if in the future the regulation is applied to either one of the named petitioners that such an individual or entity would not have standing to bring an action.

For the foregoing reasons, I must **CONCLUDE** that respondents' motion to dismiss the Petition of Appeal must be **GRANTED** for failure of the Petition to state a claim for which relief could be granted in view of the fact the issue presented is not yet ripe and petitioners have no standing to bring such an issue at this time. Therefore, the Petition of Appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

August 15, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

August 9, 1990
DATE

Mailed To Parties:

AUG 15 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

gjb

THE COUNCIL OF PRIVATE SCHOOLS FOR CHILDREN WITH SPECIAL NEEDS, INC., COASTAL LEARNING CENTER, INC., AND RONALD BOEDART,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, STATE BOARD OF EDUCATION, DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS.	:	

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

The Commissioner, upon review of the record, adopts as his own the analysis and conclusions of the Administrative Law Judge in this matter. Accordingly, the Petition of Appeal is dismissed for the reasons stated in the initial decision.

COMMISSIONER OF EDUCATION

Pending STate Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING PETITION
OAL DKT. NO. EDU 757-90
AGENCY DKT. NO. 8-1/90

BART AND KATHLEEN MANDAGLIO,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,
Respondent.

Bart and Kathleen Mandaglio, petitioners, pro se

Russell Schumacher, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: July 23, 1990 Decided: July 31, 1990

BEFORE STEPHEN G. WEISS, ALJ

This matter was transmitted to the Office of Administrative Law by the Department of Education on January 29, 1990, pursuant to the provisions of N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. It pertains to a complaint by the pro se petitioners, parents of two school children in respondent's schools, who allege they had been discriminated against by the respondent with respect to the Board's alteration of a school bus stop for the pick up and discharge of their children. Following the filing by the Board of its answer denying any discrimination or other unlawful conduct, the matter was transmitted to the Office of Administrative Law and a telephone prehearing conference was conducted by the undersigned administrative law judge on April 27, 1990. A plenary hearing was conducted on July

23, 1990, at the Municipal Building, Wharton, New Jersey. Following presentation of the case on behalf of petitioners, respondent moved to dismiss the petition, which motion was granted for the reasons which follow.*

TESTIMONY

As noted, this case involves a claim by the Mandaglios that they had been discriminated against by virtue of the Board's determination to change the school bus pickup and discharge point for their children beginning in the 1989-90 school year. Testimony on the Mandaglios' behalf was presented by a variety of witnesses, some of whom were employees of the Board.

In advance of the hearing, a joint stipulation of facts was submitted (Exhibit J-1) which set forth the following facts:

1. The petitioners reside at 16 Saddle Hill Road in the Township of Mendham.

2. The petitioners are parents of two children who are enrolled as students in the Mendham Township School District. The petitioners' children have completed the third grade and will be enrolled in the fourth grade at the Mendham Township Elementary School commencing in September 1990.

3. The petitioners reside more than 2.0 miles from the school and their children are entitled to bus transportation as pupils remote from school pursuant to N.J.S.A. 18A:39-1.

4. During the 1986-87, 1987-88 and 1988-89 school years, during which petitioners' children were enrolled as students at the Mendham Township Elementary School, the respondent Board of Education provided transportation to petitioners' children and assigned them a bus stop on

*Although I rendered an oral decision at the hearing, I thereafter advised the parties that I would for their benefit reduce my decision to written form.

Saddle Hill Road in the area or near the end of their driveway or at or near the end of a neighbor's driveway.

5. The petitioners have resided at the above address since 1979.

6. Since approximately 1977 when the first home on Saddle Hill Road was occupied, until the 1989-90 school year, children residing on Saddle Hill Road and attending Mendham Township Public Schools have been assigned to either of two bus stops on Saddle Hill Road.

7. During the 1989-90 school year, the respondent Board of Education established a bus stop for petitioners' children at the intersection of Saddle Hill Road and Roxiticus Road.

The witnesses called by petitioners included Dr. Joseph P. Cornell, the superintendent of schools, Ms. Florence Bockoven, the transportation coordinator, Ms. Mary Mazzocchi, the owner of N. J. Bus Company, which contracts with the Board for the provision of transportation services, Ms. Barbara Ann Rogers, president of the Board, Ms. Darlene Savadge, a bus driver for N. J. Bus Company, Mr. Richard J. Sheola, the Mendham Township Administrator, Sergeant Thomas R. Zenick of the Mendham Township Police Department, and Mr Richard A. Bellush, the person who developed the area where the Mandaglios reside and who is a neighbor as well. Mrs. Mandaglio also testified on her own behalf

As noted, the Mandaglios reside on Saddle Hill Road, a road which ends in a cul-de-sac. Prior to the 1989-90 school year, the Board picked their children up at or near their driveway. However, when in September 1989 the Board changed the pickup points, their children were required to walk approximately seven-tenths of a mile tothe intersection of Saddle Hill Road and Roxiticus Road. The distance from the front door of the Mandaglio residence to the point where the two children now are picked up is approximately .774 miles as measured by petitioners.

According to the Board-employed witnesses called by petitioners, the reason for the change in 1989-90 was the fact that the Board adopted a policy which precludes sending any bus on a road which ends in a dead end, such as a cul-de-sac. The rationale for the determination was the reluctance to require a 54-passenger

school bus have to back up in order to make a turn. Testimony from Ms. Savadge, Ms. Bockoven and Ms. Mazzocchi all indicated that there are dangers inherent in such a maneuver. The Board's policy applied not only to Saddle Hill Road, but to every other roadway in the Township which, like that road, also ends in a cul-de-sac. Although Mrs. Mandaglio testified that she personally had observed large school buses make a "full circle" turn in the Saddle Hill Road cul-de-sac, and therefore not have to back up, Ms. Bockoven denied that this could safely be done by her. Ms. Savadge, who actually drove the particular route between March and June 1989, testified that while she sometimes could make a "full circle" turn in the cul-de-sac, there were other occasions when this was not possible because of weather conditions or the presence of obstacles. She also noted that not every bus has the same turning radius and that not every vehicle can make a "full circle" turn.

Ms. Bockoven also testified that the Board's decision not to send a school bus on a road which ends in a cul-de-sac was prompted by the difficulty drivers were having turning around in these situations and the fact that the configuration of school buses makes such a maneuver dangerous. While some of the new bus stops were changed following parental complaints, Bockoven (as well as Dr. Cornell) both indicated that these changes were made because of special considerations such as the tender age of a child (kindergarten) or the particularly hazardous nature of the original stop. However, I **FIND** as a **FACT** that no change reintroduced a route that required a school bus to turn around in a cul-de-sac.

Thus, the testimony offered by petitioners themselves revealed that although the new stop for the Mandaglio children on Roxiticus Road imposes a burden upon them to walk a substantial distance along a roadway which has no sidewalks and a 50-mile-per-hour speed limit; nevertheless, they were not "singled out" at all. Although some dispute did exist as to the total number of children who must walk more than six-tenths of a mile to a bus stop, there was evidence that at least two other families had children who had to walk that distance, at least, in order to reach their own stop. Most importantly, however, the evidence also revealed without dispute that the Board's policy is applied uniformly--no school bus route traverses a dead-end or cul-de-sac road. Rather, every bus route includes the ability to make left or right turns in order to complete a circle, even if it lengthens the distance that the bus must travel.

DISCUSSION

The case law with respect to matters of this sort is well settled. For example, in his decision in Walters v. Board of Education of the Township of Mendham, 1977 S.L.D. 854, the Commissioner, quoting from the an earlier case, noted as follows: "Boards of education are not authorized by law to provide for the safety of children in reaching school. While a board should be concerned as to the safety of children and should report to the State Police or local officers reckless use of highways, it is not directly responsible for the danger to pedestrians because of automobile traffic any more than it is responsible for sandy or muddy highways. Highways and street dangers demand parental concern and care of children to avoid accidents and also a civic enforcement of traffic laws rather than larger expenditures of public funds to provide transportation." In addition, in the Walters case, the Commissioner made reference to the decision in Pepe v. Board of Education of Livingston, 1969 S.L.D. 47, wherein it was noted that, "in order to establish unlawful discrimination there must be a showing that one group in entirely the same circumstances as another is given favored treatment." This disparate treatment was not shown here--a deficiency in proofs which is fatal to petitioners' case.

Literally dozens of decisions by the Commissioner articulate the same basic principles. Simply put, boards of education have discretion with respect to the establishment and/or alteration of school bus routes and stops, and unless it can be demonstrated that their determinations were arbitrary, capricious or unreasonable, their decisions will not be "second-guessed" by the Commissioner. In this case the Board's determination to change its policy to preclude large school buses from traversing dead-end roads was neither arbitrary, capricious nor unreasonable. Nor was it applied in a discriminatory manner against the Mandaglios or their children. While it is regrettable that nine-year-olds now must walk more than three-quarters of a mile down a road with no sidewalks and a 50-mile-per-hour speed limit in order to reach their bus stop, the hazards that such a route poses to them primarily is a matter of law enforcement-municipal concern. So long as the Board has not acted in a discriminatory fashion, there is no basis to set its determination aside. See, e.g., Centofanti v. Bd. of Ed. of Tp. of Wall, 1975 S.L.D. 513; Schrenk v. Bd. of Ed. of Ridgewood, 1960-61 S.L.D. 185.

Accordingly, in light of the undisputed facts, including the testimony and documentary evidence presented, I find that petitioners have failed as a matter of law to make out a prima facie case of discrimination or other unlawful action by the respondent and their petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis does not so act in forty-five 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(c).

I hereby **FILE** this initial decision with **DR. JOHN ELLIS** for consideration.

July 31, 1990
Date

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

Aug. 7, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 08 1990
Date

OFFICE OF ADMINISTRATIVE LAW

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BART AND KATHLEEN MANDAGLIO,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MENDHAM, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Petitioners except to the initial decision urging that consistent application of the Board's policy prohibiting buses to travel on cul-de-sacs does not mean that the policy itself is not arbitrary, capricious and unreasonable. They provide a "post-hearing" summary which they believe supports this contention and that their children have been discriminated against by the Board's policy.

Upon review of the record and the parties' exceptions, the Commissioner adopts the findings and conclusions of the Administrative Law Judge. Notwithstanding petitioners' arguments otherwise, the record supports that (1) the Board's policy prohibiting a school bus from turning around in a cul-de-sac is neither arbitrary, capricious nor unreasonable; (2) that the decision to preclude such turning around was based on safety considerations related to the inherent dangers of backing up a school bus on a cul-de-sac, including Saddle Hill Road's; (3) there was a failure to demonstrate that the Saddle Hill Road cul-de-sac was designed to accommodate the turning around of a vehicle the size of a school bus without backing up the school bus as contended by petitioners; and (4) the policy was applied in a nondiscriminatory and consistent manner.

Accordingly, the Commissioner adopts as his own the findings and conclusions of the ALJ for the reasons expressed in the initial decision. The Petition of Appeal is, therefore, dismissed.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3559-90
AGENCY DKT. NO. 102-5/90

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION - NEWARK,

Barbara Todish, petitioner, pro se

Robin Mc Mahon, Esq., for respondent
(Hilda Burnett, Chief Counsel for the Board)

Record Closed: July 13, 1990 Decided: August 6, 1990

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

Barbara Todish, a defeated candidate, alleged election irregularities of a late poll opening at the Senior Citizen building in the East Ward as well as elsewhere and seeks an investigation by the Commissioner presumably to void the election and order a reelection. The Board denies the allegations and seeks dismissal of the petition of appeal by way of motion for summary decision.

The matter was transmitted to the Office of Administrative law on May 9, 1990, pursuant to N.J.S.A. 52:14F-1 et seq. An in-person prehearing was held on June 7, 1990, at which time counsel for the Newark Board of Education declared an intent to file a Motion to Dismiss on the ground that the public will was not thwarted even if petitioner met her burden of proof by a preponderance of credible evidence.

The results of the balloting for three members for the Board at the April 24, 1990 annual election are as follows:

Good	6650
Simmons, Jr.	5540
LaScala	5373
Turco	4753
Rashid	1533
Campbell	1269
Ellis, Jr.	1125
Mitchell	989
Saldutti	978
* Todish	923
Torres	673
	29,816

* Complainant in the instant matter

The total votes cast for candidates were 29,816. Todish received 923 votes while the third highest votes were cast for successful candidate LaScala who received 5,373 votes representing a difference of 4,450 votes.

The particualr polling location in dispute is the Senior Citizen Building in the East Ward for District 26 voters. Todish received 38 votes while LaScala received 57.

It must be noted that the tabulation of total votes cast for District 26 in the East Ward is erroneous, as the report indicates 0 cast while the tabulation of votes received by the 11 candidates total 620. Notwithstanding that the tabulation for this district indicates that 92 total votes were cast for and against the budget, it is not unreasonalbe to conclude that slightly more than 200 voters cast votes for candidates since three votes were to be cast by each voter.

It is totally unreasonalbe to anticipate that a reelection would significantly alter the votes of those who voted. The only change that could possibly be anticipated would be the votes cast by those who did not vote on April 24, 1990. I **FIND** it unreasonable to believe that Todish could conceivably overcome the difference of 4450 votes when the difference in the totality of East Ward votes between Todish and LaScala was 1179 votes. See, C-1

This recommended decision may be adopted, modified or rejected by the **DR. JOHN ELLIS, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. However, if **DR. JOHN ELLIS** 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 the **DR. JOHN ELLIS** for consideration.

DATE

PHILIP B. CUMMIS, ALJ

8 8 90

DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE AUG 10 1990

FOR OFFICE OF ADMINISTRATIVE LAW

bh

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION IN THE SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF NEWARK,	:	DECISION
ESSEX COUNTY.	:	
	:	

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

Upon review, the Commissioner concurs with the ALJ that even if petitioner had been able to prove her specific allegations regarding the late opening of certain polling places, there would still be no basis to conclude that the will of the electorate had been thwarted. Further, as noted by the ALJ, although petitioner had standing to request an inquiry as a defeated candidate, that portion of her request pertaining to the district budget vote does not meet the plain directive of statute requiring such requests to be made by ten or more qualified voters.

Accordingly, for the reasons stated therein, the Commissioner adopts the initial decision of the Office of Administrative Law as the final decision in this matter and affirms the April 24, 1990 election of Candidates Good, Simmons, Jr. and LaScala to three-year terms on the Board of Education.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4436-89

AGENCY DKT. NO. #186-6/89

HARRY DEARDEN,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Thomas W. Sumners, Jr., Esq., for respondent

Record Closed: April 12, 1990 Decided: August 16, 1990

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE, PROCEDURAL HISTORY AND ISSUES

Petitioner Harry Dearden appeals to the Commissioner of Education, under N.J.S.A. 18A:6-9, from the abolishment of his position as Assistant Purchasing Agent/Stock Inventory Control by the respondent Board of Education for the City of Trenton (Board of Education or Schoolboard). Dearden claims that he was the victim of

an arbitrary and politically inspired hatchet job initiated by the late Mayor of Trenton, who referred to Dearden, in the context of a Board of School Estimate (Board of Estimate) meeting on the schoolboard's budget, as a "political hack," whose job was unnecessary. The Board of Education denies that Mr. Dearden was the subject of a political "hit" and maintains that elimination of his position was a carefully considered result of required budget cuts and tough funding choices. Dearden also claims that he acquired tenure in his position as Assistant Purchasing Agent/Stock Inventory Control pursuant to N.J.S.A. 38:16-1, et seq., and N.J.S.A. 18A:17-1, et seq., and argues that the Respondent Board acted arbitrarily, capriciously and in contravention of his legal rights by abolishing that position. The issues to be resolved, as framed by the Prehearing Order, are:

(1) whether the respondent Board of Education's action in abolishing the petitioner's position was arbitrary, capricious and in violation of petitioner's tenure rights under N.J.S.A. 38:16-1 et seq. and N.J.S.A. 18A:17-1 et seq., and if so, what penalty or remedy is warranted, under the circumstances;

(2) whether the vote taken by the respondent Board of Education to abolish peitioner's position was valid, given the fact that only four members out of the nine-member Board voted to abolish the position.*

*Procedural History:

The Bureau of Controversies and Disputes of the Depatment of Education filed this matter with the Office of Administrative Law on June 19, 1989, for hearing as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. and a prehearing was held on August 10, 1989. The plenary hearing was held in Mercerville, New Jersey, on December 4 and December 8, 1989, and also on January 12, 16, and 30, 1990, when the hearing was completed. A hearing day scheduled for December 7, 1989, Pearl Habor Day, was adjourned, due to a fire at the Office of Administrative Law. A motion to intervene was filed on behalf of Alfred Misiakowski on January 12, 1989, and was granted under N.J.A.C. 1:1-16.1 et seq. because of petitioner's claim of entitlement to the position currently held by Misiakowski. The parties submitted extensive post-hearing briefs by February 14, 1990, and petitioner moved pursuant to N.J.A.C. 1:1-18.5(c), on March 15, 1990, to reopen and supplement the record, which was granted. Respondent filed a cross-motion to supplement the record on April 5, 1990, which was also granted and the record closed on April 12, 1990. The due date for submission of this initial decision was extended for good cause not related to this case, including a backlog of initial decisions stemming from Public Utility matters affecting many New Jersey residents. I regret any hardship, inconvenience or aggravation that this unavoidable delay may have caused the parties.

FACTUAL DISCUSSION AND FINDINGS

The essential dispute of fact here is whether the Board of Education's action in eliminating Mr. Dearden's position was, as Dearden alleges, a purely political and vindictive act without any real budgetary basis, improperly prompted by a casual remark by former Mayor Arthur J. Holland, to the effect that the Board could reduce its budget by eliminating "hacks," such as the petitioner, or whether there was a valid and reasonable fiscal justification for eliminating Petitioner's position. Unfortunately, Mayor Holland died prior to the hearing in this matter and no deposition preserves whatever his testimony on the subject might have been. The Petitioner's angle of attack on the facts at the hearing was to knock down the Board's cited reasons of unavoidable budget cuts requiring elimination of Dearden's position. The following is a summary of testimony and documents admitted into evidence.

Petitioner began his employment with the Trenton Board of Education or or about September 1979 as the "Assistant to the Assistant Secretary of Purchases and Supplies," which title was changed in the 1985-86 school term to that of Assistant Purchasing Agent/Stock and Inventory control. The parties stipulated to Dearden's work record and job description, as well as his record of military service. His following job description establishes the following as the major functions and performance responsibilities of the Assistant Purchasing Agent/Stock and Inventory Control:

1. Responsible for the centralized receiving function of all district acquisitions.
2. Responsible for the timely maintenance of equipment, furnishings and fixtures which are in need of repair.
3. Responsible for disposing of all physical assets.
4. Tags all equipment, furnishings and other fixtures acquired by the district.
5. Prepares records required in order to prepare input documentation for computerized inventory reporting (monthly basis).
6. Maintains records on perpetual basis showing the location, condition and custodial responsibility of all equipment and furnishings.
7. Maintains pertinent records of service and repair activities related to all equipment items.

8. Coordinates service and repair actaivity for equipment in the district.

9. Coordinates the disposal of outdated and unrepairable equipment on an annual basis.

10. Prepares annual inventory reports.

11. Assists in the purchasing operation as assigned by the Assistant Secretary/Purchasing Agent. [P-2]

The Superintendent of Schools, Crosby Copeland, Jr., testified that he develops the annual budget for the Board of Education, which is then reviewed by that Board and approved, if acceptable. The Board of Education then submits the approved budget to the Board of School Estimate, consisting of the Mayor, two Councilmembers, two Schoolboard members, and the Superintendent of Education. As part of the budget process, the Superintendent recommends abolishment of positions to the Schoolboard, and in the 1988-89 year Copeland completed his initial review and recommendation in February 1989. The Superintendent did not contemplate eliminating Petitioner's position between October and February of 1989, and the first budget including funding for that job to a level of $51,000 to $53,000. In anticipation of sending the budget to the Board of Estimate, the Schoolboard met four times between October of 1988 and February of 1989 to review the Superintendent's recommendations, which initially included petitioner's job. At the first meeting, the Board of Education members requested that the superintendent go back to the budget drawing board and return with a budget representing only a $3.5 million increase, as opposed to the $12 million increase first recommended by Copeland. The Schoolboard did not specifically instruct the Superintendent as to what cuts to make, and, initially, he made no recommendation, (nor did anyone else) to eliminate Dearden's position, although proposals to do so were sort of an annual event in the City of Trenton. At the three initial Board meetings between October 1988 and February 1989, there was, in fact, no specific discussion of the retention or elimination of the Petitioner's job, and the Superintendent recommended that it be retained, which it was, in the second budget submitted to the Board of Education in March 1989, which that Board of Education unanimously approved.

The Schoolboard then submitted the budget to the County Superintendent, who approved the 3.5 million dollar increase, and sent the request to the Board of School Estimate, on which sat Arthur Holland, late Mayor of Trenton. The Board of Estimate's practice was to consider budget line items, including personnel and other expenditures. At a second meeting to consider the Trenton Board's 3.5 million dollar increase in its

budget, members of the Board of Estimate, particularly the Mayor and Council members, expressed concern on funding for the City's portion of the budget. In the course of this second meeting, there was discussion concerning Petitioner's job in the budget especially, concerns were expressed by the Mayor and other Board of Estimate members, that the Board of Education was too top heavy with administrative types, especially in the supply department, and that Dearden was, essentially, a "political hack," to use the Mayor's phrase. By using the phrase "political hack," Mayor Holland, a plain-spoken man not prone to pulling punches, was suggesting that the Petitioner's position had been created for political reasons, without any real need or justification. No other Board of Education employees were directly referred to in the Board of Estimate meeting, according to Copeland. Although the former Mayor stated that he felt that Dearden's position was not needed, the Superintendent, while, conceding that Dearden had initially only been a political appointment, argued to the Board of Estimate that Petitioner had become very knowledgeable in the position over the years and was now needed. The Superintendent also defended the need for a second Buildings and Grounds position, but the Board of Estimate did not respond and voted to reduce the Schoolboard's budget increase request and to eliminate the petitioner's position.

Superintendent Copeland stated that neither he nor the Schoolboard was required to accept the Board of Estimate's recommendation, although they were bound to cope with the final funding imposed by the Board of Estimate, if not the particular line items recommended for reduction. After review of budget needs, the Superintendent recommended that both the Petitioner and an additional Buildings and Grounds position be retained by the Board of Education. Copeland also recommended that the Schoolboard appeal from the Board of Estimate's reduction of the budget request, but the Board of Education declined to follow this advice. The budget recommendations made by the Board of School Estimate were also reviewed and confirmed by the City Council which sliced the budget by another $916,900. (c.2) The Schoolboard, ultimately, appealed to the Commissioner from that decision, and the Order to Show Cause was settled in Octaobaer of 1989, by restoration of most of the funds, excluding the $50,925 for the Assistant Purchasing Agent. (C-1, at 3).

Although the Superintendent consistently recommended to the Board of Education that the Petitioner and the Grounds and Building position be retained, indthat there was a need and funding for both slots, he recalls that Board Member Yuki Laurenti

stated that some personnel cuts would have to be made before she would support the Superintendent's recommendations on the budget. Ms. Laurenti espoused the Board of Estimate's recommendation that Petitoner's position be cut. Superintendent Copeland was again instructed to draft a new budget for the Schoolboard's perusal. Part of Copeland's concerns in drafting this budget was a so-called "Kittrels' Report," which had been drafted in January of 1985, by an outside consultant, the Kittrels Educational and Training Systems, Inc., and had extensively reviewed organization within the district, for need and efficiency. The report touched on Dearden's position and the supply department but made no specific recommendation to eliminate or retain it, though it did see a need for information which might reduce staffing: (J-1 at 36).

> [w]hile we were not charged with reviewing the operations of the purchasing office, interviews with the three supervisors, information gathered in interviews with Departmental Personnel, and information obtained during the secretarial study raises serious questions regarding the staffing in the Purchasing Office. There appears to be an abundance of work being performaned manually. The District should make the computerizing of many of its function (in particularly the ordering of supplies and the annual orders) a top priority. This would pay significant dividends and then adjustments could be made in the staff required in this area.
>
> At the supervisory level, we questioned the need for three supervisors given the history of this office, practices of other school districts, and the circumstances that resulted in the structure being created and maintained. This office could easily function with an administrator and one assistant. If proper attention is given to computerizing this operation, a reevaluation for the remaining assistant should be made....[J-1 at 36] [emphasis added]

In light of the Board of Education's rejection of Copeland's recommendation that petitioner's position be retained, the Superintendent consulted with Douglas Palmer, then Assistant Secretary in charge of Purchasing (and now Mayor of Trenton), who indicated that that Schoolboard wanted at least two personnel cuts, one of which could be the assistant sectretary to the Board of Education and the other the assistant manager of Buildings and Grounds. At that time, there were three positions in the Supply Department, and only two in Buildings and Grounds. Throughout all of these deliberations, the Board of Education was not aware of the Petitioner's status as a veteran, and the question had not been raised by the Petitioner or the School Board at any point. Copeland felt that the Board was instructing him, implicity, that he had to eliminate the Petitioner's position, after Board Member Laurenti picked up on the Mayor's theme and

convinced the Board of Education to go along. At no point in this process, did the Superintendent change his mind as to the need and funding available for Petitioner's job. Copeland claims that he had asked that the Board's Comptroller, David Shafter whether funds were available for Dearden's position and on May 30, 1989, Shafter told the Schoolboard that there was enoungh money in insurance savings to retain Petitioner. (P-4 at 22) The Board of Education rejected this proposal, which Copeland did not specifically submit, without voting on it and concluded that, in order to retain Petitioner, it would have to reduce instructional materials and supplies, and eliminate untenured teachers.

On cross-examination Copeland stated that, as of May 5, 1989, he had eliminated three line item positions from the budget, including that of the senior secretary in charge of supply, the assistant manager of Buildings and Grounds, and the Assistant Purchaser in the stock room, Dearden's job. (R-2). The Board voted to fund the Senior Secretary position, and Assistant Manager of the Buildings and Ground's, but not the Petitioner's position and justified this action by concluding that it was necessary in order to ensure funding for educational areas directly serving students (R-3). Approximately forty (40) untenured teaching positions were also eliminated for budgetary reasons in the Spring of 1989.

The second witness called by the petitioner was Douglas H. Palmer, former Assistant Secretary for Purchasing and Dearden's supervisor. In the Spring of 1989, Palmer learned that Dearden's position was slated for abolishment, but he also noted that this, as stated before, was almost a yearly ritual in Trenton, generally prompted by critical questioning from the Mayor and City Council members on the Board of School Estimate. Palmer conceded that Dearden got his job through "politics" and that this fact had been raised against Dearden on an annual basis for years, but the Board of Education had, until then, resisted calls to eliminate what Mayor Holland had disparagingly referred to as a "political hack" from its budget. Palmer felt that he had adequate justification for the position and advised the Superintendent to retain the Petitioner. He communicated his reasons for retaining Petitioner to the Schoolboard, and "anyone else" who would listen. Palmer stated that Dearden's duties were now being performed by several Board of Education employees, including Alfred Misiakowsi, but that there is still need for Dearden's position, to ensure involves of new equipment purchased and entering of inventory information into the computerized record system. In making his pitch for Dearden's position, Palmer stressed the foreseeable negative effect on supply operations that loss of that spot might well entail. He acknowledged that the

City was experiencing an increasing fiscal crisis over the years, which has had an adverse fiscal an impact on the Board of Education, requiring "tough decisions."

The Comptroller for the Trenton Board, David Shafter, who had previously served as Assistant Sectretary for Business Services and Payroll, testified for Petitioner and stated that his function, as of October 1987, was to prepare the annual budget, a task in which he was assisted by Douglas Palmer, as to supplies. Since Palmer, as Assistant Purchasing Agent, made no recommendation to reduce Deardon's position, Shafter, likewise, kept the position in the budget. When the Board of Estimate rejected Superintendent Copeland's first budget, which had been approved by the Board of Education, and called for a reduced increase of only three million dollars, Shafter saw the Board's alternatives as consisting of (1) "plan A": to close schools; or (2) "plan B": to abolish positions across the board. The Board opted for "plan B", and directed that positions be abolished, including forty (40) untenured teachers, and two to three administrative positions. Shafter noted that the position of executive director to the Schoolboard was not funded, but that a position formerly occupied by a deceased employee had been funded.

As Comptroller, Shafter also attended the Board of School Estimate meedings to assist Superintendent Copeland in explaining and defending the budget, which is, generally, reviewed page by page. He noted that Copeland volunteered to defend petitioner's job by advising the Board that "you may not like the occupant, but the position is necessary." Shafter recalled that Dearden's position had been recommended for cuts in previous years, and stated that the peititoner was not "liked" by certain individuals in the political community in Trenton. Former Mayor Holland responded, in Shafter's presence, that Dearden was "nothing but a political hack." Nonetheless, Comptroller Shafter and Superintendent Copeland recommended to the Board of School Estimate that Dearden's position was needed and should stay in the budget. Shafter also testified that the Board of Education, following the lead of the Board of School Estimates, wanted to eliminate both the position of Assistant Purchasing Agent and that of Assistant Manager of Buildings and Grounds, but that Copeland elected to eliminate Dearden's job, in hopes of saving the Assistant Manager of Buildings and Grounds position. He recalled that certain of the Board members expressed feelings that the City Purchasing Department was able to do the job with less personnel than the Board of Education and that the School Board wanted to try to do more with less, in the supply area. Shafter disagreed with this analysis, because of differences in the magnitude of the supply problems facing the Board of

Education and City, respectively, and of the great importance of supplies to the educational process. He recalls also that Copeland was instructed to come up with a budget package that would have little or no impact on educational programs.

Dearden next presented the testimony of Orlando Beckles, employed by the Trenton Board of Education as a truck driver delivering supplies. Beckles, who had been supervised by Dearden, as Assistant Purchasing Agent/Stock and Inventory Control, stated that he now performs some of Dearden's duties in the area of tagging and inventory of supplies, which takes time away from his basic function in the warehouse of filling and delivering supply orders. Beckles feels that the elimination of Dearden's job made things "tougher" and generally slowed things down in the Supply Department, imposing a burden on remaining employees to pick up the slack. Beckles conceded that, as a result of the abolishment of Dearden's position, he has to work a "little harder" and that he would have to work somewhat less if Dearden was reinstated. Beckles also filed an unsuccessful grievance complaining of the imposition of some of Dearden's administrative duties upon him. He described Dearden's functions in the warehouse, as those of overseeing the purchasing of oil, supplies, as well as the tagging of equipment, filing of delivery receipts and punching of inventory records into a computerized system.

Another truck driver employed by the Board, Roy Hasty, echoed Beckles's testimony as to the adverse impact of the operational loss of Dearden's position, which makes it harder to order supplies and to tag inventory, both of which impede supply efficiency. On cross-examination, Hasty admitted that tagging was not a particularly difficult task to complete.

Petitioner also presented the testimony of Bernadette Devone, a member of the Trenton Board of Education and also a member of the Board of School Estimate, since October 1988. She recalled that, in the initial budget submitted in early winter of 1988, there had been no recommendation to eliminate Dearden's position and that the proposal to do so was initiated by the Board of School Estimate. She also recalls the course of the general conversation at that meeting and testified, consistent with Copeland and Shafter, that the late Mayor referred to petitioner as a "political hack," although his comments were general in nature. Devone noted that the Superintendent continued to press for the position even after the Mayor had made this disparaging reference to Harry Dearden. Devone also recalled that Laurenti stated that Dearden's position was not needed, but that

there had been no discussion of veterans' tenure rights by the Board, at any point in their consideration of eliminating Dearden's spot. The reason given, as Shafter and Copeland so noted, was strictly budgetary. Devone was not present at the Board's meeting on May 30, 1989, but had discussed the matter with Douglas Palmer, who indicated that the position was needed and that the abolishment of that position might lead to late supplies. Devone personally visited the supply department on the morning of the Board's meeting, to review operations with Board Member Jones. Devone recalls that Comptroller Shafter advised the Board that there was money in the budget for Dearden's position, even with the cuts required by the Board of School Estimate. Devone also stated that she understood that the Board of Education was not obligated to go along with line item recommendations made by the Board of School Estimate, so long as the Board met the bottom line of reductions required. She stated that she was not in any way influenced by Mayor Holland's somewhat unflattering reference to Dearden. She was, however, influenced by what she described as the difficult and tough budget decision to be made in the Spring of 1989, because of the cuts directed by the Board of School Estimates and the resulting concern as to possible impairment of the educational programs.

Board Member Donald D. Jones, Vice-President of the Trenton Board of Education, testified that he had participated in the budget process for the last four years and noted that the Board of Education normally left questions of supplies and positions to be cut from the budget to the discretion of the Superintendent. He also noted that the Board of School Estimates had attempted in the past to eliminate Dearden's position, and that Board Member Laurenti had also voted previously to eliminate petitioner's spot. Jones had no recollection of Mayor Holland's comments, but they are adequately recalled by other witnesses and not disputed in this proceeding. Jones recalled that Superintendent Copeland wanted to keep petitioner in the budget, as well as the Assistant Buildings and Grounds position. Prior to the Spring 1989, Jones noted that the Board of Education had never rejected or even questioned the Superintendent as to specific positions: so long as the Superintendent found the money in the budget, the petitioner could remain. Jones also recalled that Shafter had advised the Board that he had found funds to pay for Dearden's position, without adversely affecting educational programs. The Board, according to Jones, felt that petitioner's position was not needed and that the money should go for other purposes. On cross-examination, Jones recalled that Copeland stated that he needed the Buildings and Grounds position more than Dearden's position, if he had to choose between the two. In an agreement later reached between the Board of Education and the Department of Education, and City Council, some funds were restored

from the Board of Estimates cuts, but the agreement did not include any funding for petitioner's job, which Jones favored. He was particularly concerned that the loss of Dearden's position would cause the Board to fail to comply with federal requirements as to tagging an inventory of equipment and supplies.

Petitioner Harry Dearden testified that he had been employed by the Trenton Board of Education since 1979, previously as an Assistant to the Assistant Secretary for Purchasing of Supplies (Douglas Palmer), and later, under a title change of October 1985, as Assistant Purchasing Agent/Stock and Inventory Control (P-2). Under this title, his job responsibilities expanded to encompass inventory of the whole educational system as far as identification and tagging of equipment, and also as to administrative duties in the Board's warehouse (P-2). He performed other duties, as assigned by Douglas Palmer, including review of bids for supplies, as well as rough supply reports to the Board of Education. After bids were let and supplies sent, Dearden's function was to check for receipt of proper items, as well as to set up a system for receipt and inventory. To facilitate this, Dearden reorganized the system of numbering stock and inventory, and performed other tasks as assigned by Palmer, including processing of requisitions, delivering supplies to schools or bringing items back to the warehouse.

Dearden recalled that in the years prior to 1988, the Mayor had proposed elimination of his position every year, but the issue "would pass," when the Board of Education elected to retain him. This occurred in eight out of the ten years of his service with the Board of Education. He states that he first learned in early April 1989, that his position was "in trouble," when Superintendent Copeland advised him that the School Board, through Board Member Laurenti, was pushing to eliminate the position, at the behest of the Mayor and Board of School Estimate. At the Schoolboard's meeting of May 30, 1989, which was also the day Dearden reached fifty-eight (58) years of age, there was a vote to abolish his position. He stated that those Board members favoring his termination did not ask him any questions concerning his duties. He also claimed that no other administrative positions were eliminated for the 1988-89 budget, although sever eventually were. An earlier attempt to remove him some seven years ago ended with a settlement following a lawsuit, through which he held on to his job. At the May 30, 1989 School Board meeting, Dearden claims that he heard Board Member Jones implore the Board that "we shouldn't do the dirty work of the politicians." Dearden also had discussed

the funding with Comptroller Shafter before the May 30, 1989 meeting, and had been advised that enough money had been found to pay his salary. Despite this, the Board's reason given to Dearden for elimination of his job was one of budgetary constraints.

There is no dispute that the vote was four to two in favor of elimination of Dearden's position, with three members absent. Voting for abolishment were President Hicks, Members Joyner, Laurenti and Rodriguez, the last of whom was a recent appointment of the late Mayor. Dearden maintains that several of the missing Board members had previously discussed needs in the supply department, but were not present at the meeting. Dearden states that he went on sick leave as of May 10, 1989, for high blood pressure and has seen a psychologist for the past year. Dearden was under the impression that Mayor Holland did not specifically name him in his reference to "political hacks" in the Board of Estimate meeting, but that the context of the reference was clear and direct to all concerned. He claims that he conversed with Superintendent Copeland who advised the Mayor that the position was necessary and that Dearden would probably sue, to which the Mayor allegedly replied, "that's good, I welcome a suit - people ought to know what's going on."

The lead-off witness for the School Board was Member Juanita Joyner, who had been appointed by the late Mayor and served since 1985. From 1985 to 1987 Joyner was a member of the Board of Estimate and from 1987 to 1989, she served as president of the school board. She stated that Mayor Holland had briefed her on her role as a school board member as a matter of law and in the "land of Trenton." The Mayor suggested that board members not be involved in the political life of the City, but expressed no intention of guiding their actions or votes. She stated that the Mayor had never spoken up as to any specific personnel position. She recalled the school board's discussion of Copeland's budget proposal at its May 5, 1989 meeting (A-2), and stated that she disagreed with Copeland's recommendation not to cut Dearden's position, and felt that the money should not be taken from academic programs necessary for a thorough and efficient education, including home instruction, curriculum development, summer work study, and the like. Initially, Joyner agreed to retain Dearden's position, but later changed her mind, out of concern that funds might be diverted from educational programs. Joyner recalled that Comptroller Shafter stated that there was an extra $50,000 in the budget, but she didn't inquire into this because Copeland did not specifically recommend that Dearden's position be funded with these found funds. She had no objection to retaining the petitioner's job, so long as it was funded without cutting into programs necessary for a thorough and

efficient education. She noted that some forth (40) teaching positions were later dropped in the 1989-90 school year because of economic factors, including decreasing enrollment and utilization of the schools, as well as budgetary limits imposed. She states that, in addition to the 1.1 million dollar cut imposed by the Board of Estimate, the City Council slashed an additional $900,000, and advised the Board of Education that it would have to subsist on a "bare bones budget." The School Board later appealed City Coucil cuts, and much of that funding was restored, but not as to the petitioner's position. Joyner also denies hearing Mayor Holland call Harry Dearden a "political hack," and said also that she was only influenced in her vote by the recommendations of Superintendent Copeland as to available funds and programs.

The budget submitted to the Board of Education on May 5, 1989 (R-2), didn't make any cuts in the buildings and grounds area, but the final version of the budget adopted by the Board of Education at its May 30, 1989 meeting omitted funding for petitioner's job (R-3). Joyner felt that the Board was financially "strapped," and she objected to any further cuts, beyond petitioner's job. She concedes that she never spoke directly to Harry Dearden about his job responsibilities, and felt that it was not proper for a Board of Education Member to inquire as to exactly what the petitioner did, so long as the Superintendent and Comptroller had considered those issues and made a recommendation. Thus, although she initially voted to retain petitioner's position, she later supported the budget proposal abolishing his job. In doing so, she felt that Dearden personally was not the focus, and cites termination of untenured teachers, required by budget considerations. She did not ask if other positions such as the Executive Director of the OSR program, could be cut to fund the petitioner's.

Board President Sidney Hicks, also appointed by the late Mayor, testified that he had been elected president at the Board's reorganization meeting on May 16, 1989. Like Joyner, Hicks did not oppose retention of Dearden's position, so long as funding could be found without cutting into educational programs. Hicks denied that his opinion was swayed, in any way, by Mayor Holland. He also recalls, that, at the Board's meeting on May 30, 1989, Member Jones asked Comptroller Shafter about the availability of funds, and was advised that insurance savings were available to fund Dearden's salary. Hicks defends the Board of Education's action in abolishing the position of Assistant Purchasing Agent as a responsible one, and as within the Board's authority. He also stated that Board of Education members do not, as a matter of general policy, become involved in personnel matters. Hicks was, however, concerned with Dearden's claim of veteran's

tenure right, raised later at a public meeting by his attorney. His concerns were diminished, he testified, when the counsel for the Board of Education advised that the proposed action of abolishment did not violate any such rights.

On cross-examination, President Hicks stated that Superintendent Copeland had initially recommended that petitioner be retained, but later changed his mind when he elected to have the level of buildings and grounds at two positions and limit the purchasing department to two, also. He also conceded that no other administrative positions were eliminated as a result of negotiations following the Board of Education's appeal of the City Council's action in further reducing the school board budget. Hicks position on Dearden's position was that he had no objection to retaining the job, so long as appropriate funding could be found. He could not recall how the buildings and grounds position became part of the negotiations before the Board, but recalls references to the "Kittrel Report," as to the need for the position. He defended the decision to terminate Dearden's position as well-thought out and based on the Kittrel Report's proposed reorganization of the supply department, and denied that the decision was, in any way, political. He also conceded that the Kittrel Report was not authorized, in particular, to review the supply and purchasing department. As Board President, Hicks felt that his responsibility was to either accept or reject proposals put forward by the Superintendent, and, for that reason, he ultimately decided to follow, without any inquiry, Copeland's recommendation that Dearden's positon, alone, be eliminated. Although Hicks was selected by the Board Members shortly before the meeting of May 30, 1989, he denies that there was any connection between this selection and his position as to the petitioner, which was never discussed prior to the meeting.

The Board of Education presented the testimony of Board Member Pedro Medina, who was present during the Board of Education's May 5, 1989 meeting, but departed from the Board, on May 19 of that year. He was familiar with Dearden's position and recalls Copeland's recommendation, but did not vote to retain the petitioner, because he felt that it would require cutting instructional programs to fund administrative

positions. He was not reappointed by the late Mayor because of his position as a City Police Officer, which Holland saw as a conflict of interest. In his six years on the Board, Medina recalled Board members "interfering" in certain personnel matters, by directing the Superintendent to take certain staffing actions. He was not aware of the late Mayor's statement that the petitioner was a "political hack," made in the context of a Board of Estimate meeting, but recalled that Board Member Laurenti took a position supporting the abolishment of petitioner's job. Medina denies that the late Mayor, at any point, discussed Dearden's position with members.

On rebuttal, petitioner called Comptroller Shafter, who reiterated that he had made a presentation to the Board of Education on May 30, 1990, that funds were available for Dearden's postiion, because of a surplus of insurance money based on a reduction of premiums. Also on rebuttal, Board Member David Jones recalled that Comptroller Shafter stated to the Board of Education at its May 30, 1989 meeting that adequate funds from an insurance surplus were available to pay Dearden's salary.

After the close of the hearing on January 30, 1990, petitioner moved to supplement the record by including parts of a deposition given by Board Member Bernadette Devone, in which she indicated that Mayor Holland brought up Dearden's name during the Board of Estimate meeting and that, when Ms. Devone said that she thought the position was needed, she stated that Mayor Holland got "a little upset" about it and did not understand why she was changing her mind. The record was also supplemented with certain portions of a deposition given by Dr. Copeland on or about March 6, 1990, in a related matter pending in Federal Court, in which he testified that, during his tenure at Superintendent, no administrator had been terminated from the employ of the respondent school district as a result of a reduction in force, except for petitioner Harry Dearden. In every other instance, administrators were reassigned to other positions, but not terminated.

The Board of Education was also permitted to supplement the record by adding minutes of Board meetings establishing that a total of seventy-one (71) other employees were terminated due to budgetary constraints at the April 25, 1988 meeting of the Board (44 instructional positions and 25 classified position abolished) and at the May 30, meeting (2 classified abolished). The basis for these reductions was a decline in pupil enrollment, a significant reduction of funds, and the Board's previous approval to reduce positions from

the 1989-90 budget. These positions range from principals down to classroom teachers, as well as nurses and investigators.

At the last day of hearing on January 30, 1990, Counsel for the Intervenor, Albert Misiakowski, introduced evidence of his military service in the United States Naval Reserve between October 16, 1958 and October 12, 1962, as well as other documentation certifying as to his military service, such as tax bills and pension information. (See, I:1,2,4) There is no dispute of fact on this point.

On the basis of the evidence submitted, I make the following findings of fact:

(1) that Dearden served in the armed forces of the United States and was honorably discharged in 1954;

(2) that Dearden's function as Assistant Purchasing Agent/Stock Inventory Control involved duties of tagging and keeping inventory of supplies and equipment and that Superintendent Copeland included funding for this position in his initial budget submitted to the Board of Education in the 1989-90 school year and that the Board of Education initially voted to include Dearden's position;

(3) that Arthur Holland, the late Mayor of Trenton did, in the context of a meeting of the Board of School Estimate held to discuss the proposed increase in the budget submitted by the Board of Education, refer to Harry Dearden as a "political hack," and questioned whether there was any real need for his position to be retained:

(4) that Dearden's positon had been questioned in a similar manner for similar reasons for at least seven of the years of his term of employment;

(5) that the comments by the late Mayor of Trenton regarding petitioner were communicated to School Board Members present at the Board of Estimate's meeting, including Ms. Laurenti and President Hicks;

(6) that funds were available through savings on insurance premiums, to fund Dearden's position, although these funds might also have been utilized for other purposes, including salaries for teachers or educational programs;

(7) that the availability of such funds was communicated to the Board of Education by Comptroller Shafter, but that the proposal to use these funds to fund petitioner's job was not specifically presented by the Superintendent or rejected by the Board of Education;

(8) that other administrative and teaching staff positions were ultimately eliminated from the budget by the Board of Education for fiscal reasons (R-6), but no other positions were specifically denied funding by the Board of Estimate except for the Assistant Manager for Buildings and Grounds. (R-2);

(9) that four members of the Board of Education, on Superintendent Copeland's recommendation, voted (with three members absent and two opposed) to abolish Dearden's position, effective August 21, 1989 (P-3 at 12);

(10) that the four members of the Board of Education voting to abolish Dearden's position did not expressly consider his status as a veteran in reaching their determination to abolish his position;

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner argues, in closing, that the claimed budgetary justification for his termination was "pretextural" and thus only a guise for a purely "political hit." Dearden noted that there was no mention, initially, of abolishing his position in the first or second budget submitted by Superintendent Copeland to the Board of Education and that these budgets were approved, with the assistance of Comptroller Shafter. It was not until the Board of School Estimate, consisting of the Mayor, Council members, Board members (including Yuki Laurenti and Bernadette Devone) went through the budget, page by page, at a meeting attended by Comptroller Shafter and Superintendent Copeland, who both supported Dearden's position, that the wind changed against Dearden, following the late Mayor's remark that he was "nothing but a political hack," occupying a position that was not needed. Dearden notes that the Board of Education was under no obligation to accept the Board of Estimate's recommendation as to particular cuts, and thus was unduly influenced by the Mayor's prejudical remarks, which were ultimately heeded by the Board of Education, with Yuki Laurenti the most vocal of the Mayor's supporters. Dearden argues that the Mayor's comments caused the Board of Education to unduly and improperly focus on him, for reasons of political animus, as the only administrative

position singled out to be abolished. He argues that the money was in the budget, as demonstrated by Comptroller Shafter's analysis, and that the Board of Education was aware of this, but chose to abolish petitioner's position anyway.

As to his status as a veteran, to which the parties stipulate, Dearden agures that he acquired tenure under N.J.S.A. 38:16-1 and 18A:17-1 et seq., and thus could only be discharged for good cause after a hearing, following charges and other procedural safeguards. Dearden argues that the abolishment of his position was based solely on political animus and a "whirlwind" of ill will eminating from the late Mayor, which constituted improper political interference with a personnel decision reserved solely to the Board of Education. He also argues that the Board of Education exceeded its authority, by disregarding the recommendation of the Superintendent and Comptroller to retain him; Dearden agrues that the Board of Education had no right to abolish his position for the purposes of terminating his services. The heart of Dearden's case is that the Board of Education's action to eliminate his position was directly and improperly related to the Mayor's statement that he was a "political hack," which led the Board to disregard the recommendation of its Superintendent and Comptroller and abolish the position, which it had initially agreed to fund. He submits that he was singled out for improper reasons of political animus.

The Board of Education summed up the case as one of a difficult fiscal decision, in which budget requirements limited available alternatives so that a sacrifice had to be made to preserve educational programs. The Board of Education cites the Commissioner's decision in the case of Lippincott vs. Watchung, 80 SLD 857, for the proposition that, where a Board abolishes a position, the employee terminated has the burden of showing that the Board did not act in good faith. The Board of Education maintained that none of its members were influenced by the late Mayor's casual statement, and points to a lack of any evidence that Mayor Holland tried, beyond this off-hand comment, to influence Board members to abolish Dearden's position. The mere fact that a statement calling Dearden a "political hack" was made, is not, in the Board of Education's view, sufficient to show such improper political influence. The Schoolboard also notes that the decision to abolish Dearden's position was made by the Superintendent, who recommended this course of action to the Board, after being asked to make reductions. Copeland thus chose to reduce the staff of the Purchasing Department in order to increase the Buildings and Grounds staff, where he saw the need for more personnel. The Board of Education maintains that it acted in good faith in the interest of

economy and thus was within its rights to abolish Dearden's position, notwithstanding his status as a veteran. Since the Board of Estimate had limited the funds available to the School Board, respondent claims that it carefully and reasonably chose to eliminate what it saw as a nonessential administrative position, rather than cut programs directly touching on education.

By way of written statement supplementing his closing, Dearden distinguished the Lippincott case as not applying to the Veterans' Tenure Law, or to the issue of whether the Board of Education has the authority to abolish a position for the purposes of terminating a tenured employee's services. Petitioner emphasizes the Superintendent's authority to make personnel recommendations, which is vested not only by statute and administrative regulation, but also by way the State Corrective Action Plan in effect in Trenton since 1981, which was partly prompted by prior meddling by the Board of Education into the district's personnel practices. Petitioner also cites the recent Commissioner's decision in In the Matter of Arthur Page, et al. vs. City of Trenton, OAL DKT. NO. EDU 626-85 and EDU 418-86, where the Commissioner admonished the Trenton Board of Education and its members for tactics smacking of interference and questionable operating procedures. The Commissioner noted in particular,

> ...the total record in this matter raises serious concerns that the Trenton Board of Education may be slipping back into the very same type of inappropriate behaviors and actions which served to trigger the original Order to Show Cause, the oversight of the Monitor-General and the CAP in that district. The record unequivocally gives indication that some Board members and particularly Board President Medina and Mr. Dillio are inappropriately interferring with the administration of the district. [Commissioner's decision at 40.] [Emphasis added]

Dearden sees this case as involving the same sort of unacceptable interference by the Board of Education based soley on the improper motive of political animus. Dearden claims that, out of approximately one hundred and fifteen (115) administrative positions, his was the only one abolished by the Board of Education in May of 1989.. In sum, Dearden sees this as a case of "pure and simple, pervasive political pressure," without any real budgetary justification. (Brief at page 5)

The Board of Education's written response reiterates that Lippincott stands only for the proposition that a petitioner, who seeks to reverse a decision by the Board of Education to abolish his position due to the interest of economy, has the burden of proof

that the decision was illegal or made in bad faith. The Board of Education notes that it did not receive any recommendation from Dr. Copeland to use additional insurance money to fund petitioner's position, and that this recommendation was the responsibility of the Superintendent, alone. In essence, the respondent Board claims that it merely voted to reject the Superintendent's first recommendation and accept his second, abolishing petitioner's job. Since the Superintendent had made this recommendation, the Board of Education properly gave it deference and was in no way influenced by Mayor Holland's "political hack" statement, which was, therefore, completely harmless. The School Board dismisses the references to the Page matter as a "smoke screen," having no connection or probative value in this case and cites the fact that a number positions, in addition to the petitioner's, were abolished in the 1989-90 school year, including teachers, para-professionals, custodians, secretaries and principals. It rejects Dearden's claim that his position was singled out and focused upon in negotiations by the Board of Education over the budget. In sum, the Board of Education maintains that the petitioner has failed to meet his burden to meet his burden of proof that the decision to abolish his position was not in the interest of economy and was thus made in bad faith. for purely political reasons.

As stated, the issues to be resolved (1) whether the Board of Education's action in abolishing Harry Dearden's position was arbitrary, capricious and in violation of his tenure rights under N.J.S.A. 38:16-1 et seq. and N.J.S.A. 18A:17-1 et seq. , and, if so, what penalty or remedy is warranted; (2) whether the vote taken by the respondent Board to abolish petitioner's position was valid, given the fact that only four members out of a nine-member board voted to abolish Dearden's position. My analysis and conclusions as to these issues are as follows taking the second issue first and breaking the tenure violation issue into the components of tenure, violation and remedy.

(1) Was the Board of Education's vote to abolish procedurally invalid?

Harry Dearden contends that the four-to-two vote (with three members absent) was invalid because it did not represent a majority of the full membership of the nine-member board: he cites no authority for this proposition. The statute governing Boards of Education is silent on this subject, although it specifies that a Board of Election must adjourn if a quorum of members is not present, see N.J.S.A. 18A-10-6, 11-1. In the absence of any direction from the Legislature, the common law rule applies whereby a majority of the full membership (in this case 5 members of the 9-member) board

consitutes a quorum and a majority vote of the members constituting a quorum (a minimum of 3 votes to two) is sufficient. See Matawan Regional Teachers' Assocation v. Matawan -Aberdeen Regional School District Board of Education, 223 N.J. Super. 504 (App. Div. 1988). For that reason, I **CONCLUDE** that the vote of the four members of the City of Trenton Board of Education to abolish Dearden's position was lawfully sufficient and not invalid, at least on this procedural ground.

(2) Did Harry Dearden acquire Tenure?

Petitioner advances his claim of tenure as a schoolboard employee under N.J.S.A. 18A:17-1 et seq. and as a Korean war veteran, pursuant to N.J.S.A. 38:16-1 et seq. The Board of Education does not dispute his claim to tenure but maintains that it is irrelevant in the context of a good faith reducation in force for economic reasons.

The statutory section granting tenure to Board of Education secretaries, assistant secretaries, school business administrators, business managers, secretarial and clerical employees provides that:

> b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
>
> 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and....

> shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title. N.J.S.A. 18A-17-2.

The phrase "clerical position" was inserted in the statute to extend protection beyond secretarial employment to other persons holding clerical positions under boards of education. See, Barnes v. Bd. of Ed. of City of Jersey City, 85 N.J. Super. 42 (App. Div. 1964) cert. den'd 43 N.J. 450 (1964). As applied to this case, the generic label of "clerical employee" covers petitioner's position as Assistant Purchasing Agent/Stock Inventory Control, which is clerical in nature, as it relates to the office duties and functions of the City of Trenton Board of Education, and I so **CONCLUDE**. I further **CONCLUDE** that Dearden acquired tenure under N.J.S.A. 18A:17-2(b) by his service for a period of over three consecutive calendar years in the district.

Dearden also claims tenure as a Korean war veteran under N.J.S.A. 38:16-1:

> [n]o person now holding any employment, positon or office of the government of this State, or the government of any county or municipality, including any person employed by a school board or board of education, or who may hereafter be appointed to such employment, office or position, whose term of employment, office or position is not now fixed by law, and receiving a salary from such State, county, municipality, including any person employed by a school board or board of education, who has served as a soldier, sailor, marine or nurse in any war of the United States or in the New Jersey State Militia during the period of the World War, and has been honorably discharged from the service of the United States or from such militia, prior to or during such employment... shall be removed from such employment, postion or office, except for good cause shown after a fair and impartial hearing but such person shall hold his employment, position or office, during good behavior, and shall not be removed for political reasons....N.J.S.A. 38:16-1 (emphasis added).

The Veterarns' Tenure Act is intended to supplement (but not LawsActs such as the Civil Service Act and tenure rights provided under Education Law. See, e.g., Giannone v. Carlin, 20 N.J. 511 (1956). Had Dearden not been protected by the provisions of N.J.S.A. 18A:17-1 et seq., because his position did not fall within the definition of clerical employee, he would have acquired tenure as a war veteran, as did the legal assistant in the case of Fox v. Board of Education of Newark, Essex County, 129 N.J.L. 349 (1943), aff'd 130 N.J.L. 531 (1944) who was a Board of Education employee but not specifically

covered under N.J.S.A. 18A:17-1 et seq., for tenure purposes. Since Dearden acquired tenure as a clerical employee of the Board of Education under N.J.S.A. 18A:17-1 et seq., the Veterans' Tenure Act does not apply because he has a term of employment fixed by law within N.J.S.A. 38:16-1, in that he may be removed only on showing of good cause, I so **CONCLUDE.**

(3) Did the Board of Education violate Dearden's Tenure Rights?

Dearden argues that the Board of Education's action in abolishing his position violated his tenure rights as Assistant Purchasing Agent/Stock Inventory Control both procedurally under N.J.S.A. 18A:17-1 et seq. and because it was not based on neglect, misbehavior or other offense, and was also not based on the good cause of economic necessity. He thus claims bad faith, and arbitrary and capricious action. The respondent Board of Education stands on its claim that its abolishment of Dearden's position was a reasonable exercise of its discretion in the face of lawful action taken by the Board of School Esitmate and City Council to reduce its budget increase and, thus, was a purely economic decision made entirely in good faith. Although the Board of Education does not deny the "political hack" statement attributed to the late Mayor, it contends that that off-hand remark did not improperly influence or taint what was otherwise a legitimate reduction in force based on required budget cuts.

Boards of Education are vested with discretion to exercise broad authority to manage the affairs of schools, and actions taken to reduce staff for reasons of economy are within a board's authority and will not be reversed. even in the face of tenure claims, unless shown to be arbitrary, capricious, manifestly unreasonable, or undertaken for improper motives of bad faith, such as political retribution. See, e.g., Werlock v. Woodbridge Twp. Board of Education, 5 N.J. Super. 140 (App. Div. 1949); Klinger v. Board of Education of Cranberry, 7 N.J.A.R. 111 (1981). Statutes protecting tenure, including the Veterans' Tenure Act, do not prevent abolition of employment or offices in good faith, in the interest of the economy. See, e.g., Moresh v. Board of Education of the City of Bayonne in Hudson County. 52 N.J. Super. 103 (1958); Reck v. Board of Commissioners of North Bergen, 110 N.J.L. 173 (1937). In exercising its discretion to abolish positions for economic good cause, a Board of Education is not legally bound to follow a Superintendent's recommendations, provided the Board is acting reasonably in good faith. See, Stahnten and Washington v. Board of Education, Commissioner's decision, May 15, 1987, affirmed, State Board September 2, 1989.

Did the Board of Education for the City of Trenton abolish Dearden's position in good faith in the interest of economy or was its action fatally tainted by improper and politically motivated meddling in the Board's personnel affairs prompted by the late Mayor of Trenton, as well as the Board of School Estimate? Retention of Dearden's position, which had been challenged on a number of occasions for largely political reasons, was supported by the Assistant Secretary for Purchase and Supplies (and now Mayor) Douglas Palmer, and urged to the Board of Education by both Superintendent Copeland and Comptroller David Shafter, who had concluded that sufficient funds were available for Dearden's position. Without any evident debate (or hesitation), the Board of Education went along with Superintendent Copeland's initial recommendation to keep Dearden's position in the budget as necessary to the supply function. Although the Board of Education did not focus on the issue with any particularity in approving the first budget submitted by Copeland, no question was raised as to the legitimacy of the claim of need for Dearden's position and the facts show that his job was not regarded by Copeland as some political "make work," but was thought by the Superintendent, Board, and other administrative personnel to be needed to maintain an effective supply and requisition system, within the school district.

In fact, it was not until the late Mayor Holland, in the context of a Board of School Estimate meeting, referred to Dearden as a "political hack" and questioned the need for his position, that any question was raised (in the 1988-89 budget season) as to the need or desirability of retaining the position of Assistant Purchasing Agency/Stock Inventory Control position. The need for Dearden's position or, more precisely, for two assistants in the Purchasing Office was questioned by the Kittrels' Consulting report in 1985 but that study was not charged with closely examining the Purchase and Supply function and also was not heeded by the Board of Education, in this regard, between 1985 amd 1988, when Dearden's position was retained despite the Kittrel's report's suggestion that the "... [Purchasing] office could easily function with an administrator and one assistant...." (J-1 at 36). It is further true that the Board of School Estimate, and City Council, directed that the Board of Education reduce its requested budget, although some items were restored after an appeal to the Commissioner of Education. It is also true that the reduction in the Board of Education's proposed budget required some reductions in staff including untenured teachers and administrtive positions. However, these reductions of administrative positions were adopted by the Board of Education in April 1989, prior to consideration of Dearden's job and the reduction directive of the Board of School Estimate and City Council. In any event, there is no question that the Board of

Education was obliged, even after its partially successful appeal to the Commissioner of Education, to reduce its budget increase and it was inevitable that some of the fiscal cuts would fall on staff.

But notwithstanding the unpleasant fiscal facts facing the Board of Education in the Spring of 1989, it is evident that the abolition of Dearden's position was primarily prompted by purely political opposition voiced by the late Mayor through the Board of School Estimate, on which also sat two members of the Board of Education, who later came to oppose Dearden's retention, after initially supporting it. Superintendent Copeland, supported by Comptroller Shafter and Assistant Secretary for Purchasing, Douglas Palmer, initially supported retention of Dearden's position, and the Board of Education initially agreed, without question or dissent. In ultimately eliminating Dearden's position from his final budget proposal to the Board of Education, Copeland evidently took into consideration the political animus expressed by the late Mayor, to the effect that Dearden was an expendable political hack, whom the Board of Education could no longer afford to keep around. Copeland was also aware of similar feelings on the part of at least two board members, and he deleted Dearden to make the budget more palatable to the Board of Education, Board of Estimate, and the late Mayor. The Board of Education did not merely echo the late Mayor's negative sentiments as to Dearden's position, and there is also no evidence that Mayor Arthur Holland in any other way attempted to seal Dearden's fate by influencing Board Members. But the evidence supports the conclusion that but, for the labeling of Dearden in the context of a Board of School Estimate meeting as a "political hack" holding an unnecessary job, Petitioner's position most likely would have remained in the budget and could have been funded, without an adverse impact on educational programs.

There is no evidence that the Board of Education directed (or even directly suggested) to Superintendent Copeland that Dearden's position be eliminated from the budget, as part of overall reductions mandated by the Board of School Estimate and the City Council. The Board of Education maintains that it left this difficult personnel choice to the Superintendent's discretion, and merely approved his suggestion that Dearden's job be deleted, rather than to cut elsewhere in the budget. Thus, the Board of Education argues that its action in abolishing Dearden's position was merely a response to the Superintendent's recommendation, and in no way influenced by the late Mayor's derogatory comments made through the Board of School Estimate. But even though the Board of Education did not direct the Sueprintendent to delete Dearden, the process by

which this decision was reached was, nonetheless, tainted and fatally flawed by the late Mayor's injection of the element of political animus, to which Superintendent Copeland, as well as those Board of Education members sitting on the Board of School Estimate, were exposed. Under these circumstances, I **CONCLUDE** that the action of the Board of Education in adopting Copeland's recommendation to abolish Dearden's position was not a good faith reduction in force for economic reasons, even though the Board of Education was forced to reduce its requested budget increase. It is possible that Superintendent Copeland might have reached the same decision to delete Dearden's position without the Mayor's unequivocal espousal of that action, given that the budget reduction was substantial and that the need for Dearden's job had previously been questioned in the Kittrel's Report. Copeland, however, had concluded that Dearden's position was necessary and it was not until he realized that a budget retaining Deardon would, in all likelihood, not be politically acceptable, that he chose to cut him lose, even though there is evidence that funding was available to retain him. Dearden had been a target for abolishment on a number of prior occasions, however, in the 1988-89 budget season, he became fair game more vulnerable to attack because budget reductions were required by changed circumstances. What hadn't changed, at least in the eyes of the Superintendent, Comptroller, Assistant Secretary for Purchasing, and some Board members, was need for Dearden's position in the Department, and, for that reason, Dearden remained in the budget in the 1988-89 year, until he was singled out by the late Mayor as a "political hack," holding an unnecessary position. Given these facts, Dearden's right to tenure in that position, secured by N.J.S.A. 18A:17-1 et seq., was violated in that the abolition of his position was not a good faith action for reasons of economy and no other good cause was cited for his termination. . Even where staff cuts must be made because of budgetary reductions, the fiscal axe must not be allowed to fall on persons singled out for political reasons alone, as was Harry Dearden in this case.

(4) Remedy

The approriate remedy in this instance is reinstatement of Harry Dearden by the Board of Education of the City of Trenton to his position as Assistant Purchasing Agent/Stock Inventory Control, with back pay mitigated by income received by petitioner during this period. Although I **CONCLUDE** that the Board of Education acted in bad faith on the basis of improper political motives, there is no basis here for the award of

prejudgment or postjudgment interest because the Petitioner did not make any monetary claim which was denied by the Board in bad faith within the meaning of N.J.A.C. 6:24-1.18 nor is the Commissioner of Education authorized to award attorneys fees to prevailing litigants.

DISPOSITION

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that Petitioner Harry Dearden be reinstated by the respondent Board of Education of the City of Trenton to his position as Assistant Purchasing Agent/Stock and Inventory Control with back pay, mitigated by any evidence of earnings or income recieved by Petitioner after the abolishment of his position. It is further **ORDERED** that Petitioner shall submit to the Commissioner of Education, within 30 days of this decision, evidence of any income earned or received by him in the period following his discharge by the respondent Board of Educaton.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

8·16·90
DATE

Richard Lyon
ALJ

8/16/90
DATE

Receipt Acknowledged:
Seymour Ellis
DEPARTMENT OF EDUCATION

AUG 22 1990
DATE

Mailed To Parties:
Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

am

HARRY DEARDEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the respondent Board of Education, and replies thereto by petitioner, were timely filed pursuant to N.J.A.C. 1:1-18.4.

In its exceptions, the Board argues that the ALJ erred in taking an "off-handed and casual remark" and making it his primary basis for concluding that the Board made a political decision when it abolished petitioner's position. This remark, the Board argues, was

> ***a harmless statement made at a public meeting during the tedious and difficult process of reviewing the Respondent's proposed budget of more than one hundred million dollars. Petitioner did not establish a scintilla of evidence, in the form of testimony or documents, that this statement was a barometer of Mayor Holland's desire that Petitioner be dismissed because his position originated from a political favor and it prompted the Respondent to carry out the Mayor's wishes by abolishing his position on May 30, 1989. Petitioner established no explanation for the cause and motivation behind Mayor Hollard's statement. Moreover, none of the five Board members who testified at the hearing stated that the statement or a subsequent conversation with Mayor Holland influenced the Respondent's abolishment decision.
>
> (Exceptions, at p.3)

Further, the Board argues, although the ALJ claims that the need for petitioner's position was not questioned until the mayor made his "hack" remark, the Board of School Estimate's (BOSE's) decision to not fund the position was a unanimous one and there is no evidence that the members of this body were coerced or otherwise improperly influenced by Holland's comment. Therefore, the Board maintains, the ALJ cannot conclude that the BOSE recommendation serving as the basis of the Board's decision and, subsequently, the Board's decision itself, was tainted by political animus.

The Board once again contends that petitioner's position was abolished solely for reasons of economy, as demonstrated by the following sequence of events:

> ***The Board of School Estimate reduced the Respondent's budget in the amount of $1,150,671. Further reductions in the amount of $916,900 were made by the City Council of the City of Trenton.*** On May 5, 1989 Dr. Copeland made two recommendations to address the Board of School Estimate reductions. In his first recommendation, he proposed accepting all the reductions except the positions of Senior Secretary, Assistant Manager of Buildings and Grounds and the Petitioner's position. ***To retain these positions, he made reductions in other areas of the budget which were not reduced by the Board of School Estimate in the amount of $107,208. ***However, Respondent rejected the first recommendation because the proposal would make reductions in educational programs directly affecting students to save personnel positions.*** [Testimony to this effect from Board members as cited in initial decision]*** After conference with his top administrators, Dr. Copeland presented a second recommendation to be approved. ***This recommendation did not include funding for Petitioner's position, but included funding for the Senior Secretary and Assistant Manager of Buildings and Grounds positions. To fund those positions, reductions were made totaling $56,283 in the areas of Secretary Salary, Workshops, Negotiation-Legal fees, Legal Fee, Training, Security Salaries and Buildings and Grounds Salaries. This recommendation was acceptable because***it had little or no impact on educational programs. The rejected first recommendation would have made deductions in the areas of computer supplies ($1,000) musical instrument repairs ($2,000), summer work study ($2,000), staff work study ($5,000), home instructions ($5,000), special education field day ($1,000), equipment ($1,000), student testing ($2,000), student transportation ($9,000 and $4,000), curriculum development ($3,000) and materials ($3,000). Therefore, the options that faced Board Members were either fund Petitioner's position or make reductions in educational programs/services. These options were solely the product of Dr. Copeland and his staff without any interference by the Board Members.*** In face of these options Respondent made a reasonable and educationally sound decision.*** (Id., at pp. 4-5)

The Board thus argues that there is no justification for the ALJ's statement to the effect that Copeland took the Mayor's political animus into account when making his final recommendation to the Board, particularly in view of the fact that 71 other positions were terminated as part of the same budget reduction process.

Further, the Board notes, while it is true that several Board members who initially voted to retain petitioner later voted to abolish his position, the budget they had to work with at that time was over two million dollars less than earlier proposals. Accordingly, the Board "changes its mind" about several funding items it had previously approved, not only about petitioner's position.

The Board also disputes the ALJ's conclusion that Copeland failed to recommend retention of petitioner for political reasons even though insurance refund monies were available to fund his position. There is no reason, the Board argues, why it must have been compelled to use those funds to save petitioner's position when many other uses were possible and teaching staff positions were being cut significantly due to budgetary constraints. The ALJ's conclusion that political animus was the cause of available monies being spent elsewhere is mere speculation, unsupported by evidence and certainly not proven to the degree necessary for petitioner to carry his burden in the present proceeding.

Finally, the Board notes that it displayed its lack of animus toward petitioner when it hired him back on a temporary basis (March 1 - June 30, 1990) to fill a short-term vacancy in the position of Assistant Purchasing Agent/Operations.

In reply,* petitioner contends that the budgetary reasons given by the Board were purely pretextual, since the administration had specifically recommended to the Board that the "found" insurance monies be used to fund petitioner's position. Further, the fact that the Board acted as it did in the face of unanimous recommendations to retain petitioner -- even in reduced versions of the budget -- from the superintendent, comptroller, line supervisor and petitioner's immediate supervisor (Assistant Purchasing Agent Palmer) is evidence of the Board's determination to carry out the will of Mayor Holland to terminate petitioner's employment.

To demonstrate the climate prevailing in such matters, petitioner points to the fact that the district is still subject to

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* Before addressing their substance, petitioner initially urges that the Board's exceptions not be considered by the Commissioner because they refer to testimony without providing a transcript of same as required by In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). The Commissioner rejects this argument, however, because all but one of the Board's supporting citations are taken directly from the initial decision and challenge is not made to the ALJ's findings of fact or inherent credibility assessments but, rather, to the conclusions drawn from them.

a Corrective Action Plan (CAP) imposed by the Department of Education in or about 1979 as a result of, among other things, a demonstrated pattern of interference in personnel matters on the part of Board members; and that several cases have since arisen which tend to demonstrate that such interference continues despite the State's directives (Arthur Page et al. v. Board of Education of the City of Trenton, decided May 18, 1987 aff'd State Board October 1, 1987, and Arthur Page v. Board of Education of the City of Trenton, decided January 9, 1990).

Finally, petitioner notes that the Board's emnity toward him is further evidenced by the fact that the position of Assistant Purchasing Agent for Operations has been available since July 1, 1990 and the Board has avoided honoring his contractual seniority claim to that position by leaving it vacant.

Upon careful review of the record submitted for his consideration, the Commissioner must concur with the ALJ that petitioner's employment was improperly terminated.

Initially, the Commissioner notes that the record in this matter offers no conclusive evidence that the Board's action in voting to abolish petitioner's position was a direct result of Mayor Holland's comments nor that the Board directed the abolition of petitioner's position for the reasons contended by him.

Nonetheless, the Board claims to have relied in its action on the recommendation of Superintendent Copeland as to how to effect budget cuts while minimizing impact on students and programs. By his own testimony, as well as that of others, Copeland did not believe petitioner's position was extraneous and, in fact, made some effort to try to keep it. Rightly or wrongly, however, he came to believe that the Board was implicitly directing him to submit a budget eliminating petitioner, and that it was doing so at the Mayor's behest. Thus, although the Board may not in fact have attempted to improperly influence Copeland's actions, his decision to recommend cutting petitioner's position was unavoidably tainted by his perception of the Board's direction and motivation. The Commissioner can therefore draw no other conclusion from the present record but that petitioner's termination did not constitute a good faith reduction in force within the meaning of N.J.S.A. 18A:17-1 et seq., and that he must therefore be restored to his position with mitigated back pay as directed by the ALJ.

In so holding, however, the Commissioner notes that he in no way means to imply that boards of education cannot or should not attempt to reduce in force unnecessary positions which are believed to have been created as the result of political favoritism or cronyism. Such reductions, though, must be clearly focused on, and based on a demonstrable lack of need for, the affected position and not on an actual or perceived desire to be rid of a politically unpopular incumbent.

Moreover, while the lack of demonstrated interference on the part of the Board obviates the need for extraordinary remedy in this matter (such as direct intervention of the Commissioner as requested by petitioner in his reply exceptions at p. 8), in view of

the district's past history in matters of this type, the Board is explicitly cautioned to hereafter take the utmost care in its words, actions and directives to the superintendent, so that they do not raise even the remotest possibility of being interpreted as politically motivated.

Accordingly, the recommendation of the initial decision reinstating petitioner to his former position is hereby adopted as the final decision in this matter and any dispute over the amount of back pay due petitioner shall be deemed a new cause of action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 7926-89
AGENCY DKT. NO. 298-9/89
OAL DKT. NO. EDU 8043 89
AGENCY DKT. NO. 301-9/89
CONSOLIDATED

ANNIE POLLARD and ALBERT GUSKIND,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondent.

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

Monica Olszewski, Esq., for respondent
(Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: August 7, 1990 Decided: August 14, 1990

This is a transcript of the Administrative Law Judge's Oral Initial Decision rendered pursuant to *N.J.A.C.* 1:1-13.1

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

PROCEDURAL HISTORY

On or about September 20, 1989 and September 21, 1989, respectively, Albert Guskind and Annie Pollard (hereinafter Guskind and Pollard) each filed a petition with the Commissioner of Education challenging the Teaneck Board of Education's (hereinafter Board) withholding of their adjustment and employment increments for the 1989-90 school year. The Board transmitted the matter of Albert Guskind on October 20, 1989 and the matter of Annie R. Pollard on October 17, 1989, for determination as contested cases pursuant to *N.J.S.A.* 52:14F-1 *et seq.* Prehearing conferences were held in these matters on February 6, 1990 and the issues were isolated. Hearing dates were set for August 7 and 8, 1990. Respondent Board filed motions for summary decision and briefs in support thereof on May 25, 1990. Petitioners then filed cross-motions for summary decision with supporting brief and affidavits on June 13, 1990. Respondent filed a brief in opposition to petitioners' cross-motions for summary decision with affidavits in support thereof and in support of respondent's motion for summary decision on July 2, 1990, and petitioners submitted responses on July 16, 1990. Both parties then filed joint stipulations of fact with attached exhibits on August 2, 1990.

ISSUE

At issue in these matters, as indicated at the outset these matters are consolidated, is:

(1) Was respondent's action to withhold petitioners' employment and adjustment increments arbitrary, capricious and/or in violation of *N.J.S.A.* 18A:29-14?

(1)(a Did respondent comply with *N.J.S.A.* 18A:29-14 by withholding petitioners' employment and adjustment increments for having accumulated over 50 uncompensated days of absence?

FACTS

A joint stipulation of facts as indicated was filed by the parties with attached exhibits on August 2, 1990. The facts necessary for a determination on the motions for summary decision are as follows:

I. Facts in regard to Albert Guskind:

1. Petitioner Albert Guskind (Guskind) is a teaching staff member employed by respondent Board since September 1, 1962.

2. Guskind is on Step 14 of the Collective Bargaining Agreement Salary Guide for the 1989-90 academic year. He is in the Master's plus 32 credits lane of the salary guide for the 1989-90 academic year. Guskind was also on Step 14 of the salary guide for the 1988 89 academic year.

3. During the 1988-89 academic year, Guskind was absent from school 95 days. These absences occurred on October 18, 1988, January 20, 1989, and January 26, 1989 through June 26, 1989.

4. The Board does not challenge Guskind's representation that the aforementioned absences were due to illness.

5. The Board charged petitioner with 41 accumulated sick days and deducted the remaining 54 days from petitioner's salary.

6. For the period February 1, 1989 to June 26, 1989, Chris Sucorowski, a properly endorsed teacher, was the substitute teacher for Guskind's classes (except for March 27, 1989, March 29, 1989, and March 30, 1989, when Thelma Hopper substituted).

7. Guskind completed all required lesson plans and substitute plan assignments (approximately three days) for the 1988-89 school year. Guskind communicated with his supervisors and with the

certified substitute teacher who replaced him for the period between January 26, 1989 through June 26, 1989 in order to insure that continuity of instruction objectives were not adversely affected.

8. Guskind's 1988-89 year-end teacher evaluation stated that Guskind had been "absent for a good portion of the second half of the year" and referred to his performance during the 1988-89 school year as being "satisfactory." Guskind's teacher evaluation recommended that he receive his employment and adjustment increments for the 1989-90 school year.

9. With the exception of the reference in Guskind's year end evaluation dated May 15, 1989, the Board through its administrators and supervisors, as its agents and representatives, did not make any written references to the impact or effects of Guskind's absences during the 1988-89 school year.

10. The assistant Superintendent of Schools had recommended to the Superintendent of Schools that the petitioner's increments be withheld based on his record absences with its inherent negative impact on the continuity of instruction and GCBD-R. The Superintendent of Schools passed the recommendation on to the Board.

11. During Guskind's absence and at the time it voted to withhold petitioner's increment, the Board, its agents, and representatives were aware that Guskind's absences were due to heart-related surgery. The Board's vote to deny Guskind's employment and adjustment increments was based on its serious concern regarding the effect that excessive absenteeism has on the quality of education and negative impact on students. The Board considered the number of Guskind's absences during the 1988-89 academic year and applying the prescriptions of GCBD-R to withhold Guskind's employment and adjustment increments

12. On or about June 29, 1989, Guskind was notified on behalf of the Board, in writing, that the Board had voted at its June 28, 1989 meeting to withhold his "increment/adjustment" for the 1989-90 academic year. The reason for the withholding was stated as "in accordance with Board Policy No. GCBD-R, absent over 50 uncompensated days during 1988-89 school year."

13. GCDB-R was approved by the Board on April 8, 1987. It is the successor to Board Policy No. 334, effective August 4, 1983, and differs from Board Policy No. 334 in no material aspect. At all relevant times Guskind was aware of Board Policy No. 334 and GCBD-R.

14. The Board has without exception withheld employment and adjustment increments of teaching staff members based on the application of Board Policy No. 334 and GCBD-R.

The facts in regard to Albert Guskind as stated are incorporated in a joint stipulation of facts, marked J-1 in evidence, with attached Exhibits A through G

II. Facts in regard to Annie R. Pollard:

1. Petitioner Annie R. Pollard (Pollard) is a teaching staff member employed by respondent, Board of Education of the Township of Teaneck, since September 1, 1981.

2. Pollard is on Step 12 of the Board's Collective Bargaining Agreement and Salary Guide for the 1989-90 academic year. She is in the Master's plus 32 credits lane of the salary guide for the 1989-90 academic year. Pollard was also on Step 12 of the salary guide for the 1988-89 academic year.

3. During the 1988-89 academic year, Pollard was absent from school 83 days. These absences occurred on November 21, 1988, November 22, 1988, November 23, 1988, November 28, 1988, February 14, 1989, and February 27, 1989 through June 26, 1989.

4. The Board does not challenge Pollard's representation that the aforementioned absences were due to illness.

5. The Board charged petitioner with ten accumulated sick days and deducted the remaining 73 days from petitioner's salary.

6. It was necessary for the Board to employ a series of different substitute teachers for Pollard's classes.

7. Pollard completed all required lesson plans and substitute plan assignments (approximately three days) for the 1988-89 school year. She communicated with designated Board supervisors and administrators, including her assigned supervisor, Jon Netts, in an effort to insure that continuity of instruction was not adversely affected.

8. Pollard's 1988-89 teacher evaluation stated that "it has not been possible to visit Mrs. Pollard again because of extensive absences" and it is hoped "that her attendance situation will improve for the next school year." He also stated that Pollard "had originally signed up to work in the teaching strategies T.E.S.S. Program, but had to be released from that responsibility because of her absences." The evaluation referred to her performance during the 1988-89 school year as being "satisfactory" and recommended that she receive her employment and adjustment increments for the 1989-90 school year.

9. With the exception of the reference in Pollard's year-end evaluation dated May 15, 1989, the Board through its administrators and supervisors, as its agents and representatives, did not make any written references to the impact or effects of Pollard's absences during the 1988-89 school year

10. The assistant Superintendent of Schools had recommended to the Superintendent of Schools that the petitioner's increments be

withheld based on her record of absences with its inherent negative impact on the continuity of instruction and GCBD-R. The Superintendent of Schools passed the recommendation on to the Board.

11. During Pollard's absence and at the time it voted to withhold petitioner's increment, the Board, its agents, and representatives were aware that Pollard's absences were due to emotional and medical concerns. The Board's vote to deny Pollard's employment and adjustment increments was based on its serious concern regarding the effect that excessive absenteeism has on the quality of education and negative impact on students. The Board considered the number of Pollard's absences during the 1988-89 academic year in applying the prescriptions of GCBD-R to withhold Pollard's employment and adjustment increments.

12. On or about June 29, 1989, Pollard was notified on behalf of the Board in writing that the Board had voted at its June 28, 1989 meeting to withhold her "increment/adjustment" for the 1989-90 academic year. The reason for the withholding was stated as "in accordance the Board Policy No.GCBD-R, absent over 50 uncompensated days during 1988-89 school year."

13. GCBD-R was approved by the Board on April 8, 1987. It is a successor to Board Policy No. 334, effective August 4, 1983, and differs from Board Policy No. 334 in no material aspect. At all relevant times, Annie Pollard was aware of Board Policy No. 334 and GCBD-R.

14. The Teaneck Board of Education has without exception withheld the employment and adjustment increments of teaching staff members based on the application of Board Policy No. 334 and GCBD-R.

A stipulation of facts in regard to Annie R. Pollard has been marked into evidence as J-2 in evidence, with attached Exhibits A through G.

DISCUSSION

This proceeding involves the application of Board Policy GCBD-R, paragraphs 1 and 2, as applied to teaching staff members employed by the Board. Policy GCBD-R states as follows:

> **Withholding Increments/Adjustments**
>
> 1. The Board will withhold the employment increment and the adjustment increment of all teaching staff members who will be on uncompensated leave for fifty or more school days in any school year for ten month employees, and sixty or more days in any school year for twelve-month employees. Such uncompensated leave will include but not be limited to child rearing leave, medical leave, home duties leave and educational leave.
>
> 2. The Board will withhold the employment increment and the adjustment increment for all teaching staff members who are absent for 20 or more school days in three consecutive years. Such absenteeism may take the form of either compensated leave or uncompensated leave or both. The increment and adjustment will be withheld in the fourth year following any three consecutive years of absenteeism as stated herein.

In the present case, petitioners Pollard and Guskind were absent more than fifty days over and above accumulated statutorily entitled sick leave, thus invoking Board Policy GCBD-R. Petitioners assert that the Board's actions concerning withholding of their salary increments were arbitrary, capricious and in contravention of education law. Respondent asserts that its actions with respect to petitioners were not unfair and that Board Policy GCBD-R has been expressly affirmed by the State Board of Education.

It is well settled that the withholding of an adjustment and/or an employment increment is generally an exercise of managerial prerogative authorized by *N.J.S.A.* 18A:29-14, which provides that a Board of Education may withhold for inefficiency, or other good cause, the employment and/or adjustment increments of any teaching staff member in any year. The standard for reviewing a Board's action taken pursuant to this provision was set forth in *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 228 (App. Div. 1960), in which the Commissioner outlined the precise scope of the inquiry as follows:

1. Whether the underlying facts were as those who made the evaluations claimed; and

2. Whether it was unreasonable for them to conclude as they did based on those facts. *Id.*

Thus, it appears that exercise of a Board's discretionary powers may not be rejected absent a finding that the Board's action was patently arbitrary, without rational basis or induced by improper motives. *Id.* Generally, however, if a rational basis exists, school boards are given great latitude regarding increment withholding from teachers.

It has been determined that "a teacher's excessive absences may constitute good cause for a local Board's withholding of a salary increment." *Trautwein v. Board of Education, Borough of Bound Brook*, 1980 *S.L.D.* 1539 at 1542 (April 8, 1980), certif. den. 84 *N.J.* 469 (1980). High absenteeism has been deemed sufficient grounds for disciplinary action even with the existence of legitimate medical excuse. *Montville Township Education Association v. Board of Education of the Township of Montville*, OAL DKT. NO. EDU 8247-83 (Feb. 29, 1984), rej. Comm'r of Ed. (April 16, 1984), rev'd State Bd. of Ed. (Nov. 7, 1984), rev'd N.J. App. Div. (Dec. 6, 1985); *Trautwein v. Board of Education of Bound Brook*, 1979 *S.L.D.* 876; *Angelucci v. West Orange Board of Education*, 1980 *S.L.D.* 1066, aff'd Comm'r of Ed. (Sept. 15, 1980), aff'd State Board of Education (Feb. 4, 1981). The teacher bears the burden of proof to show that performance is unaffected by continued absences notwithstanding the legitimacy of excuse. *Vonita Smith v. Board of Education of the City of Trenton*, OAL DKT. NO. EDU 5255-88 (Mar. 6, 1989), aff'd Comm'r of Ed (April 18, 1989).

It is within the spirit of these decisions that the Teaneck Board acted. More to the point, the State Board has upheld Teaneck policy GCBD-R in two separate school law decisions. In *Bialek and Meehan v. Board of Education of the Township of Teaneck*, OAL DKT. NOS. EDU 7908-84 and EDU 8107-84 (May 30, 1985), aff'd Comm'r of Ed. (July 19, 1985), aff'd State Bd. of Ed. (Dec. 6, 1985), the State Board of Education affirmed the decision of the Commissioner of Education that Policy No. 334 (now essentially Board Policy GCBD-R)[1], paragraph 1 of the Teaneck Board of

[1] Board Policy No. 334 was the predecessor of the current Teaneck Board of Education Policy GCBD-R. The current Board Policy GCBD-R differs in no material aspect from its predecessor Policy No. 334. Policy GCBD-R merely substitutes the word "will" for "shall." (See *Bialek*)

Education, is not unreasonable, arbitrary, lacking in demonstrated rational basis or otherwise unlawful. Additionally, in that matter, the State Board affirmed the Commissioner's decision that petitioners had not borne the burden of proof that increment holdings were arbitrary, capricious, unreasonable or unlawful. *Id.*

The decision in *Bialek and Meehan, supra,* has been reaffirmed in *Harvey Fried v. Bd. of Ed. of the Township of Teaneck*, OAL DKT. NO. EDU 6128-86 (Feb. 25, 1987), aff'd Comm'r of Ed. (March 31, 1987), aff'd State Bd. of Ed. (Sept. 4, 1987), where the Administrative Law Judge concluded that the petitioner had not proven that the withholding of his increments pursuant to paragraph 1 of Policy No. 334 was arbitrary, capricious, unreasonable or unlawful, or that the Board policy itself was unreasonable, arbitrary, lacking in demonstrated rational basis or otherwise unlawful. The Administrative Law Judge stated that "paragraph No. 334 represents a rational exercise of the Board's managerial authority . . . Furthermore, the rationale that compelled the passage of the policy is meritorious and conducive to the maintenance of sound educational goals." *Id.* at 8. In *Fried*, the judge granted summary decision to the respondent, Board of Education of the Township of Teaneck.

Although it would simply appear that in the present case the Board policy should be upheld, it behooves this tribunal to examine this conclusion in light of the impact of recent education decisions. In *Kelsey v. Bd. of Education of the City of Trenton*, OAL DKT. NO. EDU 5773-88 (Mar. 27, 1989), aff'd Comm'r of Ed. (May 11 1989), the Board relied on a pattern of absences in withholding petitioner's increments for the 1988-89 school year. The Commissioner of Education in *Kelsey* in ordering the reinstatement of a teaching staff member's increment held as follows regarding the Board of Education's obligations in increment-withholding matters relating to a teacher's absenteeism:

> What a Board of Education is required to show, however, is that there was consideration of (1) the particular circumstances of the absences and not merely the number of absences (*Kuehn, supra*); (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact; and (3) that there be some warning given to the employee that his or her superiors were dissatisfied with the pattern of absences *Transky v. Board of Education of Trenton*, decided April 19, 1989; *Meli supra* In the instant matter, the Board failed in its responsibilities with respect to these elements (Slip Opinion at p. 19)

It is this test which petitioners assert has overruled the holding in *Bialek*. Again, in *Neptune Township Education Association v. Board of Education of the Township of Neptune*, OAL DKT. NO. EDU 4432-88 (May 25, 1989) rev'd Comm'r of Ed. (July 10, 1989), a five-step staff attendance policy was reviewed as to its facial validity. In *Neptune*, the Commissioner of Education again struck down a Board Staff Attendance Policy which lumped together sick days, personal days, in-service days, bereavement days, and disability days pursuant to *N.J.S.A.* 18A:30-2.1 for the purposes of applying a district-wide absenteeism policy. The Commissioner relying loosely on the *Kelsey* test held that:

> A Board of Education is not permitted, however, to take disciplinary action against a staff member unless it has taken into consideration the nature of the illness and has not relied on sheer number of days for its action. *Kuehn v. Board of Education of Teaneck*, 1981 *S.L.D.* 1290, rev'd State Board 1983 *S.L.D.* 1581; *Meli v. Board of Education of Burlington County Vocational Technical School, Burlington County*, decided March 15, 1985, rev'd State Board December 4, 1985, aff'd N.J. Superior Court, Appellate Division March 4, 1987.
>
> More specific to the matter herein, Board of Education attendance policies which rely on sheer number of absences and do not take into consideration the nature of absences will not be upheld by the Commissioner or the Courts. *Montville Township Education Association et al v. Montville Township Board of Education*, 1984 *S.L.D.* 550, rev'd State Board 559, rev'd N.J. Superior Court, Appellate Division December 6, 1985; *Burlington, supra.* (Slip opinion at page 12).

See also *Bass v. Union City Board of Education*, OAL DKT. NO. EDU 8459-88 and EDU 8868-88 (Feb. 26, 1990), aff'd Comm'r of Ed. (April 16,1990).

Although a broad reading of recent case law would seem to suggest that a Board policy which relies upon a specific number of absences for withholding an increment may be invalid, a closer examination of the facts and circumstances in *Kelsey* and *Neptune* seems to demonstrate that *Bialek* may have been subject to the Commissioner's three-part *Kelsey* analysis. Additionally, the holdings in *Kelsey* and *Neptune* were specifically based upon the fact that petitioners in those cases were penalized for using statutorily entitled leave and, thus, those cases may be distinguished from the present case.

In *Kelsey v. Board of Education of the City of Trenton, supra*, the Board relied on a "pattern" of absences in withholding petitioner's increments for the 1988-89 school year. The Board's policy allowed for increment withholding when incidental absences exceeded 5%. In challenging the withholding, the petitioner contended that the absences cited as part of the pattern, for the 1985-1986 school year and 1986-1987 school year, did not exceed those which were available by contract or statute and only the absences during the third year, 1987-1988, were in excess of those allowed by statute. The absences during the 1987-88 school year were pursuant to a discretionary leave previously granted by the Board with no notice that it would or could result in the loss of increments. Petitioner further alleged that this was the first instance in which her supervisor had ever invoked the Board's increment withholding policy. Petitioner also challenged the withholding on the basis that the Board had acted in bad faith and was discriminatory based on petitioner's age and religion.

The Administrative Law Judge ordered that the petitioner's increment be reinstated. The order was explicitly premised on the conclusion that (a) the Board had made an "arbitrary capricious application of a mechanistic (5%) standard;" (b) the excess days taken by petitioner during 1987-88 were pursuant to a leave granted by the Board without notice that disciplinary penalty involving increment loss would follow; and (c) most importantly, "[a]ll other absences were days authorized by statute or contract." *Id.* at 15. [Emphasis added.] Clearly, it seems that the fact that all other absences were statutorily or contractually authorized substantially impacted on the ultimate conclusion that the policy application was improper

The Commissioner, with slight modification, agreed with the Administrative Law Judge's decision recommending increment restoration. The Commissioner stressed that even legitimate absences "which do not exceed statutory or contractual entitlements, may be the basis for increment withholding, notwithstanding the fact that a teacher's performance may be good, or even excellent, when he or she is present in the classroom." *Id.* at 18. A Board of Education is required to show "that there was consideration of:

> (1) the particular circumstances of the absences and not merely the number of absences (*Kuehn, supra*); (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the

> fact; and (3) that there be some warning given to the employee that his or her superiors were dissatisfied with the pattern of absences." *Id.* at 19.

It appears that the test outlined in *Kelsey* substantially mirrors that test previously applied to Board Policy No. 334 by the Commissioner in *Bialek and Meehan v. Board of Education of the Township of Teaneck, supra,* where Board Policy No. 334 was upheld. In *Bialek and Meehan*, the Commissioner stated that:

> "the fact that the standard policy does not take into consideration individual circumstances is not . . . in violation of *Kuehn* . . . because the standard of excessive absenteeism impacting upon the petitioners is (1) reasonable, (2) arrived at and formally adopted after careful deliberation and public hearings and (3) does not impinge upon any statutory leave entitlement." *Id.* at 24.

The Administrative Law Judge stated that:

> "[t]he policy is a reasonable exercise of the Board's discretionary authority. It was arrived at with due deliberation, and it considered the effect on the students, after a certain number of teacher absences deemed by the professional staff to be contrary to beneficial educational purposes. The standard that the policy establishes is not unreasonable or arbitrary." *Id.* at 17

Thus, it appears that, in the *Bialek and Meehan* cases, the Board's regulation has been subjected to analysis virtually parallel to that set forth in *Kelsey* Petitioners Pollard and Guskind were treated fairly. The Board (1) clearly considered the unfortunate circumstances of the absences, (2) withheld the petitioners' increments in light of these facts, coupled with the damaging effects of their absenteeism, and (3) posted more than an adequate warning to the petitioners. Further, while it can be argued that the petitioners' teacher evaluations only vaguely expressed concerns over their absences, and occurred subsequent to the absences, it cannot be contended that petitioners were not aware of Board policy and its immediate and requisite consequences. By virtue of Board policy, petitioners were aware of the Board's dissatisfaction with excessive absenteeism. Thus, the Board's decision was based on a reasonable policy.

Additionally, even if the liberal interpretation of the *Kelsey* analysis upon *Bialek* is ignored, it appears that the present case is factually distinguishable from that presented in *Kelsey*. In *Kelsey,* the 5% policy applied to statutory and accrued

sick time. GCBD-R applies only after all accrued sick time is exhausted and 50 or more days' absence are utilized. There seems to be no rational or credible argument that where a teacher is absent more than one-third of the school year (petitioners were actually absent more than half of the school year), there is not an adverse effect on the continuity of instruction. In *Kelsey*, the petitioner claimed she had no warning that her increments could be withheld due to excessive absences and that she was not notified that increment withholding could result when the Board granted her request for leave. The Commissioner specifically rejected this argument and stated that the Board need not determine if increment withholding will follow when it makes the decision to grant leave. *Id.* In the present case, the sick leave was take after notice of the existing Board policy and was not pursuant to a grant by the Board. The petitioners clearly had warning through Board policy and teacher evaluations that excessive absences were discouraged and could result in the loss of increment. Thus, it appears that *Kelsey* is distinguishable because its invalidity was based on its application to statutorily entitled leave.

The holding in *Neptune* is also distinguishable. In *Neptune Township Education Association v. Board of Education of the Township of Neptune*, *supra*, the challenged policy involved a series of automatic disciplinary measures commencing after 4 days' absence were incurred. It was not until Step IV of the policy (9-12 days' absence) that action was no longer mandatory and the policy permitted individualized judgments by an administrator about the nature of the absences and the possible consequences. The Commissioner found that the policy was too mechanistic in its application at Steps I - III and, therefore, it was not sustained in its present form. Again, the *Neptune Policy* is clearly distinct from GCBD-R, since it was triggered by only 4 days' absence and was applied to all absences including days authorized under a negotiated contract. GCBD-R allows for 50 or more days' absence beyond statutorily accrued sick leave. Significantly, in *Neptune*, the Commissioner noted that he has, in the past, upheld attendance policies dealing with sick leave and excessive absenteeism where the policies were not applied mechanically "to any and all absences of staff, nor . . . applied without regard to the underlying reasons for the specific absences." *Id.* at 13. The Commissioner rejected petitioner's argument that:

> A Board of Education is without authority to adopt an attendance policy which may impact upon the use of . . . days allowed under a negotiated agreement. Absences, even legitimate ones, are not

> immune from disciplinary action being taken by a Board of Education seeking to deter the harmful or deleterious effect of excessive absences on the continuity of instruction being provided to its students." *Id.* at 11-12.

Thus, it would appear that the holding in *Neptune* was geared to the specific situation and again the invalidity of the policy was due to its application to statutorily entitled leave.

CONCLUSION

In the present case, Board policy GCBD-R is valid and the increments of petitioners should be withheld. The withholding of employment increments is squarely an exercise of managerial prerogative authorized by *N.J.S.A.* 18A:29-14, and petitioners have not demonstrated that the Board's conduct was arbitrary, capricious or unreasonable. An annual employment increment to a teacher's salary based on meritorious service to a school district is not a matter of statutory right but is subject to denial for inefficiency or other good cause. *North Plainfield Education Association v. Board of Education of Borough of North Plainfield*, 96 *N.J* 587 (1984). No credible argument has been put forth to substantiate petitioners' contention that a teacher who is absent more than half of the school year does not have an adverse effect on the continuity of instruction. In the present case, it is reasonable to conclude that petitioners simply do not deserve a merit increment

ORDER

For the foregoing reasons, it is hereby **ORDERED** that summary decision is granted for respondent. The action by respondent withholding petitioners' increments is upheld and petitioners' appeals are **DISMISSED**.

END OF TRANSCRIPT

I, Jane R. Pearson, hereby certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Elinor R. Reiner's oral decision rendered in the above matter.

August 14, 1990
Date

Jane R. Pearson
Jane R. Pearson

This oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis does not so act in forty-five 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(c).

I hereby **FILE** this initial decision with **DR. JOHN ELLIS** for consideration.

Date

Receipt Acknowledged.

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 24 1990
Date

OFFICE OF ADMINISTRATIVE LAW

jrp/e

ANNIE POLLARD AND ALBERT GUSKIND, PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions.

Incorporating its Summary Decision Brief by reference, petitioners cite three exceptions to the initial decision, which are summarized, in pertinent part, below.

EXCEPTION ONE

THE TEANECK BOARD OF EDUCATION FAILED TO CONSIDER THE PARTICULAR CIRCUMSTANCES OF THE ABSENCES OF PETITIONERS AND SOLELY CONSIDERED THE MERE NUMBER OF ABSENCES AT ISSUE IN CONTRAVENTION OF A SERIES OF RECENT COMMISSIONER OF EDUCATION DECISION

While petitioners agree with the ALJ's summary of their legal contentions regarding the application of Kelsey v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner May 11, 1989; Neptune Township Education Association v. Board of Education of the Township of Neptune, Monmouth County, decided by the Commissioner July 10, 1989; and Bass v. Union City Board of Education, Hudson County, decided by the Commissioner April 16, 1990, they disagree with the conclusions the ALJ drew from those cases in applying their holdings to the instant facts. Petitioners aver that the Board ignored all the stipulated facts in this case except the one establishing that the Board has, in all instances, withheld employment and adjustment increments based upon the Board's policy requiring increment withholdings whenever an individual had been out more than 50 uncompensated days in an academic year. They contend that the Board did not consider the reasons for the absences at issue, the recommendations of petitioners' supervisors that increments be granted to them both for the 1989-90 school year and the individual efforts of petitioners to insure that continuity of instruction goals were not adversely affected during their absences. Thus, petitioners submit, there was no individualized assessment of the facts and standards referred to as required in the above-stated cases.

Petitioners claim that the Board's position in this matter is indefensible. They posit that the Board appears to take the position that it would only be bound by the standards developed in Kelsey, supra; Bass, supra; and Neptune Township, supra, if a teacher's absences exceeded accumulated leave entitlements. According to petitioners, the Board maintains that individuals will automatically lose their increments if an individual were absent for 50 days in a year only if that individual had previously exhausted contractual leave entitlements. Yet a teacher who has 70 days accumulated leave entitlement will not suffer the loss of his increment, petitioners claim. It is petitioners' position that this "dichotomization" (Exceptions, at p. 3) does not make sense.

EXCEPTION TWO

THE BOARD OF EDUCATION FAILED TO SHOW THERE WAS ANY CONSIDERATION OF THE IMPACT THAT PETITIONERS' ABSENCES HAD ON THE CONTINUITY OF INSTRUCTION DURING THE PERIOD OF TIME THE ABSENCES OCCURRED

Petitioners cite the stipulation of facts to establish that despite their serious physical problems, they completed all required lesson plans and substitute plan assignments for the 1988-89 school year and, moreover, communicated with their supervisors and replacement teachers to insure that continuity of instruction objectives were not adversely affected. Moreover, they point to the supervisors' recommendation that both receive their 1989-90 increments based upon an evaluation of their overall performance during the school year notwithstanding their absences to support their claim of entitlement. Petitioners aver a board cannot simply mention "continuity of instruction" (Exceptions, at p. 3) concerns to justify withholding increments of teaching staff members. In Petitioner Guskind's case, they claim one properly endorsed teacher replaced him for all of his classes except one three-day period. Petitioners submit that "when a properly endorsed teacher immediately takes over a classroom situation and is involved in communications with the teacher who is out on an extended sick leave, the Board of Education bears the burden of persuasion in setting forth evidence that, in reality, continuity of instruction was adversely affected." (Id., at pp. 3-4)

Petitioners argue that there is nothing in the record that in any way establishes that the Board considered the impact that the absences had on the continuity of instruction during the period of time the absences occurred. They aver that the Board "simply presumed that continuity of education would be adversely affected based upon a mechanical application of the Board's increment withholding policy." (Id., at p. 4)

EXCEPTION THREE

THE BOARD OF EDUCATION FAILED TO ESTABLISH THAT THERE WAS ANY WARNING GIVEN TO THE PETITIONERS THAT THEIR SUPERIORS WERE DISSATISFIED WITH THEIR PATTERN OF ABSENCES

Finally, petitioners again rely on the stipulation of facts to establish that with the exception of references to their number of absences in their year-end evaluations, the Board, through its agents, did not make any written references to the impact or effects that their absences had during the 1988-89 school year. Petitioners aver that the supervisors' recommending that increments be awarded for the affected petitioners hardly represents warning as contemplated in the Kelsey, supra, decision.

Petitioners request summary judgment in their favor, and that the initial decision be reversed.

By way of reply exceptions, the Board incorporates its brief in support of the Motion for Summary Decision and its brief in reply to petitioners' Cross-Motion for Summary Decision. It also supports the ALJ's finding and conclusions granting the Board's Motion for Summary Decision.

More specifically, the Board counters petitioners' Exception One by agreeing with the ALJ's having distinguished, Kelsey, supra; Neptune Twp., supra; and Bass, supra, from the instant matter because in all of those cases, the subject withholding and attendance policies applied to statutorily accrued sick leave. The Board stresses that its policy only applies after 50 days of uncompensated leave.

> ***This generous standard allows the Teaneck Board to accommodate the needs of teachers while at the same time protecting the educational process for its students. The fifty day "threshold" is so liberal that it enables the Board to forego an assessment which weighs the needs of a chronic allergy sufferer against those of a teacher who underwent cardiac surgery.***
>
> The Commissioner of Education and the State Board of Education have previously counteranced the Teaneck Board policy.***
>
> (Reply Exceptions, at p. 2)

The Board recites from the Commissioner's decision in Bialek and Meehan v. Board of Education of the Township of Teaneck, Bergen County, decided by the Commissioner July 19, 1985, aff'd State Board of Education December 6, 1985, claiming that the Commissioner and the State Board have already analyzed the Teaneck policy in question in the context of case law which requires consideration of individual circumstances, which was later reinforced in the Commissioner's affirmance of Policy 334 (the precursor to the policy in question) in Harvey Fried v. Board of Education of the Township of Teaneck, Bergen County, decided by the Commissioner February 8, 1986. Therein, the Commissioner stated: "The promulgation of paragraph 1 of Policy No. 334 and its application to this case fully comport with standards that were not satisfied in Kuehn or Montville." (Reply Exceptions, at pp. 2-3, quoting Fried, at p. 6)

The Board claims that since the decision in Fried, "***the policy [in the district] has remained unchanged substantially. [They submit that] petitioners attempt to impugn the policy, via hypotheticals which subject the policy to analyses based on selective numerical gymnastics, should be rejected" for the reasons expressed in the initial decision. (Id., at p. 3)

In reply to EXCEPTION II, the Board claims that its steady application of the policy in question reflects the Board's continued attention to the negative effects of absenteeism on the student population. It advances the position that it has consistently adhered to the approach of the Commissioner that a teacher who is not present cannot per se contribute to the educational process, and that in such instances, the reward of an increment is inappropriate.

The Board counters petitioners' claim that they were diligent in preparing lesson plans by stating:

> In the instant matter, it is undisputed that the Board was aware of the circumstances of the petitioners' medical leaves. However, particular medical diagnosis did not, of course, lessen the impact of the absences on the continuity of instruction. Since petitioners had prepared lesson plans for only three days, all other lesson plans for the remaining 80+ days of absence were prepared by other staff members or substitutes. In fact, five different substitutes were employed to cover Pollard's classes and two substitutes were needed to cover Guskind's classes. Clearly, the instructional process was significantly impaired as a result of petitioners' attendance records.
>
> (Reply Exceptions, at p. 3)

Moreover, the Board claims that both teachers' year-end evaluations referred to their excessive absenteeism. The Board submits that such references indicate dissatisfaction with the incidence level of absences regardless of the supervisors' diplomacy in the statement recommending both teachers receive increments. The Board avers it can be fairly assumed that petitioners' supervisors, while sympathetic to legitimate illness, were imparting their concern about the negative impact of petitioners' absences on the educational process.

Finally, in regard to EXCEPTION II, the Board rebuts argument concerning the burden of proof in this matter. The Board contends it is well-established that petitioners bear the burden of proof to show that continuity of instruction is unaffected by excessive absences, citing Vonita Smith v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner April 18, 1989 and Darius Transky v. Board of Education of the City of Trenton, Mercer County, decided by the Commissioner April 19, 1989, aff'd State Board September 6, 1989. The Board claims that petitioners' novel argument that the Board bears the burden of

persuasion that continuity of instruction was adversely affected is without basis in law. It counters by relying on the stipulation of facts to suggest that the disruption occurred by noting that seven different substitutes were required to fill the two positions, albeit that the substitutes were properly endorsed. The Board supports the ALJ's conclusion that a teacher who is absent more than one half of the school year can make no credible argument that the continuity of instruction has not been impaired. Thus, the Board claims, petitioners have not met their burden of proof and, accordingly, the increment withholdings were appropriate.

Regarding EXCEPTION II, the Board claims that petitioners' argument that they were without warning that their excessive absences were considered unsatisfactory is so patently specious that it is offensive. The Board suggests it is undisputed that petitioners were aware of Policy 334 and GCBD-R. It further argues that the terms of the Board's policy were unambiguous, and that petitioners' attendance records subjected them to application of GCBD-R. Moreover, the Board suggests, petitioners' evaluations explicitly referred to the level of their absenteeism. The Board submits that a duly adopted written policy which addresses, in explicit terms, the consequences of excessive absenteeism is the epitome of adequate notice. Thus, the Board claims, petitioners' claims of surprise belies this tenet.

The Board summarizes its position by stating that petitioners' exceptions fail to set forth any fact which would warrant a conclusion that the Teaneck Board acted in a manner which was arbitrary or capricious. It seeks affirmance of the initial decision.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the action of the Board withholding petitioners' increments for the 1989-90 school year was a reasonable exercise of its authority and that petitioners have failed in their burden to demonstrate arbitrary, capricious or unreasonable action on the Board's part. In so concluding, the Commissioner finds that petitioners' exceptions are substantially a reiteration of the arguments raised before, and fully considered by, the ALJ in her well-reasoned initial decision. The Commissioner is persuaded, as was the ALJ below, that the holding in the cases from this district Bialek and Meehan, supra, and Harvey Fried, supra, are dispositive of this matter.

In so stating, the Commissioner would add that while petitioners would argue that the policy in question is arbitrary because it penalizes only those "hypothetical" teachers who are absent for 50 days or more and who have exhausted contractual leave entitlements, but not those "hypothetical" teachers whose 70 days absence during a particular school year represented accumulated leave entitlements, that issue is not squarely before him because petitioners herein do not contest that their absences were uncompensated days. In the case herein, the Commissioner concurs with the ALJ that the law is well-settled through Bialek, supra, and Fried, supra. No facts exist in this matter to distinguish reliance on these two cases.

Moreover, the Commissioner agrees with the Board's position that the burden of proof in this matter lies with petitioners to show that continuity of instruction is unaffected by excessive absences once the Board has clearly demonstrated its concern for continuity of instruction. See, Darius Transky, supra, and Vonita Smith, supra. Accordingly, the Commissioner rejects petitioners' contention that the Board bears the burden of persuasion that continuity of instruction was adversely affected.

Accordingly, for the reasons expressed in the initial decision, the Commissioner accepts the recommendation of the Office of Administrative Law granting the Board's Motion for Summary Decision and dismisses the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

Pending State Board

JOSEPH J. KARABIN, MEMBER, WOODBRIDGE TOWNSHIP BOARD OF EDUCATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD ATTORNEY AND BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

For Petitioner, Joseph J. Karabin, Pro Se

For Respondent, Palmisano & Goodman (Carl J. Palmisano, Esq., of Counsel)

This matter, which questions whether petitioner, a board member and retired teaching staff member of the district, stands in conflict of interest with the Board pursuant to N.J.S.A. 18A:12-2 were he to vote on the teachers' collective bargaining agreement, was originally opened before the Commissioner as a Petition of Appeal with request for Emergent Relief on July 17, 1990. Following submission of a timely Answer from the Board of Education, the Board submitted a Notice of Motion for Summary Judgment together with supporting Brief on August 13, 1990. Petitioner Karabin submitted his Memorandum of Law on the Motion for Summary Decision on August 13, 1990. Simultaneously, the parties submitted a fully executed Joint Stipulation of Facts.

ISSUES TO BE RESOLVED

The issues to be resolved in this matter are:

1. Whether petitioner, as a retired member of the administrators' association of the district, stands in conflict of interest with the Board pursuant to N.J.S.A. 18A:12-2 were he to vote to approve the Woodbridge Township Education Association (WTEA) collectively bargained agreement, whereby it is averred that there exists the possibility, in his so voting, that petitioner might receive some insurance benefits.

2. Whether disallowing petitioner to vote on said collective bargaining agreement constitutes an infringement upon his right

to seek and hold public office, as well as his right to freedom of expression.

FINDINGS OF FACT

Based on the Joint Stipulation of the parties, the facts of this matter are found to be as follows:

1. Petitioner is a duly elected Board of Education member.

2. Petitioner is a retired educator, having served as Science Department Head at Colonia High School, Woodbridge, New Jersey.

3. Benefits in the collective bargaining agreement between the Woodbridge Township Board of Education and the Woodbridge Township Education Association are negotiated for teachers, per diem substitutes, clerks and secretaries, teacher aides, teacher assistants, bus attendants and all janitorial, attendance, transportation, cafeteria and safety personnel.

4. The Woodbridge Township School Administrators Association represents directors, principals, vice-principals, supervisors and department heads.

5. Health benefits are set forth in the W.T.E.A. Employee Agreement under Article XIII, Insurance Protection. (See attached Exhibit A.)

6. Retirees are provided benefits under Article XIII, A.2. (See attached Exhibit B.)

7. Petitioner receives benefits as a retiree because of a clause in the Administrators Contract which provides at pg. 17, Article VIII, Benefits, Subparagraph A.:

> Benefits accorded to teachers shall also be granted to administrators.

8. The Agreement between the Board of Education and the Education Association expired on June 30, 1990 and is currently in negotiations.

9. Among the provisions which are actively being negotiated are the employees' health benefits.

10. Any benefits modifications in the W.T.E.A. Agreement will result in modified benefits under the Administrators Agreement.

11. Petitioner is over the age of 65 and makes personal contributions toward the medical and dental plans provided by the district as evidenced by the attached billing statement. (Exhibit C.)

12. Medicare is the primary care carrier for the Petitioner. Any benefits which accrue to the Petitioner through the Administrators Contract are secondary to Medicare coverage.

13. Petitioner is also covered by his wife's benefits as an educator covered by the State Plan.

PETITIONER'S ARGUMENT

Petitioner avers that as a duly elected board member, whose constituents were fully knowledgeable of his status as a member of the community and as a former educator in the district, to "disenfranchise" him from voting on the collective bargaining agreement in question "would place my integrity in jeopardy and would negate my vote as a duly elected board member." (Petitioner's Memorandum of Law, at p. 1) In so stating, petitioner relies on the decision captioned Warren R. Larsen v. Board of Education of the Township of Woodbridge, Middlesex County, decided by the Commissioner March 18, 1985 for the proposition that because no specific benefit will accrue solely to him but, rather, are negotiated for an entire group, no substantial and materially sufficient conflict of interest exists. He claims that another factor to be considered is his age. Mr. Karabin avers that he qualifies for Medicare and as such his primary care is covered by Medicare, but is also covered by his wife's benefits as an educator under the State Health Benefits Plan. He cites Exhibit C accompanying the joint stipulation of facts, noting that petitioner pays for secondary hospital coverage and dental coverage. He claims that for his 21 years of service in the district, he earned the right to participate in such coverage and does not receive it in any way from his being a board member.

Petitioner concedes that he benefits indirectly from an administrators' contract. However, he maintains that "***the coverage as had in the Administrator's Contract bears an air of illegality. Piggy-backing is not considered a legal entity. Again, to base my coverage on an illegal instrument should not be considered viable." (Id., at pp. 1-2)

BOARD'S ARGUMENT

Initially, the Board notes reference to Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954) for the proposition that the instant matter is ripe for summary judgment because all factual issues have been resolved by the Joint Stipulation of Facts filed by the parties.

At Point II of its Brief in Support of Summary Judgment, the Board contends that where a direct or indirect benefit accrues to a board member, a conflict of interest exists. Citing N.J.S.A. 18A:12-2, which states that "[no] member of any board of education shall be interested, directly or indirectly in any contract with or claim against the board,***" the Board claims that as a member of the administrators' association, a conflict exists in petitioner's voting on the teachers' contract because the language of the administrators' contract clearly delivers benefits to administrators based upon the benefits accorded to teachers in the employee agreement presently in negotiations. Said agreement addresses benefits for retired employees, the Board submits, including health, dental and vision benefits. Additionally, the Board maintains that it pays for benefits until retirees reach a stated age. If the benefits are modified, the Board argues, whether the modification is more or less favorable to teachers, petitioner, as a member of the association of administrators, would necessarily be directly affected. The Board relies on Stipulation of Fact No. 10 in support of this claim.

In response to petitioner's argument that because he is over the age of 65, because he makes personal contributions toward his benefits plans, and is covered primarily by Medicare benefits and his wife's health program benefits, the degree of any benefit enuring to him is so minescule as to be insignificant, the Board urges that it is not the degree of benefit one receives which establishes a conflict, but rather it is the existence of the benefit itself. Citing South Plainfield Independent Voters, James Mebane, President v. Board of Education of the Borough of South Plainfield, Middlesex County, 1975 S.L.D. 47, Van Itallie v. Franklin Lakes, 28 N.J. at 268 (1958) and Aldom v. Roseland, 42 N.J. Super. at 503 (App. Div. 1965), the Board submits that the interest of Mr. Karabin is neither remote nor speculative as in Van Itallie. Rather, it claims, the interest of Mr. Karabin is sufficient to bring the issue within the language of the Court in Aldom, wherein it was stated:

> The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interest conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue,

> too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect. Such an approach gives recognition to the moral philosophy that next in importance to the duty of the officer to render a righteous judgment is that of doing it in such a manner as will beget no suspicion of the pureness and integrity of his action, *** 42 N.J. Super. at 502. (Board Brief, at p. 6)

It is the Board's position, made in reliance on Aldom, supra, that petitioner should be found to have a conflict of interest which must be prohibited.

At Point III of its brief, the Board advances the argument that where N.J.S.A. 18A:6-8.4 permits teachers to serve on elected boards of education, employment and service must be in different districts. While the facts vary in the instant matter because petitioner is a retired teacher, the Board urges that the language of Visotcky v. City Council of Garfield, 113 N.J. Super. 263, (App. Div. 1971), which interpreted N.J.S.A. 18A:6-8.4, is controlling in this case. In Visotcky, it is stated:

> A teacher's position is also one of public service, but the teacher is an employee whereas the board of education is the employer. There are many potential conflicts of interest between the two. "It is no answer to say that the conflict in duties outlined above may never in fact arise. It is enough that it may *** Jones v. MacDonald, 33 N.J. 132, 138 (1960)".

The Court further went on to state

> A teacher's self-interest can readily run counter to a board member's loyalty to the public. We entertain no doubt that an individual may not properly act contemporaneously as a teacher and a member of the board of education in the same school district. The positions are incompatible and represent intolerable potential conflicts of interest. Id. at 266
> (Board's Brief, at pp. 8-9)

The Board's position is that Visotcky speaks to the proposition that although the conflict may never arise, where the possibility for such conflict exists, it must be rejected. Because the language in the administrators' contract provides that "benefits accorded to teachers shall also be granted to administrators" (Id., at p. 9, quoting the Joint Stipulation of Fact No. 7), the instant matter requires a finding that a conflict of interest exists if Mr. Karabin is permitted to vote on the contract for Board employees. It also cites Sokolinski v. Woodbridge Tp. Municipal

Council, 192 N.J. Super. 101, 105 (App. Div. 1983) wherein Griggs v. Princeton Borough, 33 N.J. 207, 219 (1960) is cited including the dictum from Pyatt v. Mayor and Council of Dunellen, 9 N.J. 548, 557 (1952) wherein it is stated:

> "***we perceive the rule to be that the mere existence of a conflict, and not its actual effect, requires the official action to be invalidated." Griggs vs. Princeton Borough, supra. 33 N.J. at 220. (Board's Brief, at p. 10)

The Board urges that the potential for conflict is not as remote as in Griggs, supra; Pyatt, supra; or Sokolinski, supra, because the petitioner herein receives limited medical benefits as a retired employee of the district. Were he not to be found to be in conflict, the Board argues,

> ***it is clear he will be in a position to address the entitlements of retirees to insurance protection or any other benefits which may come within the newly negotiated employee agreement. This will place petitioner within the ambit of "benefits accorded to teachers" referred to in Joint Stipulation of Facts number seven (7) and therefore represents a direct conflict of interest. (Board's Brief, at pp. 10-11)

The Board submits that the participation of Petitioner Joseph J. Karabin in the deliberations and vote for the pending employees' contract constitutes a direct conflict of interest within the meaning of N.J.S.A. 18A:12-2. Accordingly, the Board contends that the Petition of Appeal should be denied, while the motion for Summary Judgment by the Board should be granted.

ANALYSIS AND CONCLUSIONS

Upon a careful review of the facts in this matter and the arguments advanced by the parties, for the reasons which follow the Commissioner determines that no violation of N.J.S.A. 18A:12-2 will occur should petitioner vote on the teachers' collective bargaining agreement.

Preliminarily, the Commissioner adopts as findings of fact the Joint Stipulation of Facts submitted by the parties. He further finds that no facts essential to a decision in this matter are in dispute, and thus, that the matter is ripe for summary judgment. Judson, supra

N.J.S.A. 18A:12-2 makes plain that no board member shall be interested directly or indirectly in any contract with the board of education on which he or she sits. However, before a conflict of interest can be declared unlawful, it must be demonstrated that there exists a substantial and material conflict. The case captioned Patsy Salerno v. Board of Education of the Township of Old Bridge, Middlesex County, decided April 23, 1984 citing the Commissioner's earlier decision in In re Bayless, 1974 S.L.D. 595, rev'd State Board 603 held:

> ***Although a bright line is difficult to draw, the substantial and materially sufficient conflict standard enunciated in Bayless must be applied. (Salerno, Slip Op., at p. 9)

The State Board decision in Bayless elaborated on said standard as follows:

> ***[W]e must determine whether the conflicting interest is substantially and materially sufficient to (1) disqualify Mrs. Bayless from holding her Board seat, or (2) whether she may continue to serve as a duly elected member of the Board, abstaining from participation in and voting on particular matters directly or indirectly affecting her husband.
> (State Board Decision in Bayless, at 605)

The State Board overturned the Commissioner's determination that because the board member's husband was an employee of the same board on which she sat, she was unable to serve on said board. Rather, the State Board declared in that case that the Doctrine of Absention applied to permit Mrs. Bayless to remain an active, voting member of the board except in regard to matters affecting her husband. Thus, the State Board found in Bayless that there was no unlawful conflict even though the board member's husband was a board employee. Not only was Mr. Bayless an employee of the board, he was directly under contract with the board and the board determined his salary on an individual basis.

Similarly, in Salerno, supra, the Commissioner held that no unlawful conflict of interest existed. In that case, a board member sought an order declaring that certain other board members were in conflict of interest when they negotiated contracts with employee bargaining units because they had relatives in those units. The Salerno decision holds:

> ***In this case, the collective bargaining agreement covers a unit containing hundreds of Board employees. The connection between the economic benefit to a single family member is an indirect and remote consequence of participation in negotiations or a vote for ratification of the agreement. It cannot be disputed that labor relations is a major concern of any board of education. To foreclose a board member from participation in labor relations matters because a relative happens to be a board employee would severely and unduly restrict an individual's ability to perform his or her obligations as a board member. (Salerno Slip Opinion, at pp. 5-6)

The Salerno decision once again stressed that before a conflict of interest may be held illegal, there must be proof of a substantial and material conflict. As noted in the Larsen, supra, matter, "***all governmental officials are also private citizens and

have legitimate private interests. A person's right to hold public office must also be weighted against the potential conflict of interests. Bayless, above, at 605." (Larsen Slip Opinion, at p. 14)

The feature distinguishing Larsen, supra; Bayless, supra; and Salerno, supra, from the instant matter is that in the former cases, the alleged conflicts involved a board member and one of his or her immediate relatives. In this case, the alleged benefit, health insurance, dental insurance, etc. would, potentially, enure, to petitioner himself.

However, the fact that it is Mr. Karabin himself who is the potential recipient of benefits does not preclude an inquiry as to whether the benefit(s) which might enure to him were he to vote to ratify the teachers' contract are so substantial and material as to preclude his voting on that contract. In the Commissioner's view, no such impediment exists to his voting.

The stipulation of facts sets forth unequivocally that the benefits in the collective bargaining agreement in question are negotiated for teachers, per diem substitutes, clerks and secretaries, teacher aides, teacher assistants, bus attendants and all janitorial, attendance, transportation, cafeteria and safety personnel. (See, Stipulation of Fact No. 3.) Stipulation of Fact No. 4 establishes that the Woodbridge Township School Administrators Association represents directors, principals, vice-principals, supervisors and department heads. It is undisputed that Mr. Karabin is a retired member of the Woodbridge Township School Administrators Association, and that he receives benefits as a retiree because of a clause in the Administrators Contract which provides a pg. 17, Article VIII, benefits, Subparagraph A: "Benefits accorded to teachers shall also be granted to administrators." (Stipulation of Fact No. 7, quoting Exhibit B) Exhibit B indicates that retirees are provided benefits under Article XIII, A.2. (See Stipulation of Fact No. 6.) It is also undisputed that one of the benefits being negotiated concerns employees' health benefits. Thus, any benefit that might attach to petitioner is decidedly remote because he is twice removed from direct consideration as a beneficiary of the terms of the negotiated agreement, by virtue of his being a retired administrator.

Moreover, because Petitioner Karabin is over the age of 65, Medicare is the primary care carrier for petitioner. See Stipulation of Facts Nos. 11, 12. Any benefits which accrue to the petitioner through the administrators' contract are secondary to Medicare coverage. Thus, the Commissioner finds that any benefits to which petitioner might be entitled by virtue of the ratification of the teachers' contract are relatively insubstantial.

Finally, as noted by petitioner in his brief, any benefits negotiated in this contract are negotiated for an entire group, including all teachers, per diem substitutes, clerks and secretaries, etc. Thus, the Commissioner finds that no specific benefit will accrue solely to the petitioner, as contemplated by the Legislature in crafting N.J.S.A. 18A:12-2. See Larsen, supra. See also Salerno, supra.

Accordingly, for the reasons expressed above, the Commissioner finds and determines that no conflict of interest exists which would preclude petitioner's voting on the teachers' contract in question. Because the Commissioner finds in petitioner's favor on issue No. 1, he need not reach issue No. 2.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6147-89
AGENCY DKT. NO. 243-7/89

GEORGETTE MADAK,
Petitioner,
v.
HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION,
Respondent.

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

James P. Granello, Esq., for respondent

Record Closed: July 5, 1990 Decided: August 7, 1990

BEFORE DANIEL B. MC KEOWN, ALJ:

Georgette Madak (petitioner), employed as a teaching staff member with a tenure status by the Hunterdon Central Regional School District Board of Education (Board), claims the action of the Board by which it withheld salary increments from her for 1989-90 is arbitrary, capricious, unreasonable, and contrary to the provisions of N.J.S.A. 18A:29-14. The Board denies the allegations and contends that its action to withold salary increments from petitioner is in all respects proper and lawful. After the Commissioner of Education transferred the matter August 16, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was scheduled and conducted June 5, 1990 at the Readington Township Municipal courtroom, Whitehouse Station, New Jersey. Thereafter, counsel to the parties filed letter memorandum in support of their respective positions after which the record closed July 5, 1990.

The conclusion is reached in this initial decision that petitioner failed in her burden to show that the action of the Board withholding salary increments from her for 1989-90 is any way arbitrary, capricious, unreasonable, or contrary to N.J.S.A. 18A:29-14.

BACKGROUND FACTS

The facts which give rise to this dispute and over which there is no dispute, except as otherwise noted, are as follows. Appellant has been employed by the Board for the past 18 years and during 1988-89, the year her performance was determined by the Board not to warrant salary increments for 1989-90, she was teaching home economics at the high school level. Appellant is properly certificated for such an assignment. Appellant testified that her philosophy regarding home economics education is that family living is part of home economics; pupils are "whole" persons; home economics must not be limited to simply perparing and serving food but consists of a wide interaction between teachers and pupils because the teacher is a role model for "value education" and for the prized traits of trust, honesty, and integrity.

Near the end of the 1988-89 academic year petitioner was advised in writing (R-7) on May 2, 1989 by the superintendent that the Board determined not to grant her salary increments for 1989-90. Petitioner was also advised that at her request the Board would provide her an opportunity to be heard on the matter at a meeting scheduled for May 15, 1989. Apparently petitioner did not persuade the Board to her point of view for the Petition of Appeal was filed soon thereafter. Nevertheless, the superintendent also advised petitioner that the Board did not grant her salary increments because her classroom performance was inconsistent and inadequate during 1988-89. Those conclusions, it is noted, are based on 12 specifications contained within the letter which follow:

> Item: In your Evaluation dated June 1988, Mr. Wimmer recommended that you establish "class and consistent student-teacher relationships...sometinmes saying "no," specific punishment for wrongdoing or non-acceptable behavior, and student respect." He also stated that "the classroom should not be affected by individual relationships. There should not be an open door policy to Georgette's class."
>
> Item: Dr. Gray's Observation Report of October 17, 1988, indicated that the problems identified by Mr. Wimmer were still

occurring. She recommended that you "continue to enforce the rules you had established" and "remind students that they should not stop by to visit when you are teaching." In Dr. Gray's November 7, 1988, Observation Report, she stated "students who are late to class must be disciplined for the lateness."

Item: On November 21, 1988, Dr. Grimm reported that students who were not scheduled for your classes were in your classroom during the eighth period class. He noted two specific incidents involving two different students on two different days.

Item: During an observation on January 23, 1989, Dr. Gray noted that there was a clear lack of control on your part. This included several students excessively late with no consequence, frequent interruptions, private conversations among students, students calling out, and generally disruptive behavior. Again, there was no consequence to any of these actions.

Item: In your January 1989 Evaluation, Dr. Gray listed once again, specific expectations regarding your classroom management and instructional techniques. These included: classroom behavior expectations for students; following school disciplinary procedures; not allowing students to visit; and a list of strategies to be implemented in your daily lessons.

Item: To assist you in working on the expectations outlined in your January Evaluation, Dr. Gray has been meeting with you on a regular basis (2/9/89, 2/13/89, 2/27/89, 3/13/89, 3/20/89, 4/19/89, 5/1/89).

Item: In Dr. Meyers' Observation Report on March 13, 1989, he reported lack of organization and direction.

Item: On March 14, 1989, Dr. Gray observed a Family Living class and discussed with you a lack of a clear objective, lack of follow-through, and students not following your instructions during class activities.

Item: On March 22, 1989, Dr. Grimm reported that three of your students were in the hallway when they should have been in class.

Item: On two recent dates, Dr. Gray oberved in one class a group of students writing on the board as you swept the floor; on another day, a student wandered in and out of your classroom while you washed another student's jacket.

Item: On April 18, 1989, Dr. Myers report that serveral students arrived late to your Period 7 class and that the major objective of that class was not realized.

Item: During our December break, I observed your classroom left in an unaccepatable condition.

In large measure, the foregoing specifications are grounded upon Observation Reports (R-1) (R-2) (R-3) (R-5) (R-6) and a mid-year evaluation (R-4A) of petitioner's performance during 1988-89. Petitioner does not dispute that she was advised prior to the commencement of the 1988-89 academic year that she must establish class control and consistent student-teacher relationships, consistent discipline for wrongdoing and misconduct, that the classroom environment must not be affected by individual pupil relationships with the teacher, in this case petitioner, and that petitioner should not have an open door policy for the classroom by which pupils not otherwise assigned to a specific class she was teaching are allowed to enter the classroom with petitioner's acquiescence.

After the commencement of the 1988-89 academic year, petitioner's immediate supervisor, Judy Gray, prepared an observation report (R-1) on October 17, 1988 wherein petitioner was given constructive criticisms and recommendations for improvement with respect to her classroom performance. In this regard, Dr. Gray noted that petitioner had to enforce classroom rules; develop alternative strategies and techniques to ensure proper pupil behavior; insist that all pupils follow instructions she gives; petitioner must prohibit pupils from wandering around the classroom during instructional time; petitioner must be prepared with all relevant materials for the commencement of class; and, petitioner must immediately cease allowing pupils not assigned to her classroom to enter the classroom while she was teaching.

It is not diputed by petitioner that on or about November 21, 1988 she was still allowing pupils, not otherwise assigned her class, to enter her classroom while she was teaching. Petitioner claims she attempted to discourage such intrusions by outside pupils by putting a sign on the outside of her classroom which directed "Go Away." Furthermore, while petitioner denies encouraging an open door policy for outside pupils to enter her classroom at will, she does acknowledge allowing outside pupils into her classroom in order to get them interested in home economics. Petitioner further explains that she stopped such practice during 1988-89 when she noted there was no increase in the number of pupils who enrolled for home economics.

Petitioner does not dispute that sometime on or about November 21, 1988 two different pupils, on two separate occasions, were allowed into her classroom while she was teaching and without those pupils having been assigned those particular classes. Petitioner explains in this regard that on both occasions she was teaching a family living

course. The two pupils had already finished with their school day but were waiting around for athletic practice to commence. On a particular day, two of the regular enrolled pupils were absent from the family living course. She invited the two pupils waiting for practice to come into the classroom to participate in the family living course in order to get a "male view point" of the discussion because, at the time, all other pupils were of the female sex.

During December 1988 Dr. Gray once again observed petitioner's performance in the classroom and prepared a written report of that observation (R-2). This report is positive in nature in that petitioner was advised she handled the delicate subject matter of sexuality in a very secure and mature manner; that she made students comfortable which allowed the students to make contributions during class; the subject matter is important for adolescents to deal with and to understand; and, Dr. Gray offered suggestions for improvement.

At this point it is to be noted that from time to time petitioner was criticized for the number of pupils who were reporting late to her class. In fact, Dr. Gray noted in this observation as follows:

> In terms of classroom management, I noted two areas which could be addressed * * * Secondly, as we discussed, students who are late to class must be disciplined for the lateness. You explained to me that you usually asked them why they are late and that they sometimes have good execuses. However, we cannot allow students to bend school rules. Therefore, I am requesting latenesses be noted daily in your role book and appropriate punishment be assigned * * *

In regard to lateness, the evidence in this case shows that the Hunterdon Central Regional High School facility is an expansive campus with three buildings. If pupils are coming to the main high school from the athletic field house, the walking distance would be approximtely one mile. The evidence shows that the Board had no specific written policy regarding latenesses during 1988-89, and according to the testimony of the president of the Hunterdon Central Regional Educational Association, three scheduling changes in two years occurred because of the great distances between the various building. At one time, pupils were given three minutes to change classes

between the field house and the high school which, it was discovered was an impossible task. Now the time allowed pupils to go to the field house to the high school is five minutes. While the evidence certainly shows that some pupils may have been late reporting to petitioner's class because of the great distance they had to traverse, the pupil latenesses relied upon here by the Board as part of its reasons for the withholding of salary increments is not simply limited to those pupils. Rather, the Board discerned an absence of attention to detail by petitioner in that pupils would wander in and out of her classroom, pupils would be observed in the hallway rather than in the classroom as instruction was occuring, and petitioner generally appeared to be unaware or unphased without inquiry when pupils reported late to her class.

On January 23, 1989 Dr. Gray evaluated petitioner's performance for the first semester of 1988-89 academic year. Dr. Gray concluded the three page written evaluation by noting "the following problem areas" of petitioner's performance:

1. Establish and communicate classroom behavior expectations for students:

   a. arrive in class on time
   b. follow teacher's instructions
   c. avoid disruptive/rude behavior
   d. one students should leave at a time with a pass for no more than five minutes
   e. students will be given late passes to their next class
   f. students will not be given passes to other areas of the school during your classes

2. Follow the school disciplinary procedures for dealing with infractions of the rules established above.

3. Do not allow students to visit your classes.

4. Pay attention to day-to-day requirements such as sub-instructions, grade sheets, etc.

5. Begin to implement the following strategies in your daily lessons:

   a. gain attention of the class before beginning instruction
   b. review past learning
   c. utilized a variety of questioning and discussion strategies as you present your lessons
   d. Utilize the overhead projector and other aids as you present your lessons

e. continue to plan appropriate evaluation methods
f. be sure to involve all students as you present your lessons
g. maintain control of the decisions related to lessons and assignments
h. summarize each lessons/activity

Documentary evidence in the record shows that on February 2, 1989 Dr. Gray once again observed and evaluated the performance of petitioner (R-3). This three page observation shows that petitioner was again advised to followup on direction earlier given to pupils, that one pupil after the formal observation was observed by Dr. Gray sitting on one of the classroom tables, and in general petitioner appears to have showed some progress in regard to her perceived deficiencies.

On March 2, 1989 another observation report and evaluation was prepared by Dr. Gray which reveals that petitioner did make progress, although more work was necessary on improving her performance particularly in regard to the deficiencies earlier noted. (R-5). Finally, on March 13, 1989 the high school principal, Dr. David Myers, observed and prepared and evaluation of petitioner's performance. Dr. Myers expressed his consternation in the observation report over petitioner's lack of organization and direction during the entire lesson; Dr. Myers noted an absence of specific objectives communicated to the pupils; and absence of demonstrations for pupil beneifts; an absence of preparation and procedures throughout the lesson for reenforcement; and, an absence of a summation and evaluation by petitioner at the end of the period. Petitioner, it is noted, filed a response (R-6A) to Dr. Myer's observation in which she states her essential disagreement with the evaluation prepared by Dr. Myers.

Petitioner's testimony is that she did enforce all rules, school and her own, in the classroom; that she reported faithfully all pupils who were late while acknowledging that there were some pupils who were "excessively" late; on March 13, 1989 she had a "great" class and was absolutely astounded when she recevied Dr. Myers' observation report (R-6) and, with respect to the last stated specification set forth above she was advised she left her classroom with empty containers of coffee and oil in the back of the sink and that she left the microwave oven in a dirty condition, clean dishes left in the sink, crumbs were left on the stove burners and that, in general, her classroom was left in a very messy condition. However, petitioner says that another teacher who used her classroom the day before vacation left it in such condition.

It is agreed that before and after each observation and evaluation, Dr. Gray and petitioner met with each other to discuss the pending observation and to discuss the obervation after the classroom visit occurred.

ARGUMENTS OF THE PARTIES

Petitioner contends in her filed letter memorandum that she cannot be faulted for pupil lateness in view of the fact the athletic facility is one mile away from the high school facility and the pupils have insufficient time to change class. Petitioner also contends that as a teacher she should not be reprimanded for inviting two pupils into her class, not otherwise enrolled in order to participate in that class from a "male respective." Furthermore, petitioner contends she should not be criticized for being too close to her students by allowing them to wander in and out of her classroom as she is teaching. For these resons, petitioner contends that the action of the Board is arbitrary, capricious, unreasonable, and contrary to the provisions of N.J.S.A. 18A:29-14.

The Board contends that under the standards articulated in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960) a board of education may exercise its discretion to grant salary increments only to those whom, its judgment earned such increments. Consequently, the Board contends that the Commissioner's review is limited soley to a determination of whether it had a reasonable basis for its judgment. In the Board's view, the record established in this case clearly shows that it had a reasonable basis to arrive at the judgment that petitioner's classroom performance during 1988-89 did not warrant the granting of salary increments to her for 1989-90 and it seeks to have the Petition dismissed.

ANALYSIS

Boards of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year. N.J.S.A. 18A:29-14. Boards of education have the inherent right to exercise their preeminent function to pass upon the quality of teacher performance. Clifton Teachers Ass'n b. Clifton Bd. of Ed., 136 N.J. Super 336, 339 (App. Div. 1978). The underlying purpose behind the evaluation procedure is to ensure that a teacher receives adequate notice of unsatisfactory performance and of ways to improve future performance. Yorke

v. Piscatawy Township Bd. of Ed., 1990 SLD- (State Bd of Ed, June 6, 1990). The purpose of N.J.S.A. 18A:29-14 is to reward only those who have contributed to the educational process thereby encouraging high standards of performance. Board of Ed of Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 321 (1979).

The only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusion. Kobera v. West Orange Bd. Ed., 60 N.J. Super. 288, 295-96 (App. Div. 1960). Neither the commissioner nor the state board may substitute its judgment for either the board or those who made the evaluation. Rather, the determinations are limited to (1) whether the underlying facts were as those who made the evaluation claimed and, (2) whether it was reasonable for them to conclude as they did based upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene. Id. at 296-97.

In this case, the record clearly establishes that this Board made a determiniation based on its judgment that petitioner's classroom performance during 1988-89 was inconsistent and inadequate. The underlying facts tend to show that petitioner's performance was inconsistent and inadequate during 1988-89. Pribr to the 1988-89 academic year, petitioner was reminded of those deficiencies she must improve. Throughout 1988-89 it does appear that petitioner continued to allow pupils to wander in and out of her classroom as she was teaching; it appears that petitioner gave instruction to pupils only to have the pupils disregard those instructions without followup by petitioner; it appears that from time-to-time petitioner would tend to show sparks of improvements but then her performance would regress thereafter; and, it appears that petitioner had great difficulty with respect to having pupils report to her class in a timely manner, remain in her class during the instuctional period, and participate in the teaching-learning process during the whole period.

For the foregoing reasons, I **CONCLUDE** that the underlying facts regarding petitioner's performance during 1988-89 were as those claimed by Dr. Gray and Dr. Myers with respect to her deficient and inconsistent performance and that it was proper and appropriate for the superintendent, and hence, the Board, to conclude petitioner did not earn a salary increment for 1989-90. Having so concluded, I **FURTHER CONCLUDE** that petitioner failed in her burden to show that the Board acted in arbitrary, capricious, or

unreasonable manner or in violation of N.J.S.A. 18A:29-14.

Accordingly, the petitioner of appeal is **DIMSISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS**, who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

August 7, 1990
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Aug. 8, 1990
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 13 1990
DATE

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

GEORGETTE MADAK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board of Education's replies thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

In her exceptions, petitioner reiterates the arguments of her post-hearing letter memorandum, which were fully incorporated by the ALJ and need not be repeated here. In reply, the Board urges acceptance of the initial decision and notes that, despite petitioner's attempts to once again explain and justify certain specific incidents, those incidents and many others -- largely uncontroverted -- support the Board's contention that petitioner failed to consistently and adequately maintain control of student behavior and the classroom environment.

Upon careful and independent review of the record, the Commissioner concurs with the ALJ that the Board had a reasonable basis for its withholding decision in this matter, acting as it did on good faith evaluations based on facts clearly sufficient to warrant the conclusions drawn by both the evaluators and the Board. Petitioner having thus failed to demonstrate that the Board's action was arbitrary, capricious, unreasonable or otherwise improper, the Commissioner may not act to deprive the Board of its lawful managerial prerogative to withhold an increment where service has not been deemed sufficiently meritorious.

Accordingly, for the reasons stated therein, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 7496-89
AGENCY DKT. NO. 273-8/89

BOARD OF EDUCATION
OF THE TOWNSHIP OF
LAKEWOOD, OCEAN COUNTY,
Petitioner,
v.
STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,
Respondent.

Richard K. Sacks, Esq., for petitioner
David Earle Powers, Deputy Attorney General, for respondent (Robert J. Del Tufo, Attorney General of New Jersey, attorney)

Record Closed: July 16, 1990 Decided: August 29, 1990

BEFORE LILLARD E. LAW, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Board of Education of the Township of Lakewood (Board) contests the New Jersey Department of Education assignment of financial responsibility for the education costs of a pupil incarcerated in a state institution and not attending the Board's public schools.

This matter was transmitted to the Office of Administrative Law (OAL) on September 29, 1989, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on February 20, 1990, at which, among other things, the issues to be determined by this tribunal were established by the parties and that the parties would propound and serve their respective motions for summary decision. Due to discovery problems, the record closed on July 16, 1990.

SUMMARY DECISION

This matter is submitted for summary decision, pursuant to N.J.A.C. 1:1-12.5, on the pleadings, stipulation of fact, the Certification of Bartholomew Fetcak and Alan Ferraro, and letter Brief submitted by the Board.

ISSUES

The issues to be resolved in this dispute are as follows:

1. Whether the reassigned pupil, J.R., is a bona fide resident of the Board's school district?
2. If not, whether the Board should be charged for J.R.'s educational expenses.

UNDISPUTED FACTS

The facts in this matter are neither disputed nor controverted and, therefore, constitute my **FINDINGS OF FACT** as follows:

1. It is stipulated by the parties that as of January 18, 1989, J.R., a minor, was continued to the New Jersey Training School for Boys (N.J.T.S.B.), Jamesburg, New Jersey, under the direction of the New Jersey Department of Corrections.

2. J.R. was initially placed in N.J.T.S.B. on September 20, 1988.

3. The Department of Corrections advised the Department of Education that J.R.'s legal parent or guardian was his mother, Dafina Flores.

4. The Department of Corrections advised the Department of Education that Dafina Flores' address was 144 E. County Line Road, Lakewood, New Jersey.

5. Alan Ferraro, the Board's Director of Pupil Services investigated the address given as Dafina Flores and J.R.'s residence and determined that the address of 144 County Line Road, does not exist in the Township of Lakewood.

6. Alan Ferraro contacted the resident at 1144 County Line Road, Lakewood Township, and no one by the name of Dafina Flores or J.R. reside at the address.

7. This information was provided to the Department of Corrections by the Department of Education with a request that it verify J.R.'s parent address.

8. The Department of Corrections responded to the Department of Education's request with the submission of a document referenced, S.F.E.A. Pupil Verification, which states, in part, "(only address we have on file for [J.R.]. He does not know his address.)" (Attached to the Certification of Bartholomew Fetcak).

9. Based upon the foregoing response from the Department of Corrections, the Department of Education determined that J.R.'s legal residence for tuition purposes was Lakewood Township Board of Education.

DISCUSSION AND CONCLUSIONS

The Commissioner of Education is authorized to deduct from a board of education's state aid for each resident child in the board's school district who is in a New Jersey State facility, pursuant to N.J.S.A. 18A:7B-2, which states:

> For each child who is a resident in a district and in a State facility on the last school day in September of the prebudget year, the Commissioner of Education shall deduct from the State aid payable to such district an amount equal to the State average net current expense budget per pupil plus the appropriate categorical program support.
>
> This amount shall be forwarded to the Department of Human Services if the facility is operated by or under contract with that department, or to the Department of Corrections if the facility is operated by that department,

> and shall serve as payment by the district of tuition for the child. This amount shall be used solely for the support of educational programs and shall be maintained in a separate account for that purpose. No district shall be responsible for the tuition of any child admitted to a State facility after September 30 of the prebudget year.

The Commissioner is required, moreover, to determine the child's residence, under N.J.S.A. 18A:7B-12, which provides as follows:

> 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.
>
> c. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. The tuition shall equal the State average net current expense budget per pupil plus the appropriate categorical program support. This amount shall be appropriated in the same manner as other State aid under this act. The Department of Education shall pay the amount to the Department of Human Services or the Department of Corrections.

The Board asserts, without contradiction, that the address, 144 County Line Road, Lakewood Township, does not exist. Therefore, it argues, it is not responsible for the tuition costs for J.R.'s educational expenses while he is under the direction and control of the Department of Corrections.

The Department of Corrections neither corroborated nor verified an address for J.R. It merely states that the address supplied by J.R.'s mother is the only address on file for J.R. and that J.R. does not know his address. This is not sufficient proof to establish the school district of residence for J.R. nor has any proof been submitted to establish J.R.'s residence prior to J.R.'s admission to N.J.T.S.B. N.J.S.A. 18A:7A-2b.

I **CONCLUDE**, therefore, that neither the Department of Education nor the Department of Corrections has established that J.R.'s district of residence is in Lakewood Township.

I further **CONCLUDE** that there is no basis in fact or law to compel the Lakewood Township Board of Education to assume or be responsible for the tuition or other educational expenses for J.R. during his incarceration at the New Jersey Training School for Boys, Jamesburg.

ORDER

Accordingly, it is hereby **ORDERED** that summary decision be entered on behalf of the Board of Education of the Township of Lakewood.

It is further **ORDERED** that the Board of Education of the Township of Lakewood shall not be charged for the educational costs of J.R.

This recommended decision may be adopted, modified or rejected by **DR. JOHN ELLIS, COMMISSIONER, DEPARTMENT OF EDUCATION**, who by law is empowered to make a final decision in this matter. However, if **DR. JOHN ELLIS** 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 **DR. JOHN ELLIS, COMMISSIONER, DEPARTMENT OF EDUCATION** for consideration.

29 August 1990
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

3/31/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 5 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, RESPONDENT.	:	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 careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that summary judgment be entered in favor of the Board of Education of the Township of Lakewood. There is no basis in fact or law to compel the Board to assume responsibility for tuition of the educational expenses for J.R. during his incarceration at the New Jersey Training School for Boys in Jamesburg, New Jersey, in that the address supplied by the Department of Corrections does not exist and no other address has been established within this record for him.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law granting the Board summary decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 6330-90

AGENCY DKT. NO. 266-7/90

LINDA DI MARE, PAT SANTORA,
FRANK BACCHUS AND FRANCES WILSON,
Petitioners,
v.
THE BOARD OF EDUCATION OF THE
TOWNSHIP OF HOLMDEL, MONMOUTH
COUNTY,
Respondent.

Linda DiMare, Pat Santora, Frank Bacchus and Frances Wilson, petitioners, pro se

Martin M. Barger, Esq., for the respondent, Board of Education of the Township of Holmdel (Reussille, Mausner, Carotenuto, Bruno and Barger, attorneys)

Record Closed: August 31, 1990 Decided: September 12, 1990

BEFORE WALTER F. SULLIVAN, ALJ:

On July 24, 1990, Linda Di Mare and three other individuals, each of them member of the Holmdel Board of Education or a candidate for membership, filed a petition with the Commissioner of Education for relief from a certain action of the Board undertaken at its meeting of July 11-12, 1990. The petitioners claim that the offensive action of the Board (specifically, the seating of Rene Bressler as a member of the Board) was undertaken in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. and, in addition, was not supported by a simple majority of a quorum.

The Commissioner accepted jurisdiction and on August 8, 1990, transmitted the matter to the Office of Administrative Law for a "hearing to be conducted to determine whether emergent relief is appropriate."

PROCEDURAL HISTORY

A hearing was held on August 13, 1990, but several factors made the prompt resolution of the dispute impossible. The unavailability of Mrs. Tobiens, the Board's stenographer, slowed the submission of her minutes and underlying notes. The Board's documentation was submitted on August 22, 1990. The petitioners were given until August 31, 1990, to submit theirs.

Meanwhile, I declined to enjoin the voting participation of Ms. Bressler at the Board meeting of August 15, 1990, holding that on the strength of the record before me on August 13, 1990, the petitioners had failed to carry their burden of justifying either a preliminary injunction or a temporary restraining order, namely likelihood of prevailing on the merits, demonstration of irreparable harm if the preliminary injunction were denied, proof that the grant of the injunction would do less harm than the denial of the injunction and considerations of the public interest. Rennie v. Klein, 462 F. Supp. 1131 (D.N.J. 1978). Further, petitioners' burden was complicated by their demand for injunctive relief which would undo a seemingly completed transaction. Tully v. Mott Supermarkets, Inc., 337 F. Supp. 834 (D.N.J. 1972).

The denial was without prejudice to an independent review of the documentary evidence to be later submitted.

Before addressing the underlying merits, I turn to a number of preliminary observations to define what is and is not in the record. On August 29, 1990, I received a letter from Howard M. Newman, Esq., making an appearance for the petitioners. Since the petitioners continued to submit their own statements and arguments after that date, I spoke to Mr. Newman and learned that preliminary discussions respecting possible representation had fallen through and that the petitioners continued to be (as they were on August 13, 1990) pro se.

Notwithstanding any theoretical question of guidance which pro se litigants might have claimed, this emergency decision proceeds to the merits of preliminary relief

upon three realities: 1) The imminent start of the school year; 2) the power of the Commissioner to provide interlocutory review (In re Kallen, 92 N.J. 4 (1983); and 3) the retention of jurisdiction of the underlying merits of the case in chief by the Commissioner. See Appendix A.

As to claims which I do not regard as properly in the matter, the arguments respecting the alleged non-conformity of the Board's actions with Robert's Rules of Order (as incorporated in the Board's bylaws) fail for two reasons. Apart from the fact that neither Robert's Rules nor the by-laws have been placed in evidence, the original petition makes no reference to the Rules and, hence, makes no demand for relief based upon them. In practice, it is possible for a party to move for leave to amend its pleadings after the matter has begun. N.J.A.C. 1:1-6.2(a), and such an amendment may be ordered in the absence of prejudice to the other party. Here, there was no motion. While I shall not speculate on whether such a motion might be prejudicial, counsel for the Board indicated in his letter of August 31, 1990, his understanding that the record had closed, which is consistent with my bench order of August 13, 1990. Ultimately, the Commissioner's retention of the non-emergent aspects of this matter demonstrates that petitioners' potential claim respecting Robert's Rules is no more than deferred.

Similiarly, petitioner Di Mare wrote on August 24, 1990, that Mr. Stan Fishson, the Board's Personnel Officer, should be required to give a statement, noting that "it would be important for the case." Mr. Fishson is not a party to this matter and, in the absence of a request for a second hearing day (respecting which he would be amenable to a subpoena), he can be compelled to make a statement only under the limited circumstances set forth in N.J.A.C. 1:1-10.1 et seq. Mr. Fishson does not meet these circumstances and no request for a second hearing day was made.

Lastly in this area, the petitioners' submission of August 28, 1990, included a supportive statement of Susan K.K. Man, a Board member who shared the sentiments of the petitioners. This raises additional difficulties. Man was not among the petitioners and her statement outruns the purpose of the extension granted on August 13, namely to allow the petitioners time to review and question the documents offered by the Board. Further respecting review and questioning, no arrangements for the cross-examination of Man were made and it is unlikely that such cross-examination (and potential rebuttal) could take place without lengthening the emergent aspects of this matter into a general inquiry upon the merits of the entire case, contrary to the transmittal.

MERITS OF THE CLAIM

The question of a quorum was not mentioned in the transmittal by the Commissioner of Education. On the other hand, the question is squarely within the scope of the petition, and addressed by both parties. Under these circumstances, it would serve no interest to disregard the materials properly in the record.

I **FIND** that the Board meeting of July 11-12, 1990, ran after midnight and had deadlocked on the issue of whether or not Ms. Bressler should be seated as a member of the Board. Shortly after midnight, Man and Wilson left the meeting, having come to a determination that the Board vacancy would not be addressed. The petitioners argue that it was inherently unfair of the remaining members of the Board to speak to the issue of Ms. Bressler's status after it was clear that members Man and Wilson had gone home for the night at what they argue was a late hour.

Wilson's and Man's position would be impeccable had there been a showing in the record that they had either been coerced or duped into leaving the meeting. The record, however, does not show this and while I have no reason to doubt Man's and Wilson's good faith when they thought the issue could not come up again, there is no indication of where this belief came from. Under those circumstances I **CONCLUDE** that the remaining members of the Board did not mislead Man or Wilson into leaving.

Petitioners argue that it was unfair and poor practice to continue transacting public business after members of the Board had left in fatigue to address their other responsibilities. The determination of this question is somewhat subtle and the Legislature has wisely directed that administrative law judges place on the record their own personal experiences as to how they come to conclude that a certain course of action was sensible and proper. N.J.S.A. 52:14-10(a).

In my own public background, seven years as the first deputy director of an urban anti-proverty program leads me to the conclusion that it is not only legitimate but quite common for public decisions to be made after 1:00 a.m. for those who have the endurance to continue to function at those hours. Be that as it may, the activity of the remaining Board in seizing the advantage placed before it by the departure of Man and Wilson seems no more improper than that of the United Nations

Security Council in June 1950 when the representative of the Soviet Union felt (erroneously) that he could block required unanimous action respecting Korea by not attending the meeting.

The separate and more difficult question concerns the status of Di Mare, who found herself in the position of watching her voting block disappear as the remaining Board members sought to take action to install Bressler.

Under the totality of the circumstances, and particularly the fact that Di Mare had little chance of stopping the vote unless she left, I am persuaded that Kossyk v. Light, 157 N.J. Super. 333 (App. Div. 1978) controls. So holding does not imply disrespect for Di Mare's course of action: it reflects the reality that her leaving the meeting was the only course seemingly available to her to carry on the position which she had ably conducted earlier in the evening.

Therefore, I CONCLUDE that Rene Bressler was voted into office by a quorum.

Petitioners' alternative argument was that the appointment of Bressler violated the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The Act supports public confidence in the transactions of public bodies by requiring advance notice of meetings, published agendas and public transactions. The Act makes limited exceptions for the body's going into closed (or executive) session and petitioners assert that the Board went into such session at 12:15 a.m., July 12, 1990, and either took an improper action to appoint Bressler or never reconvened in public session to make the appointment effective.

Two accounts exist with respect to the transactions beginning on July 12, 1990 at 12:15 a.m. The first is a set of notes supported by the transcription of Mrs. Tobiens, the Board stenographer, which were taken down at the meeting. I am without the skill to review the conformity of Mrs. Tobiens' transcriptions to her stenographic notes, but no party has pursued that question and I am content to conclude that the notes are transcribed properly. See, Appendix 2.

Apart from this document, the record also includes an undated statement by Manuel Fernandez that page 20 of Mrs. Tobiens' notes had been reviewed with Mr. Barger,

counsel for the Board, and that Mr. Fernandez had found the original page 20 to be inaccurate. The memorandum does not indicate the author of the corrected page and the question is not easily accessible since Mr. Barger is ethically barred from testifying with respect to his activities in connection with the Board meeting. In any event, the revised closing page of the notes shows different series of events from those taken down by Mrs. Tobiens and is set forth as Appendix 3.

If Fernandez's account is accurate, the subject of selection was never undertaken in an executive session. One may fairly confer that the departure of Man and Wilson at 12:45 a.m., which would render it helpful to the pro-Bressler faction to leave the executive session without the intended discussion taking place. As to that, the critical issues are the credibility of the scope of the executive session motion set forth in the Fernandez document and, beyond that, the credibility of the reconvening of the public meeting after Man and Wilson had left. I have already addressed the conclusion that I see no impropriety in doing business in public session within the scope of the agenda (which this was) even if late at night, but I note petitioner Di Mare's argument that the credibiity of the Fernandez document revolves about a specific sequence of events, as follows:

12:48 a.m. Return to a public session and movement of Bressler's name into contention and a roll call vote.
12:48 a.m. Identification of the minute at which Santora left the meeting.
12:49 a.m. Identification of the minute at which Di Mare left the meeting.
12:51 a.m. Identification of the closing of the meeting "due to lack of a quorum."

The credibility of Fernandez's account is limited by two considerations. First of all, there is nothing in the record to suggest that Mrs. Tobiens had an ax to grind in this affair, one way or the other. Secondly, the Fernandez minutes support the Board's position only upon the accurate timing and sequence of a variety of actions including Fernandez's memorialization that Di Mare was physically present but stating "I am not here" during the 12:48 vote (for which she might be counted as a member of a quorum), Kossyk and Fernandez's conceded lack of a quorum at 12:51 a.m.

Without impugning the integrity of Fernandez's statement that his account is accurate, it is obvious that it was prepared in light of the pending litigation and is pointed with respect to the circumstances under which one faction could win.

Minutes need not and should not be verbatim records of meetings. Aside from the resolutions of action and the votes thereon, minutes need only summarize the discussions surrounding the motions. Ehrhardt v. Watchung Hills Reg'l High School Bd. of Ed., 1989-90 S.L.D. 196. (June 16, 1989).

Notwithstanding the level of credibility which I attribute to Mrs. Tobiens, the school board submitted, under a covering letter of Mr. Barger of August 20, 1990, charts of roll calls maintained by Mrs. Tobiens and Dr. Fernandez. In my view, the chart of roll calls maintained by Mrs. Tobiens is credible. Apart from the higher level of objectivity which I attribute to her views, the chart is in the form of a log of checkmarks on roll call votes supplemented by a chronological set of remarks covering transactions (as pertinent to this case) between 11:15 p.m. and 12:51 a.m. I have no reason to doubt, indeed, the petitioners have not argued, that the chart or the remarks were put together as an afterthought or that Mrs. Tobiens was suborned in the preparation of her comments. Mrs. Tobiens' notations indicate the following (See, Appendix 4):

12:15 a.m. Executive Session - Motion carried
12:45 a.m. Man and Wilson left the meeting
12:50 a.m. Meeting reconvened on the initiative of members Merces and Rocag, which bears a footnote that at 12:49 a.m. members Santoro and Di Mare left the meeting
12:51 a.m. Meeting closed due to lack of a quorum

Therefore, since Mrs. Tobiens' remarks both support the reconvening of the meeting and are consistent with Dr. Fernandez's remarks that the Bressler motion was made, Mrs. Tobiens' comments support the position of the Board. Furthermore, Mrs. Tobiens prepared a one page statement dated August 20, 1990, which was submitted as attachment E of Mr. Barger's letter, in which she asserts that she observed Santora and

Di Mare leave the meeting and clocked the time. Mrs. Tobiens asserts that she heard a call for a public session and recorded it at 12:50 a.m. but did not hear a motion or second for either the return to the public meeting or for the nomination of Bressler for the Board vacancy.

Nevertheless, Mrs. Tobiens was objective with respect to her recording Di Mare's statements of unethical conduct and the fact that Dr. Fernandez had provided information regarding the motion and seconding. As noted above, these questions pertain, in my view, to the propriety of action under the Board bylaws and Roberts Rules of Order which the petitioners have not, at this time, made the object of either a formal complaint or a motion to amend. What Mrs. Tobiens does not is the calling of the roll and recording of the vote and, again with candor, Mr. Barger's comment that this matter would have to be reviewed.

Based on the foregoing, I continue to accept Tobiens' account as the more objective, contemporary and well-informed version of what took place at the board meeting and notwithstanding my withholding of judgment as to the enforceability of bylaws, I **CONCLUDE** that there was no violation of the Open Public Meetings Act and therefore decline to **ORDER** a preliminary injunction.

Upon this Order I have no continuing jurisdiction and return the file to the Commissioner of Education for ongoing review.

This recommended order on application for emergency relief may be adopted, modified or rejected by **DR. JOHN ELLIS, COMMISSIONER, DEPARTMENT OF EDUCATION,** who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If **DR. JOHN ELLIS** does not so act in forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

DATE 2/13/96 — **WALTER F. SULLIVAN, ALJ**

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LINDA DI MARE ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administration Law in the form of an Order have been reviewed. Petitioners submitted a document dated September 1990 addressed to the Secretary to Dr. Ellis asking that a document addressed to the ALJ below dated August 28, 1990 be included in the file in this case. Said document, which appears to be a copy of the post-hearing submission presented to the ALJ, does not conform with the requirements for filing exceptions, first because there is no evidence that such document was intended to be exceptions. Secondly, no proof of service upon the Board or its attorney was provided to satisfy the requirements of N.J.A.C. 1:1-18.4. Finally, said submission was untimely filed with the Commissioner. Accordingly, such document has not been considered as exceptions in the Commissioner's review of this case.

Similarly, petitioner's exceptions, faxed to the Commissioner, were not received until October 4, 1990 and, thus, were untimely pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record developed in this matter, the Commissioner adopts as his own the finding and conclusion of the ALJ below denying pendente lite restraints pursuant to the standards set forth in such case law as Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) and Rennie v. Klein, 462 F. Supp. 1131 (D. N.J. 1978) for the reasons expressed in the initial decision. The Commissioner's consideration of the ALJ's holding on the injunctive relief sought herein is extended to any further Board meetings that may have occurred since the one held on August 15, 1990. The Commissioner finds that the ALJ's rationale for disallowing injunctive relief based on the meeting of August 15, 1990 must be extended to take into account any further meetings that have ensued since August 15, 1990.

However, the Commissioner's review of what the ALJ captions "MERITS OF THE CLAIM" (Initial Decision, at pp. 4-8) leaves concerns that require further explication or development of the record. Among these concerns are the following:

1. As it appears the ALJ considered the underlying merits of the claims advanced by petitioners, it is unclear why he

states "***I have no continuing jurisdiction and return the file to the Commissioner of Education for ongoing review." (Id., at p. 4) Do any matters remain unresolved in the ALJ's opinion? The ALJ repeats his understanding that he is resolving only the emergent aspects of the case wherein he states at page 3 "***[u]ltimately, the Commissioner's retention of the non-emergent aspects of this matter demonstrates that petitioners' potential claim respecting Robert's Rules is no more than deferred." N.J.A.C. 1:1 et seq. makes plain that matters considered by the Office of Administrative Law pursuant to N.J.A.C. 1:1-12.6(k) remain in the jurisdiction of the Office of Administrative Law after issuance of an initial decision on motion for interim relief if any issues remain to be resolved.

2. While it is true that the Petition of Appeal makes no mention of Robert's Rules of Order nor of the Board's bylaws, a full and fair disposition of this instant matter, raised by pro se petitioners, requires that the record be developed on whether the instant Board is governed by Robert's Rules of Order or by some other procedural policy and, further, whether it failed to conform to any such rules of order and whether any such failure impacted on the validity of seating Mrs. Bressler.

3. In resolving whether a violation of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq., occurred on the evening in question, the issue of notes recorded for the purpose of developing Board minutes was called into question.

From the ALJ's recitation concerning the dual Board minutes, no definite conclusion is apparent as to whether the Board followed appropriate procedure for resuming a public session in voting to seat Mrs. Bressler. While realizing that part of this confusion stems from the fact that the ALJ did not consider petitioners' argument made in reliance upon Robert's Rules of Order or the Board's bylaws because no such arguments were pled by the parties at the outset of the case, the problem is compounded by what appears to be a typographical omission of a word in the last sentence of the first complete paragraph on page 8. However, without an elaboration by the ALJ of what he believes transpired from 12:15 a.m. onward on July 12, 1990, it is unclear how he arrived at the conclusion that there was no violation of the OPMA. Notwithstanding this conclusion, it is plain to the Commissioner, based on his independent review of the record developed thus far, that petitioners have failed to sustain their burden of persuasion that they are likely to succeed on the merits of their claim based on their presentation before the ALJ on August 13, 1990. For this reason, and because there has been no demonstration of irreparable harm nor a showing that a stay would be in the public interest, the Commissioner affirms the ALJ's denial of preliminary restraints.

Accordingly, for the reasons expressed herein, the Commissioner adopts that part of the initial decision order denying emergent relief. He remands the ALJ's discussion of the merits of the case for a plenary hearing on all claims related to petitioners'

allegations of violation of Robert's Rules of Order, the Board's bylaws and allegations of violations of the OPMA in the seating of Mrs. Bressler to the vacancy on the Board in the night in question. In so remanding, the Commissioner directs that the ALJ delineate, step-by-step, the actions or inactions on the part of the Board which immediately succeeded the Board's coming out of executive session, if it did so, and the conclusions the ALJ arrives at based on those steps, so that the Commissioner may himself judge whether the Board's actions were in contravention of law or Board policy. Moreover, on the section of the initial decision dealing with whether a quorum was present at the time in question, the ALJ concludes that Mrs. Bressler was voted into office by a quorum based on "the totality of the circumstances." The Commissioner further directs the ALJ to specify exactly what the totality of circumstances were that led to his conclusion that a quorum was present on July 12, 1990 when the vote was taken.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5739-89
AGENCY DKT. NO. #237-7/89

MARJORIE R. BUNDY,
Petitioner
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF BEDMINSTER,
SOMERSET COUNTY,
Respondent.

Stephen E. Klausner, Esq., appeared on behalf of petitioner (Klausner & Hunter, attorneys)

William B. Rosenberg, Esq., appeared on behalf of respondent (Blumberg & Rosenberg, attorneys)

Record Closed: August 13, 1990 Decided: September 7, 1990

BEFORE DAVID J. MONYEK, ALJ:

STATEMENT OF THE CASE

Petitioner appeals from respondent's determination to withhold her salary increment for the 1989-90 school year, claiming that respondent's adverse action was arbitrary, capricious, unreasonable and unlawful.

PROCEDURAL HISTORY

On or about June 28, 1989, petitioner prepared and thereafter served and filed a petition of appeal disputing both the cause for and propriety of respondent's withholding of her increment for the 1989-90 school year. On or about July 28, 1989, respondent filed its answer to the petition of appeal theretofore filed by petitioner. Both of the aforesaid pleadings were filed with the Commissioner of Education of the State of New Jersey. On August 3, 1989, the Bureau of Controversies and Disputes, Department of Education of the State of New Jersey, transmitted the matter as a contested case to the Office of Administrative Law for determination in accordance with and 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 on November 22, 1989, and a Prehearing Order was prepared, served and filed on November 29, 1989. A plenary evidentiary hearing was conducted at the Green Brook Township Municipal Building, Green Brook, New Jersey, on May 17, 1990, at which place and time testimony was heard and proofs were proffered by and on behalf of both parties. At the conclusion of the hearing, on motion made and granted, counsel for the respective parties were given the opportunity to present written submissions and memoranda of law. The final memorandum was filed on August 13, 1990, the date of the closing of the record.

FACTS

On April 26, 1989, respondent adopted the following resolution:

> WHEREAS, the Administrative Principal has presented certain facts to the Board of Education with respect to Marjorie Bundy; and
>
> WHEREAS, based on those facts, the Administrative Principal has recommended the withholding of her increment; and
>
> WHEREAS, those facts amount to good cause for withholding the increment of Marjorie Bundy; and
>
> NOW, THEREFORE, BE IT RESOLVED by the Board of Education of the Township of Bedminster that the employment increment and adjustment increment of Marjorie Bundy shall be withheld for the school year 1989-90; and

BE IT FURTHER RESOLVED that the withholding of said increment shall continue in future years unless the Board of Education shall restore some [sic] as an adjustment increment N.J.S.A. 18A:29-14, and

BE IT FURTHER RESOLVED that written notice of this action together with the reasons therefore, [sic] shall be given to Marjorie Bundy within 10 days of this date. [Exhibit P-2]

On May 3, 1989, respondent sent petitioner the following letter:

The Bedminster Board of Education, at its regular meeting of Wednesday, April 26, 1989, voted to withhold your adjustment and employment increments for the school year 1989/90. The resolution, as adopted by the Bedminster Board of Education, is attached.

The reason for this action is behavior unbecoming that of a professional teacher, specifically:

> That on Friday, March 31, 1989, during the school's activity period (2:47-3:17) a seventh grade student, I.M., was pushed forcefully by you causing him to hit his back against the blackboard.
>
> That on Friday, March 31, 1989, during the school's activity period (2:47-3:17) a seventh grade student, C.G. , was pushed by you, first with your hands and second with your body.

In the Board's opinion, the above behavior constitutes good cause for its action. [Exhibit P-3]

The two incidents of March 31, 1989, which allegedly occurred between 2:47 and 3:17 p.m., referred to in the letter of May 3, 1989 (Exhibit P-3) were recounted at the hearing of the matter by C.G., I.M., S.S. , Marjorie R. Bundy and Carol Johnson.

C.G. , a seventh grade student at the time, testified that on March 31, 1989, because of the commission by him of a prior disciplinary infraction, he was not permitted to go to the All-Purpose Room with the remainder of the class, but rather was constrained to remain in the homeroom and busy himself with homework assignments while the rest of the class partook of fun activities. Because of ill behavior by the rest of the class at the All-Purpose Room, the fun period was cut short and the students returned to the classroom; the ill behavior continued in the classroom and a group of students engaged in teasing a female student by throwing her jacket back and forth. Although C.G. claimed not to have been among the teasers, he

acknowledged, nevertheless, that he was in the vicinity of the activity. Petitioner, in an effort to quell the disturbance, told C.G. to go to his seat. He ignored her. Accordingly, Mrs. Bundy approached him and he claimed that she raised her voice, and pushed his shoulder "a little bit," and that her shoulder and his shoulder made contact. In his statement given to Gertrude Doyle, Chief School Administrator, on April 4, 1989, C.G. claimed the two incidents here involved consisted of the following:

> It was activity period and I couldn't go to gym class. (because I got my name and a check on the board). Someone tied J.D.'s jacket to J.C.'s bag. J.C. was made [sic] and threw the jacket to me. I tossed it by the coat hangers. Everyone was calling her names. This time I wasn't involved in the name calling bit. Mrs. Bundy started yelling at me and then started to push me (two times). The class went to gym and came back five minutes later. I.M. just asked to go to the bathroom and she (Mrs. Bundy) just pushed him away. Just like she did to me. I didn't care that she did it to me but the look on I.M.'s face made me have to say something. Mrs. Bundy constantly calls us idiots and says that we are acting like crap all the time. [Exhibit P-7]

I.M. testified that the class was unruly at the All-Purpose Room, and Mrs. Bundy brought them back to the classroom "because we were being bad." He then claimed, "We got to the classroom and some kids were throwing around a girl's jacket." Then, he claimed, he went up to Mrs. Bundy's desk and asked her if he could go to the bathroom. He claimed that she didn't answer and he asked her again, at which time she told him to sit down and then she pushed him. He claimed that she pushed him on the right shoulder and when asked, "When you say pushed you, what do you mean by that?" he responded, "Well, she pushed me but it wasn't real hard." He then claimed that he went back to his seat and sat down. [T2 at 96-97]

S.S., a member of Mrs. Bundy's class and admittedly a friend of both C.G. and I.M., on April 11, 1989, approximately two weeks after the events of March 31, 1989, decided to go to the school office and make a statement, after discussing the matter with his two friends. He claimed that "Mrs. Bundy came in physical contact with both C.G. and I.M., pushing both of them." [T2 at 110]

Carol Johnson, a foreign-language teacher at the school who shared Mrs. Bundy's classroom, testified that she was seated at her desk during the entire time that both episodes were alleged to have taken place, and although she was aware of the general unruliness of the students at that time, she observed no untoward physical conduct

by Mrs. Bundy toward either C.G. or I.M. She did recall, however, I.M. coming up to her desk to ask if he could go to the bathroom, which request she too refused. She further noticed that C.G. appeared to be disgruntled and emotionally out of sorts.

Petitioner, Marjorie R. Bundy, testified on her own behalf. She is a tenured school teacher with 20 years' experience, has a Master's Degree and has been employed by respondent for approximately 8 years as a mathematics teacher. She testified that on the day in question she left three students behind in the classroom when the remainder of the class went to the All-Purpose Room, because the three left behind had been disruptive during the day. However, upon the remainder of the class commencing their play period at the All-Purpose Room, they, too, became disruptive and disobedient. Accordingly, she returned the students from the All-Purpose Room to the classroom. At that point the coat throwing incident broke out in the rear of the room and she approached C.G., who was encouraging and instigating further disruptive conduct by the coat throwers. Accordingly, she walked toward C.G. but he refused to make eye contact with her or respond to her requests. Therefore, she touched him on both shoulders to direct him to his seat. She denied using any force, but rather touched his shoulders with the palms of both her hands and walked with him about two feet to the area of his seat. At that point C.G. sat down and that episode concluded.

Mrs. Bundy testified that thereafter I.M. came to the side of her desk, put both hands on her desk, leaned over the desk and "put his face in my face." Reacting to this intrusion, Mrs. Bundy put her hands on I.M.'s arms and removed them from her desk. In response to the question, "What force, if any, did you use in removing the hands?" she replied, "I did not use force. It was an object, I just took it off the desk." [T2 at 22]

Mrs. Bundy testified that, thereafter, I.M. walked over to Mrs. Johnson's desk and asked her if she would excuse him, to which she, too, replied "no." Thereafter, I.M. "just went back and sat down." [T2 at 23]

APPLICABLE REGULATORY AUTHORITIES

On April 21, 1988, respondent adopted the following policies:

USE OF CORPORAL PUNISHMENT

The Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching.

Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

A teaching staff member who

1. uses force or fear to discipline a pupil except as such force or fear may be necessary to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil, to act in self-defense, or to protect persons or property;

2. or who touches a pupil in an offensive way even though no physical harm is intended;

3. or who permits pupils to harm one another by fighting;

4. or who punishes pupils by means that are cruel or unusual will be subject to discipline by this Board and may be dismissed.

N.J.S.A. 18A:6-1; 18A:27-4; 18A:37-1

[Exhibit R-1]

WITHHOLDING AN INCREMENT

Advancements on the salary guide, including annual employment and adjustment increments, are not automatically granted and must be earned by satisfactory performance. Advancements require favorable evaluations of the employee's performance of assigned duties, a satisfactory attendance record, and adherence to the rules of this district and high standards of professional conduct.

The Board of Education may determine, by recorded roll call majority vote of the full membership and at any time prior to the commencement of the school year or contract year in which the employee's salary will vest, to withhold any or all of the increments indicated by the salary guide or by Board policy. In no case will the Board withhold a portion of an increment.

The Board shall, within ten days of its formal action to withhold an increment, give written notice to the affected employee of both the action and the reason or reasons for which it was taken.

> The purpose of the Board in withholding increments is to improve the educational program and encourage the highest possible professional performance of its employees. Accordingly, all reasonable efforts will be made to inform employees of any deficiencies that may result in the withholding of an increment and to assist them in the correction of those deficiencies.
>
> An increment withheld may be restored only by the action of the Board. Nothing in this policy shall limit the right of a successor Board to restore an employee from whom an increment or increments have been withheld to that place on the salary guide he or she would have achieved had the increment or increments not been withheld.
> N.J.S.A. 18A:29-14
> [Exhibit R-2]

ANALYSIS

Based upon the totality of the evidence presented, it is both undisputed and uncontroverted that petitioner did, in fact, physically touch two students on the day in question. However, even the two students directly involved claimed that the touching was light, minimal and painless. Mrs. Bundy claimed that the touching of C.G. was directional rather than forceful, and the touching of L.M. consisted of removing his hands from her desk after he offensively intruded himself upon her, by placing his hands upon her desk and putting his face close to hers, after initially being refused permission to leave the room.

Mrs. Bundy appeared to be a sincere, truthful, credible and candid witness. Both what she said and the manner in which she testified rang exceedingly true. She further appeared to be an extremely mild-mannered person who does not exhibit tendencies toward physical force and violence. This observation is confirmed by her most recent teacher evaluation form (Exhibit P-1).

In sum, I **FIND** and **CONCLUDE** that on the date and at the time in question Mrs. Bundy used neither force nor fear to discipline anyone. Further, I **FIND** and **CONCLUDE** that although petitioner did touch both I.M. and C.G. , the touching was neither offensive, aggressive nor forceful. In one case it was directional and gently persuasive; in the other it consisted of a mild and necessary response to an assault or threat upon her person, private space and dignity. Therefore, I **CONCLUDE** that petitioner acted properly, reasonably and judiciously under the circumstances then and there existing.

CONCLUSIONS OF FACT

1. Petitioner did not use force or fear to discipline any pupil on March 31, 1989.

2. Petitioner touched neither I.M. nor C.G. in an offensive way and did not inflict harm or damage upon or to either of them.

3. Petitioner was the victim of an assault or threat by I.M. and reacted reasonably and judiciously by removing his hands from her desk.

4. Petitioner, at no time, used non-allowable physical force or the threat of non-allowable physical force in either of the incidents here in question to maintain discipline or compel obedience.

CONCLUSIONS OF LAW

1. Petitioner did not use corporal punishment on March 31, 1989.

2. Petitioner did not violate respondent's policy of July 21, 1988, regarding the use of corporal punishment.

3. Petitioner's behavior of March 31, 1989, was not unbecoming that of a professional teacher employed by the Board of Education of the Township of Bedminster.

RECOMMENDED DISPOSITION

Based upon the testimony heard and evidence adduced, it is hereby **ORDERED** that petitioner's adjustment and employment increments for the school year 1989-90 be and are hereby **RESTORED**. It is further **ORDERED** that any and all resolutions, records, and other data disciplining, criticizing or in anyway prejudicing petitioner for the incidents of March 31, 1989, be forthwith rescinded, revoked, nullified and expunged.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

9/7/90
DATE

DAVID J. MONYEK, ALJ

Receipt Acknowledged:

9/10/90
DATE

DEPARTMENT OF EDUCATION

SEP 17 1990
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

am

MARJORIE BUNDY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner filed timely reply exceptions thereto.

The Board raises four points of exceptions which are summarized, in pertinent part, below.

POINT ONE

THE COMMISSIONER SHOULD REJECT JUDGE MONYEK'S INITIAL DECISION BECAUSE PETITIONER FAILED TO CARRY [HER] BURDEN OF PROOF, AND JUDGE MONYEK MADE CONCLUSIONS OF LAW DISREGARDING THE PROPER LEGAL ALLOCATION OF THE BURDEN OF PROOF.

Citing Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960) for the proposition that the local Board's decision to withhold an increment of a teaching staff member may not be upset unless found to be arbitrary, without rationale basis, or induced by improper motives, the Board claims the ALJ below did not indicate that the instant withholding was any of these. Citing the transcript of the hearing below at Tr. 2-136-142, the Board avers that none of the ALJ's conclusions of law find that he supported his decision by a finding that either of the Kopera standards was breached. The Board further contends that the ALJ admonished petitioner's counsel that he presented no evidence as to what was considered by the Board in withholding petitioner's increments and, thus, that the ALJ stated that he could make no ruling as to whether the Board acted arbitrarily or was induced by improper motives. The Board cites the same section of the transcript for this proposition.

The Board also argues that the ALJ exceeded the scope of his review and substituted his own view of whether petitioner's contact with the children in question was reasonable or not. It further contends that in light of petitioner's poor evaluation and admitted inability to control her students without resorting to physical force on two separate occasions within a one-half hour time span, the ALJ erred in concluding that the Board's action was arbitrary, unreasonable or improperly motivated.

POINT TWO

JUDGE MONYEK'S RELIANCE ON THE TESTIMONY OF CAROL JOHNSON WAS IMPROPER AND HIS BASIS FOR SAME IS COMPLETELY CONTRADICTED BY THE RECORD.

The Board avers that the ALJ's conclusion that Ms. Johnson, who shared petitioner's classroom and was present during the two incidents in question, "observed no untoward physical conduct by Mrs. Bundy towards either [C.G.] or [I.M.]" (Exceptions, at p. 4) is subtly, but directly contradicted by Ms. Johnson's testimony. It claims that no weight should be given to the testimony of Ms. Johnson to the effect that she did not see or hear anything going on in the classroom at the time in question, citing Tr. 1-67-68 for this testimony, because even under petitioner's own testimony and admissions, there was physical contact between her and each of the two boys, albeit that she contends such physical contact was not corporal punishment and was not forceful.

The Board goes on to suggest that the ALJ compounded the error of giving weight to Ms. Johnson's testimony by misrepresenting it. The Board claims Ms. Johnson never said she observed "No untoward physical contact by Mrs. Bundy towards either [C.G.] or [I.M.]" (Exceptions, at pp. 5-6), as the ALJ suggests. Rather, the Board claims, Ms. Johnson's testimony was that she observed "no conduct" not "no untoward conduct." (Exceptions, at p. 6, quoting unreferenced transcript) Thus, the Board submits, the ALJ's reliance on Ms. Johnson's testimony was factually incorrect and insupportable as a matter of law.

POINT THREE

JUDGE MONYEK'S RELIANCE ON PETITIONER'S TESTIMONY IS NOT SUPPORTED BY THE RECORD.

The Board relies on petitioner's most recent evaluation where it is stated that improvement was needed in the area of "maintains discipline by being friendly, fair and firm." (Exceptions, at p. 6, quoting uncited evaluation) It is also stated at another place in said evaluation that petitioner "Does not follow assertive discipline plan" to counter the ALJ's statement that petitioner appeared to be "extremely mild-mannered, not exhibiting tendencies towards physical force and violence." (Id.) The Board contends that nowhere in the evaluation is there a category for mild-manneredness or one for exhibiting no tendencies toward physical force and violence. It adds that even if there were, this is hardly a basis to determine someone's credibility.

The Board also claims that the touchings averred in this case were not "light, minimal and painless" as the ALJ surmised but, rather, that in the case of I.M. the force from petitioner's contact hurt him "a little bit." (Exceptions, at p. 7, quoting Tr. 2-101) He later explained, according to the Board that "It wasn't hard, it wasn't soft, in between." (Id., quoting Tr. 2-98) Thus, the Board avers, the ALJ equated "light and minimal" with "medium and painless" to be the same as "It hurt a little bit." (Exceptions, at

p. 7) With respect to C.G., the Board cites Tr. 2-58-9 for its contention that the student used the words, "pushed" and "shoved," but did not differentiate as to whether the pushing and shoving was light, minimal and painless, or greater than light and minimal and painful. The Board avers the ALJ erroneously inferred that the contact was light and minimal in the absence of any testimony to support such a finding.

Moreover, the ALJ's account of the incident whereby petitioner denied pushing the student off her desk into the blackboard is not credible from even the teacher's rendering of what transpired, the Board submits. It cites petitioner's testimony at Tr. 2-22. The Board contends:

> Judge Monyek's acceptance of this testimony at face value is, again, insupportable. In evaluating the Petitioner's credibility, Judge Monyek obviously did not consider that a more proper response for an adult teacher who allegedly felt threatened by a thirteen year old child asking to go to the bathroom was to first ask the child to remove his hands before physically removing them by force. At best, even if her testimony was credible, the Petitioner's inappropriate response to the child's request to go to the bathroom was sufficient in and of itself to justify the Board's increment withholding. It is submitted that it was plain error for the Judge to find that the Board should condone this teacher's use of physically removing a child's hands from her desk without at least asking the child to remove his hands first, even if he believed the teacher's version of the events.
>
> Secondly, the Petitioner's statement that she did not use force is contradicted by every elementary lesson of physics. In order to remove any object, she had to use some kind of force. In characterizing the student's hands as an object, she was insensitive to the actual force that she necessarily used in removing those hands. Judge Monyek, who twice on the record noted his own sensitivity to differences in perception by people who are part of any event, (See Tr. 2, 61, 87) failed to perceive that a teacher removing a person's hands from a desk in an obviously annoyed and threatened state, unaware that she used any force at all, might have had no perception whatsoever that she was using unnecessary physical force on the child.
>
> (Exceptions, at pp. 9-10)

It is the Board's position that the ALJ determined whether the physical force used by petitioner was acceptable, thus, substituting his opinion for the Board's in its evaluation of the

teacher's performance as a disciplinarian. It contends that given petitioner's poor evaluation and the Board's awareness of it, the Court could only conclude that the Board acted properly under the circumstances.

POINT FOUR

JUDGE MONYEK'S NON-RELIANCE ON THE TESTIMONY OF THE THREE STUDENTS WAS ERROR.

The Board contends the statements of the three students, the two students involved, C.B. and I.M., and S.S. who was a witness, should have been given great weight by the ALJ. The Board states that all three students indicated they were friendly with petitioner and have no ax to grind with her. The Board further claims that all three students took on the risk of future uncertainty in their relationship with the teacher by testifying in an adult forum with the prospect of no personal gain from it.

In summary, the Board contends that the ALJ committed errors both in his factual findings and his application of law. The Board contends the recommended decision should be rejected and the action of the Board be affirmed and enforced.

Petitioner's reply to the Board's exceptions submit that all issues raised in the Board's exceptions were fully litigated and briefed previously. Petitioner's counsel annexes his post-hearing memorandum to the ALJ and suggests that a review of that brief and the transcript leads to the conclusion that Judge Monyek's credibility findings are fully sustainable and should not be rejected.

Upon a careful and independent review of the record of this matter, the Commissioner affirms the findings and conclusions of the ALJ below for the reasons expressed in the initial decision as supplemented herein. In response to the exceptions, the Commissioner first notes that the standard of review governing the Commissioner's review of the withholding of a teaching staff member's increments is embodied in the case captioned Kopera, supra. Therein the Court established that the Commissioner's scope of review is limited to assuring that there exists a reasonable basis for the Board's decision to withhold an increment. Exercise of the discretionary powers of the local board in such managerial situations may not be upset unless patently arbitrary, without rational basis or induced by improper motives. It was further established in Kopera that the burden of proving unreasonableness rests upon the party challenging the board's action. (Id., at 297)

The Commissioner is mindful, in reciting these standards, that his review of the factual determinations of an ALJ is narrow. The Appellate Division in Parker v. Dornbierer, 140 N.J. Super. 185, 188 (App. Div. 1976) has stated that such standard of review is limited to "whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility.***"

(emphasis in text) The Commissioner's review of the record of this case, which includes the transcript of the hearing below, supports not only the ALJ's credibility determinations, but the conclusions of law developed based on the witnesses' testimony.

In resolving the question of whether the conduct of Ms. Bundy in this matter constitutes corporal punishment, the Commissioner recites for the record the statute which speaks to corporal punishment. N.J.S.A. 18A:6-1 provides:

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

The underlying philosophy of this statute has been described by the Commissioner as the right of the student to freedom from offensive bodily touching even though there is no physical harm. In the Matter of the Tenure Hearing of Frederick L. Ostergren, 1966 S.L.D. 185, 186. See also, In the Matter of Portia Williams, School District of the Borough of Red Bank, 1981 S.L.D. 931, aff'd State Board 1982 S.L.D. 1592, aff'd New Jersey Superior Court Appellate Division 1982 S.L.D. 1594.

In regard to the incident concerning C.B., the Commissioner finds that whatever touching may have occurred was an appropriate act on the part of petitioner to quell a disturbance among a group of students taunting another by throwing her jacket from student to student. C.B. admitted that he had thrown the jacket back to its owner (see Exhibit 7) just before petitioner approached him. He also admits that this behavior occurred after he was forbidden from joining his classmates in a gym class because of prior poor behavior earlier in the same day. Nothing in either the Board's policy regarding corporal punishment (Exhibit R-1) or its policy on withholding an increment (Exhibit R-2) speaks to a prohibition against physically directing a student to be seated under

circumstances where the education process is disrupted by dangerous student misbehavior. To the contrary, the Board's policy appears to exempt teachers from punishment when force is necessary "***to quell a disturbance threatening physical injury to others***". (Exhibit R-1) Reference to P-7, C.B.'s own statement, indicates that "[he] tossed it (the jacket) by the coat hangers." See also Tr. 2-72. Under circumstances where such teasing and shenanigans could potentially lead to eye injury or other bodily harm, petitioner's actions in removing C.B. from the situation to his seat by touching his shoulder could not be deemed in any way untoward and, certainly, not corporal punishment warranting penalty. See Laurence Tave v. Board of Education of the Manalapan-Englishtown Regional School District, Monmouth County, decided by the Commissioner May 28, 1987, aff'd State Board November 4, 1987. (Petitioner's act of pushing a student into his chair to protect another student was reasonable use of force not constituting corporal punishment). See also In the Matter of the Tenure Hearing of Basil Fattel, School District of Paterson, 1977 S.L.D. 941. (No corporal punishment found where respondent placed hands on pupil's face where his defiant, unruly behavior endangered other pupils.) For these reasons, as well as those expressed in the initial decision, the Commissioner finds no corporal punishment occurred between petitioner and C.B.

As to the other encounter between petitioner and I.M., the Commissioner's review of the matter uncovers no basis for rejecting the ALJ's credibility determinations which led him to the conclusion that petitioner's touching I.M. was neither offensive, aggressive nor forceful but, rather, "consisted of a mild and necessary response to an assault or threat upon her person, private space and dignity." (Initial Decision, at p. 7) The Commissioner is fully cognizant of every student's right to be free from offensive bodily touching. In the Matter of the Tenure Hearing of David Fulcomer, 1962 S.L.D. 160, 162, remanded State Board of Education 1963 S.L.D. 251, decided by the Commissioner November 13, 1964, aff'd State Board of Education, March 2, 1966. Having observed the witnesses and heard their testimony, the ALJ concluded that whatever contact occurred involving petitioner and I.M. was proper, reasonable and judicious under the circumstances. The record supports those conclusions of fact and law as found by the ALJ on page 8 of the initial decision. In fact, the Board's own exceptions at page 12 state that "[u]nder [the students'] testimony, the pushings did not result in serious injury***." Neither student sought medical attention (Tr. 2-75) and, in fact, upon reporting the actions to Mrs. Doyle, Chief School Administrator, some time after school, were told to return on Monday (Tr. 2-102). Accordingly, such conclusions of fact and law are adopted as the Commissioner's own for the reasons expressed in the initial decision.

In so concluding, the Commissioner rejects the Board's contention that petitioner's refusing to allow I.M. to go to the bathroom in itself constitutes a reasonable basis for withholding her increments. The absurdity of this argument is made plain in recognizing that the other teacher present in the room at the time of this encounter, Ms. Johnson, was also approached by I.M. after

petitioner refused his request. Ms. Johnson also denied him permission to use the bathroom during the last few minutes of the day's classes. If the Board were persuaded that refusal to allow I.M. to use the bathroom under the circumstances extant in this situation were grounds for withholding increments, both Mrs. Bundy and Ms. Johnson would have had their increments withheld. No such fact has been presented in this matter. Further, had the Board believed such refusal constituted a basis for withholding, it could have advanced that as a specific reason.

Concerning the exception voiced by the Board that the ALJ overstepped his authority in this matter by substituting his judgment for that of the Board, the Commissioner reiterates that the Kopera standard requires the ALJ and the Commissioner to evaluate the Board's decision in light of the facts presented. In the Commissioner's view, as well as the ALJ's, the facts upon which the Board presumed it had a reasonable basis to withhold petitioner's increments were not as represented to it, as evidenced by the ALJ's conclusions of fact as found on page 8 of the initial decision after his careful consideration of the demeanor and testimony of all witnesses.

The Commissioner also rejects the Board's argument that petitioner's poor evaluation justified the withholding of her increments. The Board's resolution (P-2) and its letter of May 3, 1989 announcing the withholding to petitioner make no reference of petitioner's evaluation. If the Board believed petitioner's record of performance was so lacking in merit it could have moved to withhold her increments on that basis. However, the documentation in the record before the Commissioner regarding the Board's rationale for withholding petitioner's increments speaks only to the corporal punishment allegations as justifying its actions. The Commissioner thus adopts those findings of fact, as well as the ALJ's conclusions of law, as his own in this matter. Based upon the testimony heard and evidence adduced, the Commissioner finds and determines that the Board's action in withholding petitioner's 1989-90 adjustment and employment increments was arbitrary and is accordingly reversed. The Commissioner directs that said increments be restored. It is further directed that any and all resolutions, records and other data disciplining, criticizing or, in any way, prejudicing petitioner for the incidents of March 31, 1989 be forthwith rescinded, revoked, nullified and expunged.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9594-89
AGENCY DKT. NO. 337-11/89

CATHERINE LAMMERS,
Petitioner,
v.
POINT PLEASANT BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for petitioner, (Klausner & Hunter, attorneys)
James P. Brady, Esq., for respondent, (Novins, York, DeVincens & Pentony, attorneys)

Record Closed: August 8, 1990 Decided: September 20, 1990

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

Catherine Lammers (petitioner), a teacher with a tenure status in the employ of the Point Pleasant Borough Board of Education (Board), claims that following a reduction-in-force resulting in the termination of her employment effective June 30, 1989, the Board violated her tenure protection by its employment of a non-tenure teacher in a position to which she is entitled. The Board defends on the basis that the individual to whom petitioner refers was employed by it as a permanent substitute, employment to which petitioner's tenure claims does not apply.

After the Commissioner of Education transferred the matter on December 19, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted March 1, 1990 during which the parties agreed the issue of the case is as follows:

> Whether petitioner establishes by a preponderance of credible evidence that the Board violated her tenure and/or seniority rights regarding the employment of a nontenure full time language arts teacher for 1989-90 without having offered her that position following the termination of her employment on or about June 30, 1989 [as the result of a] reduction-in-force.

The parties agree that all relevant facts are stipulated so that the issue may be decided on cross-motions for summary decision and supporting letter memorandum.

Findings are reached in this inital decision that petitioner established by a preponderance of credible evidence an enforceable claim to continued employment with the Board for 1989-90. The conclusion is reached, therefore, that the Board violated petitioner's rights by its refusal to continue such employment.

FACTS

While counsel to the parties did not file a formal stipulation of fact, it is agreed that the relevant facts may be gleaned from the pleadings and their respective letter memorandum. The facts are not complex and they are as follows:

1. Petitioner has been employed by the Board as a teacher of English on the secondary level for the academic years of 1985-86, 1986-87, 1987-88, and 1988-89, and, consequently, acquired the status of tenure.

2. Petitioner is in possession of an instructional certificate with an endorsement as a teacher of English. This endorsement authorizes petitioner to reach English at "all levels." N.J.A.C. 6:11-6.1(a).

3. During April 1989 petitioner was notified by the Board, through its superintendent of schools, that her employment would be subject to reduction-in-force and that her position of employment as a teacher of English-secondary was to be abolished as of June 30, 1989. (Exhibit B) No argument is advanced that the reduction-in-force was made in bad faith.

4. During the 1989 summer another teacher of English assigned to the Board's Middle School, grades six, seven, and eight, applied for and received a maternity leave of absence for the 1989-90 academic year.

5. The Board, pursuant to N.J.A.C. 6:27-1.2(b),[1] considers grades seven and eight to be part of its elementary organization, even though these grades are in its Memorial Middle School. The Board requires teachers in grades kindergarten through eight to hold an instructional certificate-elementary.

6. On August 10, 1989 the Board approved the full-time employment of a non-tenure teacher, Sandra Anthony, to teach English primarily at grade eight, but with one class of pupils at grade seven.

7. Petitioner was not offered the employment offered to Ms. Anthony for the 1989-90 academic year. Ms. Anthony's contract of employment (Exhibit E) is a standard teacher's contract pursuant to N.J.S.A. 18A:27-5, but with "LONG TERM SUBSTITUTE" emblazoned on the top of the document. Ms. Anthony's 1989-90 salary of $22,500, the amount at the first step of the Board's teachers' salary policy, was fixed by the Board pursuant to Article X, Section A, paragraph 8, of the 1988-1990 Agreement between it and the Point Pleasant Education Association which provides as follows:

> During the school year those teachers who are hired to replace teachers who terminate employment or who are granted leave during the course of the school year shall be considered to be in Category A or Category B and said teachers shall be classified as short-term temporary substitutes.
>
> Category A: Teachers who are contractually hired before January 1, to complete the school year will be issued a regular teacher's contract, will be entitled to all benefits thereof, and will be members of the association's unit * * *
>
> Category B: Teachers who are hired after January 1 shall accure no benefits other than pro rata sick leave.
>
> Nothing in this section shall be construed to impair the right of the Board of Education to hire per diem substitutes nor shall this section be construed to either enhance or diminish the accrual of tenure rights, if any, of short-term temporary substitutes.

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[1] Repealed December 18, 1989. See N.J.R. 2441(c), 21 N.J.R. 3933(a).

8. Ms. Anthony, even though the Board claims she was employed as a substitute teacher, was enrolled in the Teacher's Pension and Annuity Fund upon Board certification that she was eligible for such membership by virtue of her employment with it as a teacher.

9. The superintendent filed an affidavit in which he attests that since at least 1982 the Board "... erroneously but routinely enrolled substitute teachers in the Teachers' Pension and Aunnuity fund."

LEGAL ARGUMENTS

Petitioner argues that a board of education may not employ a nontenure teacher to perform full-time instructional services within a particular subject area when, as here, a tenure teacher with reemployment rights in that subject area has not been recalled to fill that full-time instructional position. Petitioner citing, among others, Bednar v. Westwood Board of Ed., 221 N.J. Super 239 (App. Div. 1987), Capodilupo v. West Orange Board of Ed., 1986 S.L.D. - (St. Bd of Ed.), aff'd 218 N.J. Super 510 (App. Div. 1987), and Grosso v. New Providence Boro Bd. of Ed., 1990 S.L.D. - (St. Bd. of Ed., March 7, 1990), contends it is of no legal consequence that Ms. Anthony was employed to replace a teacher who was on an approved leave of absence because she is employed in a full-time position for the entire academic year, the position is at the secondary level in which she, petitioner, has served the Board during her employment, and that the refusal of this Board to reemploy her instead of Ms. Anthony violates her seniority rights under N.J.S.A. 18A:28-11 and 12. Petitioner claims that the Board is without authority to fill a secondary level English vacancy with a nontenure teacher when she, petitioner, is on a preferred eligible list for reemployment.

The Board argues it did not violate either petitioner's tenure rights or her seniority rights because Ms. Anthony is employed by it as a substitute teacher in the stead of its regularly assigned teacher and, as such, Ms. Anthony is not employed in a teaching position. The Board explains that neither tenure nor seniority entitlements provide petitioner with any claim to be appointed as a substitute teacher because tenure and seniority only provide for claims to a position which becomes vacant. The Board distinguishes this case from the cases relied upon by petitioner by noting that in each of

the cited cases a vacancy in a position of employment actually existed so that the tenure and/or seniority claims of each plaintiff was found to be superior over nontenure teachers employed by the respective boards of education. The Board asserts that it simply exercised its right under N.J.S.A. 18A:16-1.1 to employ a substitute teacher, Ms. Anthony, to act in the place of the regularly assigned teacher during that teacher's leave of absence. The Board, in support of its position, relies upon N.J.S.A. 18A:1-1, 18A:16-1.1, 18A:28-5 and - 12, in addition to Spiewak v. Rutherford Board of Ed, 90 N.J. 63(1982) and, in some measure, Sayreville Educ. Ass'n. v. Board of Ed of Bor. of Sayreville, 193 N.J. Super 424 (App. Div. 1984). Finally, the Board argues that it would be unfair to the teacher on leave to allow petitioner's claim to stand because the on-leave teacher, who theoretically may have had 10 more days seniority than petitioner prior to the leave, could lose her employment because during her leave she would accumulate only 30 days seniority while petitioner, if given the employment because it is a "position", would accumulate one full year of additional seniority. Thus, when on-leave teacher attempted to return, petitioner's seniority claim would be superior.

The essential argument made by petitioner is that she is entitled to the employment held by Ms. Anthony during 1989-90 by virtue of her tenure or seniority rights which are superior to any claim Ms. Anthony may have had with the Board. The Board's essential argument is that neither petitioner's tenure nor seniority rights give her any claim to the employment held by Ms. Anthony because that employment was in the nature of substitute employment and the selection of substitutes for its schools is within its sole discretion under N.J.S.A. 18A:16-1.1. In short, the Board says no position vacancy existed to which petitioner's tenure or seniority rights applied.

ANALYSIS

There is a legal distinction between a teaching staff member, as that term is defined at N.J.S.A. 18A:1-1, and a substitute teacher although occasionally the distinction becomes blurred in practice. A substitute who, having met minimum requirements for the possession of a county substitute certificate set forth at N.J.A.C. 6:11-4.4, or higher requirements as may be set by the employing board, may be employed by the a board to

"act in place of any * * * employee during the absence * * * of any such * * * employee but no person so acting shall acquire tenure in the * * * employment in which he acts pursuant to this section when so acting." Case law supports the distinction between teaching staff members and substitute teachers in that a substitute teacher is not entitled to statutory benefits afforded regularly employed teachers. See, Spiewak, Supra; Driscoll v. Board of Ed. of City of Clifton, Passaic County, 165 N.J. Super 241 (App. Div.), aff'd 79 N.J. 126 (1978). However, the same decisions reject any effort by a board of education to affix the label substitute to an individual otherwise employed by it as teaching staff member in order to avoid having that person denied the statutory benefit of tenure. In Sayreville Educ. Ass'n., supra, the following was said:

> We construe [N.J.S.A. 18A:16-1.1] as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis * * * The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, than the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the observations in Spiewak v. Rutherford Board of Ed., 90 N.J. at 77, that the exception to the tenure statute which N.J.S.A. 18A:16-1.1 constitutes 'is limited to employees hired to take the place of an absent teacher.' Again the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.
>
> Clearly, a local board of education could not indefinitely fill a vacancy by the statutory substitute technique, no matter how financially advantageous it might be. Nor could it use that technique to fill a vacancy for a full academic year. Any such attempt would constitute an obvious effort to circumvent school laws and would be condemned as such * * *.
>
> 193 N.J. Super at 428.

Petitioner's tenure status, acquired under N.J.S.A. 18A:28-5 in the position of teacher, affords her the benefit of protection of employment in that position from dismissal or reduction in compensation except for cause or as a result of a reduction in force. Petitioner's tenure gives rise to a companion enforceable seniority claim when, during a reduction in force, a choice must be made between two or more teachers who have acquired tenure but who compete for one remaining position. Tenure, on the other

hand, is a superior right to continued employment over a nontenure teacher, assuming the tenured teacher is properly certificated for the particular position. See, Bednar, supra 221 N.J. Super 239.

The Board's argument that petitioner's claim is defeated because Ms. Anthony's employment was that of a substitute is appealing, and it is facially supported by the employment contract which contains the legend 'long-term substitute.' However, petitioner's claim must be examined against the circumstances of the employment of Ms. Anthony; not soley on the basis Ms. Anthony was assigned the classroom of a regular teacher who was on an approved leave of absence. While a Board of Education may engage the services of a substitute teacher to temporarily take the place of an incumbent who is absent, such a technique may not be used to fill a vacancy for a full academic year, Sayreville, supra.

The circumstances of the employment relationship between the Board and Ms. Anthony are these. The Board executed a standard teacher's contract with Ms. Anthony for her employment; the Board established Ms. Anthony's salary at the first step of its regular teachers salary guide; the Board extends the title "teacher" to those who are hired to replace teachers granted leave during the course of the school year albeit by virtue of the negotiated Agreement; and, the Agreement provides that the replacement teachers shall be members of the Point Pleasant Education Association who are entitled to all benefits of a regular teachers contract, and all benefits contained within the agreement. Two remarkable features regarding the employment relation are (1) the Board enrolled Ms. Anthony in the Teachers Pension and Annuity Fund upon its own certification she was employed by it as a teacher, not as a substitute teacher, despite the attestation of the Superintendent that such enrollment was error, and (2) the Board engaged Ms. Anthony for the full 1989-90 academic year. If an error was made regarding Ms. Anthony's enrollment, it was not of her making.

These conditions of employment taken as a whole establish that Ms. Anthony was not employed as a per diem substitute nor as a short-term temporary substitute. Rather, all evidence in this case establishes Ms. Anthony was employed with all the emoluments and benefits afforded the Board's regularly employed teachers. That being so, the legend "Long-Term Substitute" emblazoned on top of Ms. Anthony's employment

contract loses all legal significance for purposes of petitioner's claim. Ms. Anthony, without deciding the legal nature of her employment which is better left for her to pursue in her own right, was certainly employed by the Board in a manner which treated her as a regularly employed teacher, who received a regularly employed teacher's salary according to training and experience while petitioner, whose tenure is to protect her employment, was involuntarily unemployed by the Board.

The Board's contention that petitioner is not qualified to teach English at the seventh and eighth grade levels because it has determined such levels to be part of its elementary organization and, as such, it requires elementary certification which petitioner does not possess, is rejected. N.J.A.C. 6:11-6.1(a) authorizes petitioner to teach English at all levels in a public school, including elementary levels. The desire of the Board to employ individuals with an elementary endorsement is an additional qualification on petitioner's comprehensive endorsement. Such an additional requirement may not be used to defeat whatever right petitioner may have to that employment. This is not a case in which petitioner is competing with another tenured teacher in order to determine which of the two has greater seniority to a particular position. Rather, it is a claim by petitioner that by virtue of her tenure of employment she should have been employed during 1989-90 over Ms. Anthony, a nontenure teacher, to teach English and because she is properly qualified through the possession of her instructional certificate to do so.

Obviously, when the regularly assigned teacher commenced her leave of absence a position vacancy did not result. But, because Ms. Anthony was assigned that teacher's classroom for the 1989-90 academic year does not result in the legal conclusion, particularly in light of all the circumstances, that the Board employed Ms. Anthony as a "substitute" teacher who is not otherwise entitled to all of the above emoluments and benefits afforded regularly employed teachers. Whether Ms. Anthony employment status is that of a substitute or of a regularly employed teacher may not be reached on this record. The record is sufficient, nevertheless, to conclude that petitioner's tenure which affords her protection of employment entitled her to employment with the Board for 1989-90 in the same manner and with the same benefits afforded Ms. Anthony. So that there is no doubt, petitioner by virture of her tenure status was entitled to employment

during 1989-90 as the teacher assigned the classroom of the on-leave teacher at a salary commensurate with her academic training and years of experience, together with all of the other benefits and emoluments of employment afforded all other teachers.

It is true as the Board points out in its hypothetical that should petitioner and the on-leave teacher be closely tied regarding their seniority at the commencement of the leave of absence, the teacher who takes the leave of absence would fall behind petitioner in total seniority. That is the very purpose of the seniority regulations to grant seniority credit for time served in the employ of the Board while performing the teaching duty.

For the foregoing reasons, I **CONCLUDE** that the Board in the total circumstances of this case violated petitioner's enforceable claim to continued employment as provided her through her tenure status by its employment of Ms. Anthony, a nontenure teacher, for 1989-90. I **FURTHER CONCLUDE** that had petitioner been employed by the Board during 1989-90 she would have earned salary commanded by virtue of her training and her experience pursuant to the Board's teachers' salary policy. In addition, petitioner would have accumulated one additional year of seniority and she would have received all other benefits and emoluments afforded of teachers regularly employed by the Board. Therefore, the Board is hereby **ORDERED** to pay to petitioner that sum of money it deprived her of earning during 1989-90 by way of salary, less normal deductions, mitigated by outside employment. The Board is also **ORDERED** to credit petitioner's seniority total by one additional year and it is **FURTHER ORDERED** to provide her all other benefits and emoluments she would have received had she not been improperly denied continued employment.

IT IS SO ORDERED.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

September 29 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

9/27/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

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DATE

OFFICE OF ADMINISTRATIVE LAW

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CATHERINE LAMMERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF POINT PLEASANT, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Late exceptions from the Board of Education were received together with a request for an extension in filing time. However, because the request for extension was filed beyond the period permitted by N.J.A.C. 1:1-18.8, with no showing of emergency or other unforeseeable circumstance as required by law, the Board's submission was denied consideration by the Commissioner. Reply exceptions submitted by petitioner in the event that the Board's exceptions were admitted essentially reiterate arguments made before the ALJ and need not be detailed herein.

Upon careful review, the Commissioner concurs with the ALJ that petitioner was entitled by virtue of her tenure status to the position given by the Board to a nontenured long-term substitute. That the position in question resulted from a leave of absence as opposed to a vacancy is of no import in a situation of the type litigated herein; the crux of this matter is that the protection envisioned by the tenure laws does not permit a district to ignore the presence of a properly certified teacher on its preferred eligibility list when an assignment within the scope of his or her certification becomes available for any reason. To hold otherwise would render the protection of tenure a nullity in RIF situations where seniority is not at issue.

The Commissioner does, however, wish to clarify certain statements made during the course of the initial decision, lest any confusion or uncertainty arise from his affirmance of the ALJ's basic reasoning and conclusions. Initially, the Commissioner wishes to qualify the ALJ's generalization (at page 5) regarding district employment of persons holding county substitute certificates by noting that the scope of such employment is strictly limited as to time, benefits and permissibility pursuant to N.J.A.C. 6:11-4.4, and that the county substitute certificate is not the generally accepted credential for substitutes employed pursuant to N.J.S.A. 18A:16-1.1. Secondly, while the ALJ does not accept the Board's arguments with respect to considering grades 7 and 8 as "elementary" for organizational and teacher certification purposes even though instruction therein is departmentalized (at pages 4 and 8), it is not sufficiently clear that regardless of how a district views its organizational arrangement, departmentalized seventh and eighth grades are specifically classified as "secondary" rather than "elementary" for employee entitlement purposes (N.J.A.C. 6:3-1.10(1)19, 20).

Accordingly, with the clarifications noted above, the initial decision of the Office of Administrative Law is adopted as the final decision in this matter, and the Point Pleasant Board of Education is directed to comply with the orders of the ALJ regarding compensation, employment credit and other benefits due petitioner as a result of the Board's violation of her tenure entitlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending STate Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DKT. NO. EDU 3394-89
AGENCY DKT. NO. 112-4/89

IN THE MATTER OF THE TENURE HEARING OF DWIGHT HAYES, SCHOOL DISTRICT OF THE TOWNSHIP OF SOUTH BRUNSWICK, MIDDLESEX COUNTY

Russell Weiss, Esquire, appearing for petitioner, School District of the Township of South Brunswick (Carroll and Weiss, attorneys)

Nancy Iris Oxfeld, Esquire, appearing for respondent, Dwight Hayes, (Balk, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: October 1, 1990 Decided: October 1, 1990

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 **RICHARD J. MURPHY,** ALJ:

Statement of the Case, Procedural History and Issues

This is a tenure proceeding being brought against respondent Dwight Hayes who's a tenured custodian by the School District of the Township of South Brunswick in Middlesex County; the Board cites grounds of neglect of duty, insubordination and conduct unbecoming. The authority for this action is *N.J.S.A.* 18A:17-3, which makes reference to the procedures established by *N.J.S.A.* 18A:6-9 *et seq.* [In terms

of procedural history I'll let the record reflect all of that, I think that is amply setforth, and I'm not obliged to put that in an Oral Initial Decision if its somewhere else in the record.]

The only issue to be addressed here is whether the petitioner Board of Education has proven the tenure charges by a preponderance of the believable evidence and it is my conclusion that they have proven the charges of neglect and insubordination, but I don't feel that they have proven charges of conduct unbecoming and I'll explains this in just a moment.

Findings of Fact

In the terms of the factual findings I'm obliged to make, the record submitted, in particular, exhibits P-7 thru P-28, amply establishes that there was indeed a pattern of failure to appear to work on time and failure to call-in as required by the school, and I also find that Mr. Hayes was on notice of these procedures and was warned and counseled on a number of occasions. I do note that there is some evidence that he had personal problems during that year, apparently due to a death in the family, unfortunately he is not here today to give us much of an account of whatever personal problems he may have been through that year himself. What I see in the record, other than some absence because of a family illness and a death, is a repeated pattern conduct involving failure to respond to requests that he call-in, failures to report to work on time, failures to answer his beeper, (which he was given, in effort to keep him in communication), also several failures to set-up the lunch room. Many of these incidents caused extreme inconvenience and in a sense jeopardized, or could of jeoparodized, the health of students, because they were sometimes left out in the cold in the winter months, as a result of Mr. Hayes' failure to come in on a timely manner or call-in, in a timely manner: that that behavior alone constitutes neglect and insubordination sufficient to sustain the tenure charge.

I note that part of the reason for the delay in this matter was Mr. Hayes requested that he be evaluated by psychiatrist or psychologist, and I am going to make part of the record a report of April 21, 1990 from Raymond H. Schweibert, M.D., and I to make specific reference to the last page in which in states:

> Based upon the neuropsychological findings of Dr. Christine and the neurological findings of Dr. Gomez, Mr. Hayes would appear to have "a significant underlying organic brain problem. . . ." The etiology of this condition is unknown to

> me. Dr. Gomez' preliminary findings indicate that this is a "static" condition, i.e., nonprogressive. Based upon my observations and findings, I too, conclude, as with Dr. Christine, that Mr. Hayes "does have the ability to rationally comprehend his position regarding the allegations made against him pertaining to his employment with the School District of the Township of South Brunswick". There is no question that Mr. Hayes is a handicapped individual. Whether he was handicapped at the time of his employment in 1982 or developed it subsequently, I am unable to state. Certainly the behaviors contained in the allegations against him may well be resultant from his organic mental disorder.

I'm going to **FIND**, as a matter of fact based on Dr. Schweibert's report, which relies upon neurological examination and neuropsychological examinations, that Mr. Hayes able to understand the charges against him and to participate fully in this proceeding. His attorney made diligent efforts to communicate with him, as did the Office of Administrative Law, and he has declined to appear here today and has not called in with any kind of excuse. I also **FIND** as a matter of fact that there is no evidence that the organic mental disorder from which he may suffer, contributed to his failure to discharge his duties. It may be that there was some problem along that line, but without Mr. Hayes' testimony to that effect, and without any more basis then I have, I am unable to find that he was not able to discharge his duties, due to circumstances beyond his physical control.

I do note that Dr. Schweibert stated that Mr. Hayes' mother had died in October of 1988, and he had problems with sleeping at night, and also began drinking. After that, he was frequently late for work. This is apparently the source of some of his problems in that year. While I am sympathetic to that, (in fact I'm very sympathetic to that), the fact is that he had ample opportunity to call-in in a timely way and take other steps to make sure that he wasn't severely inconveniencing other people when he had to be absent, for whatever reason. The record is adequate on this point to support a finding that he was guilty of neglect and insubordination, neglect in the sense that he failed to perform his duties in a timely way, and insubordination in a sense that he failed to comply with, or even attempt to comply with, the request that he call-in and take other actions. I don't think there is any basis for deeming this behavior as conduct unbecoming, mainly because I think that neglect and insubordination are more precise, in this instance: conduct unbecoming, as I understand it, is better applied to other circumstances.

Conclusion of law and
Order

I think this is just strictly a neglect and insubordination case and on the basis of the findings of fact I made above, I **CONCLUDE** as a matter of law that the Board of Education has proven the charges of neglect and insubordination and I further **CONCLUDE** that this warrants his dismissal, notwithstanding his tenure.

The exhibits will be part of the record and I'm not going to numerate them here, but I have reviewed and admitted them all.

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

END OF TRANSCRIPT

I, Clair Talmage, certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Richard J. Murphy's oral decision rendered in the above matter on October 1, 1990.

October 2, 1990
DATED

Clair Talmage
CLAIR TALMAGE

Receipt Acknowledged:

10/3/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 5 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

IN THE MATTER OF THE TENURE	:	
HEARING OF DWIGHT HAYES, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF SOUTH	:	DECISION
BRUNSWICK, MIDDLESEX COUNTY.	:	
	:	

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

Upon review, the Commissioner concurs with the findings set forth by the ALJ, including those based on the results of the neurological and neuropsychological examinations conducted at respondent's request. The Commissioner further concurs with the ALJ's conclusion that, given those findings and the absence of contrary evidence or mitigating information from respondent, the Board of Education has proven its charges of neglect and insubordination and respondent's dismissal from tenured employment is fully warranted on that basis. Finally, given that charges of insubordination and neglect have been deemed proven and sufficient to warrant dismissal, the Commissioner finds it unnecessary to consider the charge of unbecoming conduct.

Accordingly, the Commissioner adopts the recommendation of the Office of Administrative Law as his final decision in this matter and directs that respondent be dismissed from his tenured position as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7724-89
AGENCY DKT. NO. 289-9/89

JAMES KOCHMAN,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,
Respondent.

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

Brian B. Smith, Esq., for respondent (Ansell, Fox, Zaro, McGovern & Bennett, attorneys)

Record Closed: August 15, 1990 Decided: October 1, 1990

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

James Kochman (petitioner), a teacher with a tenure status in the employ of the Keansburg Board of Education (Board), claims in a Petition of Appeal filed to the Commissioner of Education that the Board acted arbitrary, capricious, and in violation of N.J.S.A. 18A:29-14 and 34:15-19.1, as well as prior administrative decisions rendered by the Commissioner of Education and State Board of Education, in its determination to withhold salary increments from him for 1989-90. The Board denies petitioner's allegations and asserts that its action to withhold petitioner's salary increments was the result of his asserted pattern of excessive and chronic absenteeism and the asserted consequent disruption of the continuity of the teaching-learning process with respect to his pupils.

After the Commissioner transferred the matter October 6, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was eventually scheduled and conducted May 7, 1990 at the Tinton Falls Borough Municipal Building, Tinton Falls. The record closed August 15, 1990 upon receipt of the Board's letter memorandum and after allowing it sufficient time to respond to supplemental material filed by petitioner.

Findings are reached in this initial decision that the Board considered only respondent's total number of absences from his teaching duties during his entire employment with it between 1964-65 and 1988-89, without consideration of the particular circumstances of the absences or the impact the absences had on the continuity of instruction. The conclusion is reached that the Board's controverted salary increment withholding action regarding petitioner is without just cause.

FACTS

The relevant facts of the matter according to the competent evidence in this record, consisting of documentary evidence and petitioner's sworn testimony as well as the sworn testimony of the superintendent of schools, are as follows. The sequence is patterned after the presentation of facts urged by petitioner in his filed letter memoradum.

1. Petitioner was first employed as a certified teaching staff member by the Board for the 1964-65 academic year. During his employment through the 1988-89 school year, petitioner has been assigned primarily as a teacher at the sixth, seventh and eighth grade levels and as a basic skills teacher.

2. On January 3, 1984 petitioner slipped on a puddle in a school hallway which resulted in documented orthopedic and neurological problems.

3. On January 28, 1986 a worker's compensation judge awarded both temporary and permanent disability benefits to petitioner regarding the January 3, 1984 accident. (P-13).

4. On January 7, 1988 petitioner slipped on a patch of ice on school grounds which resulted in additional orthopedic and neurological problems.

5. In a workers' compensation judgment issued on May 1, 1990 (P-14) petitioner was awarded both temporary and permanent disability benefits relating to the January 7, 1988 accident.

6. Petitioner's school attendance record (R-1) since the 1983-84 academic year, during which he suffered injury from the slip and fall on water accident, is as follows exclusive of absences for personal days, professional days, and other:

YEAR	SICK	WORKERS' COMPENSATION
1983-84	0	110
1984-85	2	49
1985-86	3	25
1986-87	20.5	0
1987-88	8.5	52.5
1988-89	35	19
TOTALS	69.0	255.5

While petitioner's attendance record in evidence (R-1) shows he used 54.5 sick days in 1988/89 and 3 workers' compensation days, petitioner testified at hearing that while he was absent a total of 67.5 days during that year, 19 absences were workers' compensation days.

7. There is no dispute that all absences incurred by petitioner from 1983-84 were for legitimate reasons of illness.

8. During 1983/84 the superintendent requested petitioner in writing (R-2) to submit his medical status, a medical prognosis, and an anticipated date of return to school.

9. Near the end of the following academic year, 1984-85, petitioner's annual summary evaluation (R-3) provides that his attendance must improve in 1985-86 "in fairness to the students." Petitioner responded on the face of the report as follows:

> Under existing compensation laws, I am not to be penalized for filing a compensation claim or penalized for days used pursuant to that claim. Therefore, I want my annual performance report changed so that it reflects only the days absent that are not related to my compensation claim of January 3, 1984. I have only 2 absences not related to my compensation claim. * * *

No change was made to the report. Within two weeks thereafter and perhaps because of petitioner's reply, the superintendent advised petitioner in writing (R-4) that Board policy provides for a written warning to professional personnel who have been on sick leave for 11 or more days in one year. Superintendent advised petitioner that the letter constituted a written warning because he was absent for 11 or more days in 1984-85.

10. The referenced Board policy (R-1) defines excessive absenteeism in the following manner:

> Excessive absenteeism
> (sick leave only)
>
> a. 11 or more days in one year warrants a written warning.
> b. 11 or more days in four (4) consecutive years warrants for a tenured employee the withholding of an increment and for the second offense a disability retirement.
> c. 50 days in one (1) year warrants the withholding of a salary increment from a tenured employee and, for the second offense, disability retirement for that employee.

11. During the next academic year, 1985-86 the superintendent requested petitioner in writing (R-5) to meet with him in order to discuss his absenteeism and medical circumstances. Petitioner was also advised he could have a union representative with him if he chose. Superintendent explained at hearing that while the meeting was held, petitioner's absenteeism was not discussed; rather, the possibility of petitioner's retirement was the topic of discussion.

12. At the end of the next academic year, 1986-87, petitioner's performance was evaluated in an annual summary evaluation (P-2) in the following manner:

> 1. Petitioner provides appropriate instruction to meet the diagnosed needs of the student;

2. Petitioner conducts continuous diagnosis of the students' progress, skills and needs;

3. Petitioner meets with the students' parents as scheduled and when ever necessary.

13. Shortly after the annual summary evaluation (P-2) issued June 10, 1987, the superintendent sent petitioner a letter (R-5a) dated July 2, 1987 by which petitioner was again officially warned in writing that he was on sick leave for 11 or more days during 1986-87 and, thus, in violation of Board policy.

14. There is no evidence in this record regarding exchanges of correspondence between school authorities and petitioner in 1987-88, although petitioner was absent a combined 61 days, 52.5 of which were workers' compensation days due to injuries sustained in the slip and fall on ice accident, January 7, 1988. It is to be noted, however, that in petitioner's annual performance report (P-3) for this academic year his performance as a teacher of basic skills was evaluated in the following manner:

1. Petitioner provides appropriate instruction to meet the diagnosed needs of the students;

2. Petitioner conducts continuous diagnosis of the students' progress, skills and needs;

3. Petitioner maintains a current and accurate read of the students' participation in the program.

It is also noted that on the face of the document it is stated petitioner's pupils achieve "very positive results" on standardized tests in reading, writing, and mathematics.

15. During the next academic year, 1988-89, petitioner was assigned to teach 8th grade. He was involved in a motor vehicle accident on November 4, 1988 with a tractor-trailer which resulted in neck and back injuries to petitioner, as well as to his chest and shoulder. Though he was not hospitalized, petitioner underwent physical therapy and he was absent from work November 5, 1988 to January 10, 1989. (R-12) (See also, R-9).

16. During petitioner's absence from school following the motor vehicle accident, the Board secretary requested (R-6) petitioner on December 6, 1988 to submit from his physician a statement regarding his medical status, prognosis, and the approximate time he was expected to return to work. On January 5, 1989 the Board secretary advised petitioner (R-7) that because no response was received to her earlier letter and that his absence was "causing an unfair burden on your students because of the uncertainity of your return," an appointment was made for him to be examined by Doctor Robert Finnesey on January 16, 1989. Shortly after this letter, petitioner submitted to the Board secretary a note from his own physician, a Dr. Allegra, which is dated November 10, 1988. The note states that petitioner was undergoing heat, massage, and ultra sound treatment for back sprain and spasam two to three times per week. In addition, a copy of a handwritten note addressed to the superintendent which petitioner says he submitted during November 1988 was also sent to the Board secretary. The superintendent denies having received either the note or the physician's note.

On February 2, 1989 the superintendent wrote (R-9) petitioner and advised that he was being docked a day's pay because of his failure to return to school following his examination by Dr. Finnesey on January 20, 1989.

17. Upon his return to work petitioner was assigned as a permanent substitute because another full-time substitute had been engaged by the Board to teach his 8th grade class following the accident. During this assignment, petitioner was absent from school 2.5 days. On or about March 30, 1989 petitioner was reassigned to teach basic skills until the end of the school year during which time petitioner was absent 12 days.

18. On June 8, 1989 the Board secretary advised (R-10) petitioner that his employment may be discussed by the Board at a meeting scheduled for June 15, 1989.

19. On June 20, 1989 the Board secretary advised petitioner in writing (R-11) that the Board acted June 15, 1989 to withhold salary increments from him permanently because of "absenteeism." This is the only time the Board withheld salary increments from petitioner for 'absenteeism.' The Board secretary further advised petitioner:

> This [action] followed a careful review of your absenteeism and its effect on the continuity and quality of the educational service being received.

20. On June 21, 1989 the school principal prepared an annual summary evaluation on petitioner's performance during 1988-89 in which he states the following:

> Because of the rate of absence from the positions assigned and therefore, the difficulty in maintaining continuity of the diagnostic progress of students skills and instructional needs, Mr. Kochman was not able to be an asset to the Keansburg educational system for the 1989-90 school years.
>
> Mr. Kochman was transferred twice during the year. A summary of the indicators regarding effectiveness would be inappropriate. For example, Mr, Kochman cannot be held responsible for the scores of the students as he was transferred to basic skills on March 30th just two weeks before the test was given to the students.

Thereafter, and made part of the annual summary evaluation, the principal reviews petitioner's absences from 1983-84 through 1987-88 and as recited above. Finally, the school principal recommended that petitioner's salary increments be withheld, an action which had already been taken by the Board six days earlier.

21. Petitioner testified at hearing that throughout his employment whenever he foresaw extended absences he would insure that his emergency lesson plans were as up-to-date as possible. However, the superintendent testified that the emergency substitute lesson plans, a three day lesson plan at best, was totally ineffective and petitioner's absences were extremely disruptive.

22. During petitioner's 26 years of employment with the Board he would have earned approximately 260 sick days. See, N.J.S.A. 18A:37-2. In that same period of time he used approximately 242 sick days, in addition to a total of 248.5 workers' compensation days granted him.

ARGUMENTS

Petitioner

Petitioner argues the facts in this case establish he received no prior warning, written or oral, during 1988-89 that the Board was considering disciplinary action against him in the form of increment withholdings due to his absences; that during 1988-89 the first notice that he received regarding disciplinary action was the Board secretary's letter advising him the Board acted five days earlier on June 15, 1989 to withhold salary increments from him; and, that the first mention to him by any supervisor that his absences were assertedly affecting the continuity of education in a negative manner was the annual summary evaluation on June 21, 1989, one day after the Board secretary advised him that the Board acted five days earlier to withhold the increments. Petitioner claims that the facts in this case show his absences did not affect the continuity of education in a negative manner particularly when the annual summary evaluations of his performance in 1986-87 (P-2) and 1987-88 (P-3) reflect high praise for his performance without mention of his absences.

Petitioner argues that the Board took its controverted action solely on the number of absences he incurred without consideration of the particular circumstances of the absences and without a good faith consideration of whether such absences affected the continuity of instruction. Furthermore, petitioner notes that the evidence in this case shows the Board erroneously applied its policy (P-1) to him for 1988-89 which resulted in the withholding of his increments because it believed he had more than 50 days of sick leave in one year when, if fact, he only incurred 35.5 days of sick leave with 19 days attributable to workers' compensation.

In regard to the absences attributable soley to workers' compensation, petitioner asserts that N.J.S.A. 34:15-39.1 prohibits the Board from imposing discipline

upon him in the sense of withholding his salary increments because of absences due to workers' compensation because to do so would "chill the rights of an employee under the Workers' Compensation laws * * * and * * * prevent an employee from legitimately excersing her rights pursuant to N.J.S.A. 18A:30-2.1 * * *" (Petitioner's brief, P 16).

BOARD

The Board argues in the first instance that the evidence presented reveals that petitioner was forewarned as early as January 1984 (R-2) that his absences were having a negative impact on the continuity of instruction for his pupils when the superintendent requested him to submit written information regarding his medical status, prognosis, and expected date of return. Furthermore, the Board contends that the evidence shows that petitioner was advised in June 1985 (R-3) in his annual performance evaluation that his attendance must improve in fairness to his pupils. In addition, the Board points out petitioner received a warning letter (R-4) in June 1985 (R-4) that his absences exceeded the limits of the Board's policy; that a meeting was called by the superintendent during March 1986 in order to discuss his absenteeism although only the potential for retirement was discussed; that a second warning letter (R-5a) was issued petitioner during July 1987 regarding his violation of Board policy; and, that during the 1988-89 academic year the Board through its school officials caused several letters (R-6) (R-7) (R-8) to be sent petitioner inquiring as to his medical condition and his return to school duties.

The Board contends that the foregoing asserted facts show a pattern of excessive and chronic absenteeism which has existed for a period of years during petitioner's employment and that "At some point in time the accumulation of absences reaches a point where [it] can no longer afford the luxury of retaining an excessively absent teacher." (Board's brief, P.5) The Board suggests that petitioner's frequency of absences, regardless of the legitimacy of the reasons for those absences, have an adverse affect on learning in the classroom. The Board claims it should not have to tolerate excessive absences because the absences have automatic consequences upon the instructional program. Whether petitioner was absent for legitimate reasons or not, a pattern of chronic absenteeism in and of itself disrupts the classroom and justifies the withholding of salary increments.

Finally, the Board does not contest the legitimacy of any of the absences incurred by petitioner because in its view the reasons for a teacher's absences are immaterial. It contends that only the fact of the absences and the number of absences are material to the finding that such frequent absences are determental to the educational process.

LAW

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

> Any board of education may withhold, for inefficiency, or other good cause, the employment increment or the adjustment increment or both, of any member in any year by a recorded roll-call majority vote of the full membership of the board of education * * * The member may appeal from such action to the commission under the rules described by him. The commissioner shall consider such appeal and shall either affirm the action of the board of education or direct that the increment or increments be paid * * *

The determination of an employing board of education to withhold salary increments from a teaching staff member may not be reversed unless the action is found to be arbitrary, without rational basis, or induced by improper motivies. Kopera v. West Orange Board of Ed., 60 N.J. Super 288 (App. Div. 1960). Furthermore, the Commissioner may not substitute his judgment for that of the Board absent such a showing by petitioner.

Teaching staff members are not automatically entitled to salary increments. In North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587, 593 (1984) the Court said:

> That is, the annual increment is in the nature of a reward for meritorious service to the school district. Board of Educ. of Bernards Tp. v. Bernards Tp. Educ. Ass'n, 79 N.J. 311, 321 (1979). Evaluation of that service is a management prerogative essential to the discharge of the duties of school board. See Id; Clifton Teachers v. Clifton Bd. of Educ., 136 N.J. Super 336, 339 (App. Div. 1975).
>
> The determination of an annual increment after evaluation by a school board serves the dual statutory objectives of affording teachers economic security and of encouraging quality in performance.

The scope of review under the Kopera, supra, standard is to determine whether the underlying facts where as those who made the evaluation claimed and whether it was reasonable to conclude as they did based upon those facts, bearing in mind that they are the experts, that the affected person did not earn a salary increment. One who challenges the action of a board to withhold a salary increment carries the ultimate burden to demonstrate that the complained of withholding was arbitrary, capricious or unreasonable because the board did not have a reasonable basis for its actual conclusion. An affected teacher would meet that burden by providing competent evidence to show that the facts are not as claimed by the board and to show his performance was such during the academic year that he earned the salary increment.

The State Board of Education, the agency head for the Department of Education, addressed the action of a board of education withholding a teacher's salary increments for reasons of absenteeism on prior occasions. As an example, in Meli v. Burlington County Vocational County-Technicals Schools, 1985 S.L.D.- (Dec. 4, 1985) a majority of the State Board ruled as follows:

> The reasonableness of the Board's action must be evaluated in the context of the relevant law. In Kuehn v. Bd. of Ed. of Twp. of Teaneck, decided by the State Board, February 1, 1983, the State Board considered a case in which the board, acting pursuant to an unwritten board policy, withheld a teacher's increment because, using her annual and accumulated sick leave, the teacher had been absent more than 90 days during the school year. The State Board emphasized that the teacher, who had been seriously ill, was statutorily entitled to use her annual accumulated sick leave under N.J.S.A. 18A:30-1 and 18A:30-3 and that withholding her increment soley on the basis of the number of absences obviated that statutory right. Accordingly, the State Board concluded that because the board had not considered the particular circumstances of the absences, its action was arbitrary and without rationale basis.
>
> The requirement that a board consider the circumstances of a teacher's absences, as well as the number, before acting to withhold an increment was reaffirmed by the State Board in Montville Tp. Ed. Assn. v. Bd. of Ed. of the Twp. of Montville, supra. In that case the State Board, although reiterating that high absenteeism could be grounds for disciplinary action even where legitimate medical excuse existed held that, disciplinary action could not be based soley on the number of absences because to so act would contravene the statutory guarantees of N.J.S.A. 18A:30-1 and -3. Therefore, while upholding the board's guidelines in the

> case before it, the State Board cautioned that local board that before taking diciplinary action based on the guidelines, it was required to consider the circumstances of the absences in each case.
>
> In the instant case, the Board acting contrary to the superintendent's positive recommendation, withheld Ms. Meli's increment because of 'absenteeism.' [Petitioner Meli had been absent during 1983-84 on 14 separate days, including eight sick days, three personal days, and three 'court' days[. Although she was absent on three occasions between the time the Superintendent made his recommendation and the date the Board made its decision * * * there is no indication in the record that the Board considered the circumstances of any of her absences when it made its decision to withhold the increment. To the contrary, in his testimony, the Superintendent asserted that the number of absences was the sole consideration by the Board in making the decision * * * We emphasize that while a board may withhold an increment because of unsatisfactory attendance even where there is legitimate medical excuse, it is required to consider the circumstances of the absences, as well as the number. The Board in this case failed to fulfill this obligation and we therefore conclude that its decision was arbitary.
>
> (Slip opinion at -)

In Vonita Smith v. Trenton City Bd. of Ed., 1989 S.L.D. - (April 18, 1989) the board withheld salary increments from Ms. Smith for 1988-89 because of her "unsatisfactory attendance record" for 1985-86, 1986-87 and 1987-88. Her absences were as the result of Crohn's disease of which the Board had knowledge and which it considered as the underlying reason for her absences at its meeting of May 26, 1988. Nevertheless, the evidence showed that the Board took its action to withhold salary increment because her absences exceeded Board policy of "incidental" absences which defines an arbitrary figure of 5% or more 'incidental absences' as 'excessive' and 'improper.' The Commissioner, finding the Board acted arbitrary and capricious, held:

> [I]n order for an increment withholding to be upheld where absenteeism is the issue there must be clear evidence of having considered (1) the nature of the illness and not just the number of absences, Kuehn, supra; Meli, supra and (2) the impact of the absences on continuity of instruction. The consideration at both the principal and board levels on these two critical elements appears to have been mechanistic and cursory. In other words, the record simply does not demonstrate clearly that the individual circumstances of the absences were weighed by either the principal or the Board vis-a-vis the 5% excessive absentee rate or that the concern for the impact of absences on continuity of instructions was considered * * *

That is not to say, however, that petitioner is right in her argument that the burden of proof shifts to the Board in regard to continuity of instruction for, as expressed in Meli, 1984 S.L.D. 906, 903, aff'd Sate Board 921 [the predecessor case to the Meli decision of the State Board cited above]:

> Commonsense dictates that a teacher's continued absences must, at some point have a negative impact upon her pupils even if a board of education is unable to prove the relationship between a teacher's attendance and pupil progress. This conclusion is summarized by the Commissioner in Reilly supra where the Commissioner stated as follows:
>
> > Frequent absences of teachers from regular classroom learning expereinces disrupt the continuity of the instruction progress. 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 a 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. (at 913-914)

What is necessary to demonstrate, however, is that the concern for continuity of instruction was specifically conveyed to the staff member during the period in which the excessive absenteeism was occurring, not merely at the end of the line of a series of fill in the blank memos * * *

(Slip opinion at)

More recently, the Commissioner held in Bass, et al. v. Union City Board of Ed., 1990 S.L.D. - (April 16, 1990) that where attendance has been identified as a problem area in regard to an increment withholding action, evaluations and professional improvements plans for the affected teacher must reflect that a problem in need of remediation exists. Nevertheless, the Commissioner has also ruled that a teacher's absences in prior years may be considered by a board in the years absences are not too remote. Trautwein v. Bd. of Education, 1980 S.L.D. 1539, 1542.

ANALYSIS

If the controlling statute, N.J.S.A. 18A:29-14, and the construction thereof by our courts in Kopera, supra, Bernards Tp., supra, and North Plainfield, supra, were applied to the facts in this case without regard to the administrative rulings of the Commissioner and the State Board of Education, the controverted action taken by the Board would of necessity be affirmed. That is, petitioner's total absences, 54, from his teaching duties in 1988-89, is a sufficient number of absences to constitute other good cause for the Board to have rationally concluded one who is absent that number of days within one academic year does not provide it with meritorious service to have earned a salary increment. This analysis does not ignore the fact that teachers are entitled to a minimum of ten sick days per year, N.J.S.A. 18A:30-2, which are cumulative, N.J.S.A. 18A:30-3.1, nor does it ignore the fact that petitioner's absences were due in significant measure to his workers' compensation claims, N.J.S.A. 18A:30-2.1. Such an analysis does not violate the provisions of N.J.S.A. 34:15-39.1 which makes it unlawful to discriminate against an employee as to his employment because of a workers' compensation claim filed. To the extent that all teachers in the employ of the Board must earn salary increments by virtue of their performance as evaluated by the Board, petitioner is not being discriminated against by the withholding action. Under this analysis, petitioner is subject to the same standard of having to earn an increment by virtue of his performance as all other teachers in the Boards' employ. With petitioner being absent from his duties 54 days in one academic year, even accepting as fact all absences are legitimate, the natural consequence is that his pupils do not have the benefit of their regularly assigned classroom teacher in 1988-89.

Furthermore, when petitioners record of absences, 324.5, from 1983-84 through 1988-89, a period of time not too remote from the withholding action, is

considered, the determination that petitioner did not earn a salary increment in 1988-89 is all the more supportable regardless of the underlying reasons for the absences or the impact such absences has had on the 'continuity of instruction.'

However, an analysis of 'law' to the facts in this case must include prior administrative rulings of the Commissioner and of the State Board of Education by virtue of their legislatively delegated authority to hear and determine controversies and disputes arising under school law. N.J.S.A. 18A:6-9. This is particularly true when the administrative agency head has issued similar written rulings regarding statutory interpretation as is the case here.

Referenced administrative rulings require that when absenteeism is the basis for an increment withholding, the board is obligated to show it conveyed to the staff member 'during the period' in which the excessive absences were occurring its concern for the continuity of instruction; and, it must show it considered the particular circumstances of the total absences and the impact of the absences on the 'continuity of instruction'; and, it must show that the affected teachers' attendance has been identified as a problem area in that teacher's evaluation and professional improvement plans. Moreover, it appears that the State Board holds in Meli, supra, 1985 S.L.D. - , relying upon its prior ruling in Montville Tp. Ed. Assn, that a teacher who has accumulated more sick days under N.J.S.A. 18A:30-1, et seq., than exist in a school calendar in any given year may be legitimately absent the entire year and, without regard to the service rendered to the Board that year, the Board would still have to show the foregoing elements in order to have a controverted salary increment withholding action affirmed by it. In this case, the Board's withholding action, whether it be based on absences between 1983-84 and 1988-89 or just 1988-89, cannot pass muster under the standards established by the Commissioner and the State Board of Education for the following reasons.

The facts in this case show that during 1983-84 the superintendent requested petitioner to submit from his physician a report on his medical status, medical prognosis, and anticipted date of return to work. The first time any concern was communicated to petitioner regarding the effect of his absences upon pupils, if that equates with continuity of instruction, occurred in 1984-85 when in his annual summary evaluation petitioner was told to improve his attendance in 1985-86 over 1984-85. It was also in 1984-85 that petitioner received a letter warning that he was in violation of the Board's policy. But, in 1985-86 there is no evidence to show any concern regarding petitioner's then 28 days of

absence by the Board or by school authorities.

In 1986-87 petitioner's annual summary evaluation shows his performance was acceptable to the Board, but, curiously, was then followed after the school year closed by a warning from the superintendent that his 20.5 of absence that year was in violation of the Board's policy. Nevertheless, in the very same year petitioner's annual summary evaluation (P-2) was viewed in a positive manner by the school principal.

While petitioner was absent a combined 61 days in 1987-88 his performance was rated in a positive manner, including the comment that his efforts had 'very positive results' regarding his pupils in standardized tests.

While it is true that during 1988-89 several letters were sent petitioner by the Board secretary who also advised him that his absences were 'causing an unfair burden on your students because of the uncertainty of your return,' nothing was conveyed to petitioner regarding a concern for the 'continuity of instruction,' nor is there evidence to show petitioner's school attendance was identified as a problem area in petitioner's performance evaluation, or the 1987-88 summary evaluation or professional improvement plans. Even if the letter of the Board secretary regarding the 'unfair burden' could constitute notice of concern for continuity of instruction, the Board secretary is not petitioner's professional supervisor. The first mention made to petitioner in the year 1988-89 by his supervisor that his attendance was a problem was in the annual summary evaluation prepared June 21, 1989 after the Board had already acted to withhold his salary increments. True, that annual summary evaluation is joined by a professional improvement plan for petitioner to improve his attendance in 1989-90; but such a plan and such notice to petitioner occurred after the fact.

Finally, there is no evidence to show petitioner's use of sick days exceeded his cumulative sick days allowable in 26 years of employment.

Accordingly, and being of the view that I am bound to follow prior administrative rulings in increment withholding matter based on absenteeism, I **CONCLUDE** that the Board's action is arbitrary and capricious because its concern for continuity of instruction was not conveyed to him during 1988-89 or any prior period in which excessive absenteeism was occurring; that the Board did not consider the nature of petitioner's absences in arriving at its judgment to withhold salary increments; and, that

the Board simply considered the number of absences for 1983-84 forward as the mechanistic basis for it to take its action. Therefore, I **CONCLUDE** that the Keansburg Board of Education acted without good cause to withhold petitioner's salary increments. It is hereby **ORDERED** that the salary increments withheld from petitioner be paid to him forthwith and that appropriate adjustments be made to his salary.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

October 1, 1990
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

October 2, 1990
DATE

DEPARTMENT OF EDUCATION

OCT 4 1990

DATE

(Mailed To Parties)

OFFICE OF ADMINISTRATIVE LAW

tmp

JAMES KOCHMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF KEANSBURG, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

The Board avers that the facts found in the initial decision demonstrate a pattern of chronic and excessive absenteeism and a disruption in the continuity of instruction caused by the absences. It likewise avers that the facts demonstrate that, whether by formal notices or by Board conduct, it repeatedly expressed its concern over petitioner's absences during the period 1984-85 through 1989 and the impact of the absences on students. The Board further argues that the instant matter is distinguishable from Meli, supra, and Smith, supra, in that this matter deals with chronic absenteeism over a period of many years. It is the Board's position that the facts of this matter support that the standard of review in Kopera, supra, has been met. It states:

> ***There could be no case of chronic absenteeism more egregious than the petitioner's. Nor can it

> be said that the petitioner was not on notice that the board was concerned about his chronic absenteeism over the years at issue, given the nine separate occasions when the board either warned the petitioner with respect to his absences, required a petitioner (sic) with respect to his medical condition, criticized petitioner's attendance, or asked for a meeting to discuss the petitioner's absenteeism.
>
> Further the court seems to ignore the import of the request made by Respondent of petitioner to meet to discuss absenteeism, dismissing it by saying that at the meeting disability retirement was discussed rather than absenteeism. Clearly the only reason disability retirement was discussed was because of the Board's concern for the absenteeism. The only reasonable inference one can draw from the request for such a meeting and a subsequent discussion of disability retirement is that the board was searching for an amicable way to solve the problem petitioner was posing for the school system.
>
> It is clear from all the foregoing that the initial decision in this action could be reversed. It should be reversed (a) because the facts at issue do not support the decision as found; (b) because the controlling statutes and case law require the decision to be in respondent's favor and (c) because the administrative rulings which are the basis for judge's findings in favor of petitioner are clearly distinguishable from the facts in the instant case. Further, should it be found that the administrative rulings relied upon by the judge are a sound basis for his decision then perhaps it is time that these decisions, notably Meli, be revisited in light of their obvious conflict with the controlling case law and statutes. (Board's Exceptions, at p. 3)

Upon review of the record and the parties' exceptions, the Commissioner is in full agreement with the ALJ's legal analysis. It must be emphasized that even where absences are legitimate, work-related and within statutory sick leave entitlement, an employee may be the subject of an increment withholding. However, in order for the increment withholding to be sustained, the record

must demonstrate that the staff member's superiors specifically conveyed a concern to him/her during the school year upon which the increment withholding is based that excessive absenteeism was negatively impacting on the continuity of instruction and that the nature of the illness was considered by the Board in reaching a decision to withhold an increment. The Commissioner, upon independent review of the record, cannot adopt the ALJ's findings and conclusion that these elements were not present in this matter as explained below.

During the 1988-89 school year, the year upon which the increment withholding is based, petitioner did receive three letters signed by the board secretary/business manager which make specific mention of a concern for the impact excessive absences have on students and the continuity of instruction. (Exhibits R-6, 7, 8) The ALJ did not accept these letters as documentation of a concern about petitioner's excessive absenteeism on instruction because the board secretary/business manager who signed the letters is not petitioner's professional supervisor. In the Commissioner's judgment, this is an insufficient basis for rejecting demonstration of a concern of the negative impact of excessive absenteeism on instruction. There is a need for further inquiry to determine at whose direction the letters were sent. Clearly, they were not sent out of the blue by the board secretary/business manager. If they were sent at the direction of the Board or by one of its administrative agents who has supervisory responsibility for instruction, then it would place form over substance to reject those letters as documenting instructional concern over the absences.

Additionally, the ALJ's recitation of facts indicates on page 8 of the initial decision that the Board transferred petitioner upon his return to work after his accident, having engaged another teacher to assume petitioner's instructional duties for his eighth grade class. This transfer needs further fact finding to determine (1) if such assignment was related to a concern for the continuity of instruction of his eighth grade students and (2) what reasons were provided to petitioner for the transfer, when they were provided and by whom.

Accordingly, for the reasons stated above, the Commissioner remands the matter to the Office of Administrative Law for the sole and limited purpose of augmenting the record relative to Exhibits R-6, 7 and 8 and petitioner's removal from his eighth grade class assignment during the 1988-89 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 15, 1990

DATE OF MAILING - NOVEMBER 15, 1990

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9725-89
AGENCY DKT. NO. 360-11/89

KATHI L. SAVARESE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE,
Respondent.

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

Nathanya G. Simon, Esq., for respondent (Schwartz, Pisano, Simon, Edelstein & Ben-Asher, attorneys)

Record Closed: September 6, 1990 Decided: October 3, 1990

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

Kathi L. Savarese (petitioner) alleges and the Bernardsville Board of Education (Board) denies that the Board improperly placed a tenured teacher in a position of Family Living teacher, in derogation of the petitioner's tenure and seniority rights, for the 1989-90 school year.

PROCEDURAL HISTORY

The petitioner filed a verified petition with the Commissioner of Education on November 29, 1989. The Board filed its answer on December 19, 1989. On December 26, 1989, the matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on February 15, 1990, and a prehearing order was entered. The prehearing specified the following issues were to be resolved:

1. Has the Board violated the petitioner's tenure and seniority rights?

2. If so, to what relief is she entitled?

The matter was set down for hearing on July 16, 1990. Prior to that date, counsel requested a telephone conference. The conference was held on July 16, and it was determined that no essential facts were in dispute. Therefore, the matter was ripe for summary judgment. A schedule was established and the Board moved for summary judgment and the petitioner cross-moved for summary judgment. All papers were received by September 6, 1990 and the record was closed on that day.

STIPULATED FACTS

The parties supplied the following stipulation of facts and documents:

1. Petitioner holds a Teacher of Home Economics Certificate from the State of New Jersey issued December 1975.

2. Petitioner has been employed as a teacher in the Bernardsville School System since September 1, 1975.

3. Charles Preston holds a Secondary School Teacher of Physical Education Certificate, Secondary School Teacher of Social Studies Certificate and Secondary School Teacher of Health Education Certificate issued September 1968.

4. Charles Preston has been employed as a teacher in the Bernardsville School System since September 1, 1968.

5. Both the Petitioner and Charles Preston serve as teachers in the Bernardsville School System per the job description for teacher. Both received and hold tenure as teachers in the Bernardsville School System.

6. Petitioner was on an approved maternity leave of absence for the 1986-87 and 1987-88 school years, with the leave concluding at the end of the 1987-88 school year.

7. At the Board meeting of April 25, 1988, the Board of Education voted not to issue a contract of employment to Petitioner Savarese for the 1988-89 school year because of a decline in enrollment and reduction in force.

8. Petitioner filed a Verified Petition with the Commissioner of Education on July 15, 1988. The Bernardsville Board of Education filed its answer on August 5, 1988. On August 23, 1988, the matter was transmitted to the Office of Administrative Law for determination. On June 13, 1989, Administrative Law Judge Oliver B. Quinn issued his Initial Decision ordering that the Board's action in not renewing Petitioner's contract for the 1988-89 school year be affirmed. On July 24, 1989, the Commissioner of Education, for reasons other than those set forth in the Initial Decision, reversed the Decision of the Admnistrative Law Judge and directed the Board to reinstate Petitioner together with all back salary, benefits and emoluments, less mitigation for monies earned during the period of her improper termination. On January 3, 1990, the Decision of the Commissioner of Education was affirmed by the State Board of Education. See Savarese v. Board of Education of the Borough of Bernardsville, OAL Docket No. EDU 6253-88, Case No. 203-89, State Board Docket No. 53-89.

9. For the 1989-90 school year, Charles Preston is employed on a full-time basis with a teaching schedule comprised of five (5) periods of Family Life, together with other assignments.

10. For the 1989-90 school year, Petitioner is employed on a part-time basis with a schedule of one (1) period team/prep and four (4) periods Home Economics comprising 51% of a full-time schedule. She is also working pursuant to the administration of the Grant funded project for the Technology Based Home Economics Curriculum for Grades 5 through 8.

11. Petitioner's salary for the 1989-90 school year is based on 51% of $34,748.00 representing Level MA, Step J for a total contractual amount of $17,721.48 together with $8,945.00 payable in ten (10) equal salary payments on the 30th of each month for the administration of the Grant funded project. Thus, her total salary for the 1989-90 school year from the Bernardsville School System is $26,666.48.

12. The following documents are stipulated into evidence:

    Employment contract between the Board of Education of the Borough of Bernardsville and Kathi Savarese from September 1, 1989 to June 30, 1990 [Herein, J-1.]

    Correspondence dated September 22, 1989 to Mr. Phil Miller, Board Secretary from Nancy Roche, Project Director and Peter Miller, Department Supervisor regarding Kathi Savarese compensation for administration of Grant funded project in Home Economics. [Herein, J-2.]

    Computer assignment sheet detailing 1989-90 teaching schedule for Kathi Savarese. [Herein, J-3.]

    Assignment sheet detailing 1989-90 teaching schedule for Mr. Charles Preston. [Herein, J-4.]

ARGUMENT

Petitioner

The petitioner urges that she has greater seniority as a teacher of Family Living and should have been employed as a full-time Family Living teacher for the 1989-90 school year. It is uncontroverted that she would be entitled to summary judgment if it were determined that seniority may be acquired as a teacher of Family Living. She has been assigned to teach the course for over a decade, while Preston appears to have taught the course for only several days prior to the 1989-90 school year.

The petitioner argues there is decisional support for her contention that seniority may be acquired as a teacher of Family Living. First, there are no seniority categories by subject. Rather, when a teacher is assigned to teach

secondary grades, she acquires seniority in the secondary category. N.J.A.C. 6:3-1.10(l)(19).

The petitioner's reasoning goes as follows. Contrary to the import of the Commissioner's and State Board's decision in the first Savarese case, seniority is limited to the subjects a teacher is authorized to teach, but is not obtained in categories defined by subject. It is obtained in categories; that is, the elementary or secondary category. Data-Samtak v. Scotch Plains-Fanwood Reg'l Bd. of Ed., OAL DKT. EDU 6385-86 (Dec. 18, 1987); aff'd in part, rev'd in part, Comm'r of Ed. (Jan. 27, 1988); aff'd St. Bd. of Ed. (June 1, 1988). The fact that there is no specific Family Living category cannot result in denial of seniority in Family Living.

Although seniority is limited to the subject area endorsements under which a teacher has actually served, it is clear that teachers in the secondary category acquire seniority in all subjects covered by their endorsements in which they have actually served. Thus, the fact that there is no category of Family Living, similar to the fact that there is no category in any specific subject, is of no relevance. There is no specific category in the secondary schools. Therefore, the Commissioner and State Board erred in Savarese I by simply concluding that Savarese did not acquire seniority to teach Family Living, because there is no such category.

The issue then is whether there is any basis in law to conclude that teachers teaching Family Living in the secondary category under subject endorsements should not obtain seniority in family living simply because regulations authorize teachers with different endorsements to teach the subject. Irrespective of past State Board decisions, there is no basis, either under the language of the regulations or pertinent policy, to deny such claims.

The facts are critical. Savarese holds an endorsement as a teacher of Home Economics and, as such, is authorized to teach Family Living. Savarese actually taught Family Living in the district. Furthermore, the subject is assigned to her department. The Board argues that the Family Life program is interdisciplinary, but it is clear that Savarese's endorsement entitles her to teach all aspects of the course in the district. This case does not involve a situation in

which a teacher seeks to force a board to restructure its program. Savarese can teach the entire Family Living curriculum under the auspices of her endorsement and her department.

In prior cases, the Commissioner has suggested that seniority in Family Living cannot be obtained when the program is interdisciplinary. Nor can a teacher require a board to restructure its Family Living program to create a position or assignment to accommodate his or her seniority rights. A teacher cannot claim seniority rights to teach a portion of Family Living for which he or she is not properly certified. Savarese is qualified to teach all aspects of Family Living, she has taught it before, and she does not seek to restructure the curriculum.

A second line of cases apparently reasons that because several endorsements authorize a teacher to teach Family Living, no seniority can be obtained in Family Living. Hart v. Ridgefield v. Bd. of Ed., OAL DKT. EDU 5113-84 (Apr. 10, 1985); aff'd in part mod. in part, Comm'r of Ed. (June 7, 1985); aff'd in part rev'd in part, St. Bd. (Dec. 4, 1985); aff'd, N.J. App. Div., Nov. 7, 1986, A-2176-85T6 (unreported). In Hart the State Board reasoned that because several endorsements authorized teaching Family Living, no seniority could be obtained in Family Living.

If Hart applies only to cases involving teaching Family Living within other disciplines, that is not the case here. Family Living is taught within Savarese's department, she is certified and qualified, and she has taught it before in the district. Thus, Savarese has a valid seniority claim. If Hart precludes teachers from ever obtaining seniority in Family Living, that reasoning is incorrect. Despite the careless language used in Hart, that certification is required to teach Family Living; that is, some specific endorsement. Although no one specific endorsement is required, an individual must hold at least one of the several endorsements.

Seniority is implemented through rules, but established by statute. N.J.S.A. 18A:28-12. The statute requires that the Commissioner establish seniority standards. N.J.S.A. 18A:28-13. The standards are implemented through regulations. N.J.A.C. 6:3-1.10. The policy behind the rules was set forth in Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983). The Court stated that the

policies at play are: (a) recognition of actual service and (b) actual experience in the position. Savarese has actual service in the district since 1976, under a Home Economics endorsement, that includes actual service as a teacher of Family Living. Under the rationale of Lichtman, she is entitled to recognition of seniority in Family Living.

Savarese's seniority entitlement is established by the regulations themselves and relevant case law. Under the regulations, Savarese's seniority was acquired not in a specific subject, but as a teacher in the secondary category. N.J.A.C. 6:3-1.10(l)(19). Although her seniority was acquired in the secondary category, it was acquired only in subject area endorsements underwhich she actually served. N.J.A.C. 6:3-1.10(l)(19)i. Thus, her seniority was acquired under those subject area endorsements under which she served. This is consistent with the philosophy of the "new" seniority regulations. However, that seniority extends to all courses Savarese is authorized to teach under the scope of her Home Economics endorsement. Because Savarese was authorized to teach Family Living, and no additional endorsement beyond her Home Economics endorsement was necessary to teach the course, her seniority extended to Family Living.

The petitioner recognizes that the Hart line of cases may be read to suggest otherwise. But, on that issue, she asserts the Commissioner and State Board erred. The State Board has reasonsed that since more than one endorsement may authorize a teacher to teach Family Living, no teacher may acquire seniority therein. That rationale is wrong. First, seniority is an emolument, flowing directly from tenure. N.J.S.A. 18A:28-12. See also, Lichtman, above. The tenure act is intended to provide a measure of job security. Seniority is the mechanism that implements that intent. Consistent with the interpretation given the tenure act; i.e., liberal construction in favor of job security, the seniority regulations must be similarly construed, particularly where an individual is experienced in a specific assignment.

Second, the regulation on its face provides that seniority is obtained under all endorsements under which a teacher has served. This has been applied in general to all subjects covered by a teacher's endorsements, even courses the teacher never taught. There is no exclusion in the regulations for circumstances in which more than one endorsement covers a course.

Third, the policy behind the amended seniority rules is to provide for seniority in categories based upon actual service and experience. The assignment in this matter is governed by Savarese's endorsement. Moreover, she has actual service and experience as a teacher of Family Living in the district. Given the manner in which the course is taught in the district, the policies behind the amended seniority rules favor Savarese's claim over a teacher with little or no experience in the subject.

Fourth, this interpretation is consistent with cases construing similar situations. Except in Family Living, it has been recognized that a teacher acquires seniority in all courses covered by the endorsements he or she has served under. Case law does not support the suggestion that when several endorsements are appropriate to teach a course, no teacher acquires seniority. All teachers holding appropriate endorsements have competing seniority rights in such circumstances. In Jarrett v. Watchung Reg'l Bd. of Ed., 1981 S.L.D. 1114, the Commissioner held under the prior seniority regulations that were both elementary and secondary subject certified teachers could teach seventh and eighth grades subjects, both groups of teachers acquired seniority rights to such subjects, and a pool approach was used. The Commissioner reached the same result in Data- Samtak, above, and the State Board affirmed. In those cases, it was held that when teachers with more than one endorsement are authorized to teach a course, all teachers acquire seniority in the subject.

Prior State Board decisions cited by the Board in this matter are flawed because they rely upon an asserted need for flexibility. The need for flexibility cannot override tenure claims. The same principles must apply in seniority cases, expecially since seniority is determined by regulation rather than on an ad hoc basis. Lichtman, above.

Teachers assigned to teach in the secondary category acquire seniority in the secondary category, not specific subjects. Their seniority is obtained under all endorsements under which they have served. They obtain seniority under those endorsements in all subjects covered by those endorsements. Family Living is one of the subjects covered by Savarese's Home Economics endorsement. Under the plain language of the regulations, she has acquired Family Living seniority. Sound

policy considerations support this interpretation of the regulations even if the question is a doubtful one.

Board

In the first Savarese case (Savarese I), the petitioner's main claim was for tenure and seniority rights to teach Family Living courses assigned to another tenured teacher. The Board's main defense was that tenure and seniority do not apply to Family Living courses. The administrative law judge sustained the Board's position and held the only limitation on the Board's discretion to determine who would teach Family Life courses is that it must assign an appropriately certificated employee. The Commissioner reversed some of the findings and determinations. However, the one point on which he agreed with the administrative law judge was that a tenured teacher cannot acquire seniority as a teacher of Family Living. The Commissioner stated:

> Upon review of the record in this matter, the Commissioner is in full agreement with the ALJ's thorough analysis of the law on the issue of entitlement to teach Family Life and his conclusion that "a tenured teacher cannot acquire seniority as a Family Life teacher even though the tenured teacher's certification may authorize the teaching of Family Life."

The Board assigned Charles Preston, who holds a Secondary School Teacher of Physical Education certificate, a Secondary School Teacher of Social Studies certificate and a Secondary School Teacher of Health Education certificate, and who has been employed as a teacher in the district since September 1, 1968, to a full-time teaching schedule of five periods of Family Life and other duty assignments. The petitioner was employed on a part-time basis with a schedule of one period of team-preparation and four periods of Home Economics, comprising 51% of a full-time schedule. The petitioner also works pursuant to the administration of a grant-funded project for a technology-based Home Economics curriculum.

The petitioner again has alleged that she acquired tenure and seniority rights as a teacher of Family Living based on her Home Economics certificate and previous assignments to teach Family Living. She claims that retaining Preston on a full-time basis while she is employed on a part-time basis violates her tenure and

seniority rights. The Board denies all claims asserted and argues as a defense that a teaching staff member cannot acqure tenure or seniority rights in the Family Living category. The assignment of personnel within certification is a managerial prerogative. It is entitled to a presumption of correctness. Further, the entire matter is barred by the doctrines of res judicata and collateral estoppel.

The State Board of Education adopted a regulation entitled Family Life Education Program, effective March 1985. N.J.A.C. 6:29-4.2. The most relevant sections of the regulations state

> (c) Family Life education instruction should include necessary information on emergency health and social issues.
>
> (d) District boards of education shall develop an elementary/secondary Family Life education program.
>
> (e) Districts that develop their program with an interdisciplinary approach may use teachers from other disciplines to assist those staff members authorized to give instruction in family life education.
>
> (f) Teaching staff members holding one of the following certicates are authorized to teach in the district's Family Life education program:
>
> 1. Biology:
> 2. Comprehesnive science;
> 3. Elementary;
> 4. Health education;
> 5. Health and physical education;
> 6. Home economics;
> 7. Nursery;
> 8. School nurse;
> 9. Teacher of psychology; or
> 10. Special Education.

The Commissioner addressed the issue in the instant case in Johnson v. Glen Rock Bd. of Ed., OAL DKT. EDU 6359-83 (Apr. 2, 1984); adopted Comm'r of Ed. (May 21, 1984). In Johnson, the petitioner alleged her seniority rights were violated when the board assigned a non-tenured or less senior teacher to teach the Family Life program while she held a Home Economics certificate she claimed invested in her an entitlement to teach the course. After reviewing the regulation, the initial decision stated

> In the absence of Family Life endorsements, the State Board wisely promulgated a regulation to incorporate who may teach in the program to provide the needed guidance and flexibility of the local boards. An interpretation of the State Board regulation that a local board is required to grant a priority on a seniority basis to teach in a discipline which encompasses Family Life but also instructional units beyond the scope of one's endorsement is over-broad.

The Commissioner agreed with the analysis and outcome. Affirming the decision, the Commissioner stated

> Clearly, the Board's decision to implement its Family Life curriculum in an interdisciplinary manner, with the major portion thereof being taught through its health courses represents a reasonable exercise of its discretionary authority. The Commissioner rejects the assertion that the Board is legally obligated to implement its Family Life curriculum in order to accommodate petitioner's seniority claims. Judge Young's conclusion that such an interpretation of the Seniority and Family Life regulations is correct, as is the Board's assertion that there is nothing in case law to support the petitioner's claims.

In Bartz v. Green Brook Bd. of Ed., OAL DKT. EDU 4214-84 (Apr. 8, 1985); aff'd as mod. Comm'r of Ed. (May 24, 1985); aff'd, St. Bd. of Ed. (Nov. 6, 1985), tenure, seniority and Family Life were analyzed based on a challenge by a teacher who had been subject to a reduction in force and then claimed to teach Family Life courses under the Home Economics endorsement. The initial decision concluded that although the petitioner was eligible to teach segments of Family Life under her endorsement, she could not claim seniority to teach the program because of its interdisciplinary approach:

> Petitioner's tenure status as a teacher is not insurance of continued employment in a reduction in force matter; the statute does, however, provide the basis to enforce inchoate seniority rights following a reduction in force. But, without an enforceable seniority claim to some position, a tenure status alone allows no such claim.

The Commissioner agreed. He cited N.J.A.C. 6:3-1.10 as further support for denying the petitioner's claims with respect to Family Life courses. On appeal, the State Board further emphasized this aspect of the case:

> In affirming the Commissioner's determination that appellant in this case has no seniority entitlement to teach the Board's Family Life program, we emphasize that eligibility to teach segments of Family Life within other disciplines pursuant to N.J.A.C. 6:20-7.1(e) does not confer on a teacher the right by virtue of seniority or tenure to assignment to a full-time position as a teacher of Family Life.

In Hart v. Ridgefield Bd. of Ed., OAL DKT. EDU 5301-85 (July 18, 1986); aff'd in part, rev. in part, Comm'r of Ed. (Sep. 9, 1986); aff'd St. Bd. of Ed. (June 7, 1989), the Commissioner clarified and strengthened Johnson and Bartz. The Commissioner repeated his determination of Family Life teaching assignments and seniority as set forth in Johnson:

> That determination rejected the argument that a Board of Education is legally obligated to implement its Family Life curriculum in such a manner as to accommodate a seniority claim. N.J.A.C. 6:29-7.1 authorizes individuals with nine different types of endorsements to teach in a district's Family Life Education program. The intent of the State Board in so acting was to allow local boards flexibility in implementing their Family Life curriculum and to permit an interdisciplinary approach to such programming. The regulation is clear and unambiguous that a diversity of individuals may teach Family Life Education. A board of education is under no obligation to assign Family Life instruction to staff members with any one type of endorsement; nor must the implementation of its program be controlled by seniority claims.

The Commissioner further stated

> If seniority claims were controlling for Family Life assignments, severe constraint would result in a Board's designation of which discipline it deems appropriate to teach specific portions of its Family Life curriculum. It could also create a burdensome strain on the scheduling of instruction not for only pupils but teachers as well. The Commissioner firmly believes that acceptance of petitioner's arguments to the contrary would lead to results far beyond the contemplation of the Legislature and State Board and it would be to the detriment of both the orderly administration of the public schools of this State and the effective implementation of Family Life education.
>
> . . .
>
> The Commissioner is constrained to emphasize, as he did in Dorothy Godwin Davis v. Board. of Education of Ewing, decided by the Commissioner on April 29, 1985, that a board

> of education is not compelled to rearrange its schedule to suit petitioner and maximize its schedule of course offerings to coincide with her instructional endorsement.

The State Board of Education affirmed the Commissioner in Hart for the reasons expressed therein. The State Board further emphasized mere eligibility to teach within the Family Life program does not confer tenure or seniority rights in the area of Family Life because it is not a specific discipline for which certification is required and to which tenure and seniority attach.

In Savarese I, above, and Nazarechuk and Cancialosi v. North Caldwell Bd. of Ed., OAL DKT. EDU 5548-88 (Dec. 15, 1989); adopted Comm'r of Ed. (Jan. 30, 1990), the Commissioner noted that Family Life education is unique in that it does not fall within the established categories in N.J.A.C. 6:3-1.10. Therefore, a tenured teacher cannot acquire seniority as a Family Life teacher even though the tenured teacher's certification may authorize teaching the subject. A board will not be required to rearrange a ligitimate approach to Family Life instruction to accommodate a disputed reduction in force or teaching assignment. There is no category established for Family Life to which Savarese or Preston can claim entitlement to teach. The case law and regulations provide clearly that where there is no specific category, the employee acquires tenure status in the position for which qualified and seniority credit in the category of the endorsement which creates eligibility to teach. The petitioner's tenure and seniority claims have not merit in the context in which they are brought. The petitioner cannot bump another tenured teacher without seniority and because there is no separate seniority category for Family Life, the category in which seniority is to be credited is determined by the endorsement under which each teacher served, regardless of assignments which might have involved Family Life.

As a matter of Legislative design and State Board intent, the decision of which teacher teaches in the Family Life program remains within the sole discretion of the Bernardsville Board of Education, subject to the eligibility list as set forth in N.J.A.C. 6:29-7.1(e) and the tenure statutes. In circumstances where two persons by virtue of tenure status can claim entitlement to a position, then it remains appropriate to review the seniority regulations to determine entitlement to teach. However, in the present case, there is no separate category under the seniority regulations and no teacher having eligibility to teach can claim

entitlement to teach. Because both Savarese and Preston are qualified tenured staff members, the Board has discretion of assignment which should be sustained as a matter of law.

In addition, the Board urges that the petition be dismissed on grounds of res judicata and collateral estoppel. Where a party has been afforded a fair opportunity to litigate a claim in a forum with jurisdiction over the parties and subject matter, and the party suffers a final judgment adverse to him on the merits, the party in whose favor the judgment was rendered may assert that judgment as a bar in a subsequent action on the same claim or cause of action. In the present case, there are similarity of issues, similarity of parties, the same underlying facts and there has been no intervening statutory or administrative rule change that would affect the outcome. Applying these basic principles, the present matter should be barred from relitigation. Summary decision should be granted in favor of the Board.

DETERMINATION

Initially, Lichtman, above, is inapposite to the present case. The Decision came hard on the heels of Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), which determined that teachers in part-time positions could acquire tenure. Lichtman established the right of a tenured, part-time employee to preference over a nontenured teacher for a full-time librarian position. Lichtman, by virtue of her tenure status, accumulated seniority rights; the non-tenured person did not. More recently, Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Ed., 22 N.J. Super. 239 (App. Div. 1987) addressed the same question: tenure and seniority rights in a situation involving a tenured staff member as opposed to a nontenured staff member. The Bednar court noted that rights conferred by tenure statutes cannot be diluted or overcome by implementing regulations. These cases are good law, but not instructive for purposes of this decision.

The unifying theme of these cases analyzing tenure and seniority rights has been that tenure is to be acknowledged when a claim to a position is made by a tenured staff member against a nontenured staff member—even where the

nontenured person has served in the position and the tenured person has not—so long as the tenured staff member holds the appropriate certificate and endorsement. These cases do not apply where both teachers hold tenure in the system.

The Appellate Division affirmed the State Board of Education decision in Hart, above. Hart clarified and emphasized Johnson, above, and Bartz, above. Speaking of the determination regarding Family Life teaching assignments and seniority in Johnson, the Commissioner left no doubt that a board of education has no obligation to assign Family Life instruction to staff members holding one particular endorsement. The State Board went further and underscored that eligibility to teach Family Life does not confer tenure or seniority rights in Family Life because Family Life is not a specific discipline for which certification is required and to which tenure and seniority attach.

The petitioner urges that if Hart applies only to cases involving teaching Family Living within other disciplines, her case is different. Because Family Living is taught in her department, she is certified and qualified and she has taught it before, she has a valid seniority claim. I **FIND** the full weight of the cases is against her position. Her service as a Family Life teacher under a Home Economics endorsement is creditable in full to her seniority as a Home Economics teacher. This is consistent with the Commissioner's determination in Savarese I (slip op. at 23).

There simply is not an endorsement to cover every conceivable course offering. Reasonableness must govern. Tenure is achieved in a position. Howley and Bookholdt v. Ewing Tp. Bd. of Ed., 6 N.J.A.R. 509 (1982). Every position must have a position title that is recognized in the administrative code. Id. at 516. And it is beyond argument that a board of education may assign a teaching staff member anywhere within the scope of his or her certificates and endorsements. If a board of education determines a need for an unrecognized position title, it must get the county superintendent of schools' approval. Among other things, the county superintendent will determine the appropriate certification and title for the position. N.J.A.C. 6:11-3.6.

In the case of Family Life, the State Board clearly created something

more than a mere amalgam of existing courses. As set forth in N.J.A.C. 6:29-4.2(a), Family Life programs are intended to develop an understanding of (1) the physical, mental, emotional, social, economic and psychological aspects of interpersonal relationships, (2) the physiological, psychological, and cultural foundations of human development, sexuality and reproduction at various stages of growth, and (3) to provide pupils the opportunity to gain knowledge that will foster development of responsible personal behavior, strengthen their own family lives now and help to establish strong family lives in the future. In consideration of this significant mission, the State Board addressed curriculum development, parent consultation, instructional materials, emerging health and social issues, development of both elementary and secondary programs, interdisciplinary approaches, use of resource persons, in-service education, Department of Education support and responsibilities, and excusal procedures. The State Board authorized persons holding any of the 10 certificates and endorsements recited above to teach in the program. N.J.A.C. 6:29-4.2(f).

Significantly, the State board did not address seniority in Family Living either in N.J.A.C. 6:29-4.2 or in N.J.A.C. 6:3-1.10. This is important for at least three reasons. First, if the State board wanted to address seniority, it could have. Second, in its quasi-legislative capacity, the State Board is presumed cognizant of its former acts—in this case, specifically N.J.A.C. 6:3-1.10—whenever it acts. Third, by not making an exception for Family Living, the State Board surely meant it to be treated as any other interdisciplinary program.

If a board of education were to approve a course on the Renaissance and to provide for science, music, English and history teachers to cooperate in presenting the course, using outside resource persons such as clergy, the circumstances would be identical to the Family Life question presented by this appeal. The mere fact that Family Life is mandated has no bearing on the concept or the outcome. The Renaissance studies teachers, if tenured, would continue to accrue seniority in their respective categories. They could build no seniority in Renaissance studies, even if assigned full-time to teach the course, because there is no such category. And that is the present case in a nutshell. All of the case law and a plain reading of administrative code point to the same conclusion. The numerous cases cited in the petitioner's brief are not controlling and do not support her assertion to tenure in Family Living.

I agree with the petitioner that "seniority is obtained under all endorsements which a petitioner has served," petitioner's brief at 8, and "there is nothing in the seniority regulations or State tenure/seniority statutes which suggests that Family Living should be treated differently than any other subject areas." Ibid. I cannot agree that because "there is no exclusion in the regulations for circumstances, where several endorsements cover a course," Ibid., seniority claims somehow attach to Family Living. Nor do I believe the cases she cites support that view. A teacher may teach American Literature for 20 years under a Teacher of English endorsement, but his or her seniority is in English, not American Literature. N.J.A.C. 6:3-1.10(l)19i.

In summary, this decision finds that tenure and, hence, seniority do not attach to Family Living irrespective of the certificate or endorsement under which it is taught. Accordingly, I **CONCLUDE** the petitioner's claims are without merit and I **ORDER** the petition of appeal **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

3 OCTOBER 1990
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

October 4, 1990
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

OCT 5 1990
DATE

Mailed To Parties:

Janice LeVasseur
OFFICE OF ADMINISTRATIVE LAW

km

KATHI L. SAVARESE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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 pursuant to N.J.A.C. 1:1-18.4.

Petitioner's exceptions and the Board's reply exceptions essentially reiterate the arguments contained in the briefs submitted to and well summarized by the ALJ.

Upon review of the record and the parties' exceptions, the Commissioner is in full accord with the ALJ's findings and determination that petitioner is not tenured as a family life teacher nor has she accrued any seniority in that subject area. Such conclusions relative to tenure and seniority as they relate to family life education have been well established in case law as carefully set forth by the ALJ in the initial decision and despite petitioner's arguments to convince otherwise.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2687-90
AGENCY DKT. NO. 54-3/90

LLOYD SOOBRIAN,
Petitioner,
v.
EDISON TOWNSHIP BOARD OF EDUCATION,
Respondent.

Lloyd Soobrian, petitioner, pro se

R. Joseph Ferenczi, Esq., for respondent

Record Closed: September 17, 1990 Decided: October 18, 1990

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

Lloyd Soobrian, (petitioner), the parent of a 13 year old pupil enrolled in the schools operated by the Edison Township Board of Education (Board), alleges the Board unlawfully or through an abuse of its discretionary authority denies his son free public school transportation to and from the school house. After the Commissioner of Education transferred the matter on April 5, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted May 14, 1990. After the Board complied with petitioner's discovery requests, a plenary hearing was conducted August 3, 1990 at the Highland Park

Municipal Court, after which petitioner was granted his requested opportunity to file a written summation. The record closed September 17, 1990 upon receipt of the Board's reply. The conclusion is reached in this initial decision that petitioner failed to establish an enforceable entitlement under N.J.S.A. 18A:39-1, et seq. and N.J.A.C. 6:21-1.1 or that the Board abused its discretionary authority under its policy for free transportation to and from school on behalf of his son.

FACTS

The facts over which there is no dispute and as established by a preponderance of credible evidence in this record are these.

1. Petitioner and his family, including his 13 year old son, reside on Goodluck Street in Edison Township. Petitioner's son, Andy, is currently enrolled in the eighth grade of the Board's Woodrow Wilson Middle School.

2. When during September 1989 petitioner initially brought his request for transportation to the attention of John Kotcho, Vice Principal of the Woodrow Wilson Middle School, Kotcho measured the distance on September 13, 1989 between the door of petitioner's residence and the school house door through the use of a calibrated walking wheel which measures distance in feet. Kotcho measured the distance to be 9,860 feet, less than 10,520 feet in the 2 miles. Because the measured distance was less than 2 miles and the route was not deemed hazardous, Kotcho recommended against granting petitioner's son transportation.

3. Petitioner then presented his request to the Board's transportation coordinator, James Brennan, who measured the distance between petitioner's residence and the schoolhouse with the calibrated walking wheel. Brennan measured the distance between the door of the residence and the parking lot of the school house which is approximately 300 feet beyond the door of the school house to be 10,138 feet. Brennan recommended against petitioner's request for transportation because the distance was less than 2 miles and the route was not deemed hazardous.

4. The route which was measured by Kotcho and by Brennan was to exit petitioner's home, then his driveway, turn left on Goodluck Street, left on Fleet Avenue, continue five blocks to Nevsky Street, turn left on Nevsky Street past Satellite Products manufacturing plant to Park Avenue, turn right on Park Avenue which is a four lane roadway, and continue for the equivalent of two blocks. At that point a school crossing guard on the opposite side of Park Avenue escorts pupils to

that side to avoid a heavily used crossing intersection further along Park Avenue. The route which is along public roadways is a 40-minute walk.

Petitioner's son then proceeds along Park Avenue, follows the left hand contour of Park Avenue to another crossing guard at Robin Road who escorts pupils back across Park Avenue. At this point, a walking pupil who choses the more direct route to school may continue south on Robin Road onto Board property to the Wood Brook elementary school, take a connecting foot path on school property to Christopher Court, to Elsi Street, to Woodrow Wilson Drive and then directly to the front door of the school house. Nevertheless, transportation coordinator Brennan as well as Vice Principal Kotcho measured not the Robin Road route but the longer way through Mulberry Lane, a block east of Robin Road, to Elsi Street to Woodrow Wilson Drive, to the school house.

5. A video-tape recording of this route, which was played at the hearing and is in evidence (R-5), shows that Fleet Avenue, which is without sidewalks, may be characterized as having very low volume vehicular traffic, limited to neighborhood residents and residential delivery traffic. The same may be equally said of Nevsky Street, which does have a sidewalk. A pedestrian on Fleet Avenue passes homes on either side of the roadway with the exception of approximately one block of vacant land which contains weeds. The video-tape also shows Park Avenue, a four-lane roadway, to consist of moderate to heavy traffic volume but it also has sidewalks for pedestrians to use. Moreover, Park Avenue traffic is controlled by traffic signals and a school crossing guard. When a pedestrian follows the route above toward the Woodrow Wilson School, very low volume of vehicular traffic is encountered after crossing Park Avenue to Robin Road escorted by the school crossing guard.

6. Petitioner produced no evidence to support his concern of drug use on or near the Satellite Products manufacturing plant, nor of so-called undesirable persons loitering nearby. In fact, the testimony of Captain Richard Barrett of the Edison Township Police Department, unequivocally establishes that not one complaint has been made of drug use or suspected drug use, nor of undesirables loitering on or near that plant's property.

7. The Board's transportation policy (R-11) comports with N.J.S.A. 18A:39-1, et seq. and N.J.A.C. 6:21-1.1 et seq. In that the Board acknowledges its obligation to provide transportation "for students of all public and non-profit private schools in grades K through 8 who live at a distance of more than (2 miles) from the school of their attendance* * *." In addition, the policy also provides that

The Board will give due consideration to recommendations of the Traffic Safety Committee for providing transportation to students within the limits established when extraordinary hazards to pedestrians' safety exists.

8. The Board does provide school bus transportation to at least four pupils to the Woodrow Wilson Middle School, each of whom live less than two miles from the school house. The basis for these pupils receiving transportation is that the routes identified as WW5 and WW8 are deemed hazardous by the Board and by the Edison Township Police Department because of the high volume of vehicular traffic, the configuration of the roadways to be taken, and the absences of sidewalks on such roadways.

9. A separate video-tape recording (R-6) of routes WW5 and WW8 shows generally that the roadway used by pedestrians in route WW5 are relatively narrow and curvilinear with more than one 'blind' spot for vehicular traffic, no sidewalks, and moderate to heavy traffic. Captain Richard Barrett, of the Edison Township Police Department who is in charge of the Police Traffic Division, finds the WW5 route unsafe for a child-pedestrian at the time he/she would be walking to and from home and school. This opinion is based on surveys (R-8) of vehicular traffic he caused to be done by police officers on September 11 and 12, 1989, between 7:30 a.m. and 8:30 a.m. and upon an earlier survey (R-9A) performed in 1986.

10. The Superintendent, who has personal knowledge of the route between petitioner's home to the Woodrow Wilson Middle School as described above finds that route to be nonhazardous to pedestrian-pupils. The Superintendent who has personal knowledge of the routes described as WW5 and WW8 finds both routes to be hazardous because of the construct of the roadways, volume of vehicular traffic, and the absence of sidewalks.

11. A route between home and school in this case, different than the route described above and measured by petitioner in his automobile according to the vehicle's speedometer, measures a distant of greater than 2 miles. This route consists of turning right out of petitioner's driveway on Goodluck Street to Park Avenue, Park Avenue to Plainfield Road, right on Plainfield Road to Woodrow Wilson Drive, right on Woodrow Wilson drive to the school entrance. (See R-1).

ARGUMENTS

Petitioner argues that "The evidence presented by the Board of Education cannot prove that [my son's] walking route is safe." (Petitioner's letter memorandum) In this regard, petitioner contends that during the winter time snow and ice "is never

removed from Fleet street and therefore [my son] is subjected to extreme danger from cars skidding on the ice and snow." Id.; that route WW5 is equivalent to the route his son must take with respect to hazards from traffic; that his son may be exposed to harassment from drug users because they use Park Avenue as a main road into the City of Plainfield; and, that the Board went out of its way to find a walking route for his son less than two miles but did not do the same for pupils on route WW5 and WW8. Thus, petitioner demands an Order directing the Board to provide his son with free public school transportation to and from school.

The Board contends that the walking route for petitioner's son between home and school is the shortest route between the two points along public roadways and public sidewalks. The Board points out that its policy provides that resident pupils less than two miles from their assigned schoolhouse are provided transportation when the shortest accessible route between home and school is hazardous. In this instance, the Board points to the evidence it had before it and continues to have which reveals that the walking route between petitioner's home and the Woodrow Wilson School is not hazardous and therefore it is under no obligation to provide school bus transportation to petitioner's son by virtue of the fact that the distance between home and school is less than two miles.

ANALYSIS

N.J.S.A. 18A:39-1 provides in part as follows:

> Whenever in any district there are pupils residing remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such pupils to and from school, including the transportation of school pupils to and from school other than a public school, except such school as is operated for profit...

The term 'remote' is defined at N.J.A.C. 6:21-1.3 in the following manner:

> (e) The words 'remote from the schoolhouse' shall mean beyond 2 1/2 miles for highschool pupils (grades 9 through 12) and beyond two miles for elementary (grades kindergarten through eight) except of educationally handicapped pupils.
>
> (b) For the purpose of determining remoteness in connection with pupil transportation, measurement shall be made by the shortest route along public roadways or public walkways from the entrance of the pupil's residence nearest such public

> roadway or public walkway to the nearest public entrance of the assigned school.

In addition to the authority of boards of education to make rules for the transportation of pupils who live remote from the schoolhouse, N.J.S.A. 18A:39-1.1 also provides that a board may provide, by contract or otherwise, for the transportation of other pupils to and from school who do not live remote from the schoolhouse. Of course, the exercise of this discretionary authority must be in accordance with the law and the rules and regulations of the State Board of Education. The distinction between a board providing the transportation for pupils who live remote from the schoolhouse as compared with providing transportation to those pupils who do not live remote from the schoolhouse is that State aid is available for the former, not the latter.

In this case, the Board did adopt a transportation policy (R-11) which allows for the transportation of pupils who do not live remote from the schoolhouse when extraordinary hazards to the pupil-pedestrian's safety exist.

The evidence and the facts established on that evidence show that the Board measured the distance from the entrance of petitioner's residence to the nearest public entrance of his son's assigned school according to the shortest route along public roadways and public walkways. That route measures a distance of less than two miles. Consequently, petitioner's residence may not be classified as 'remote' from the schoolhouse under the regulatory definition. True, if the standard for measuring the distance between petitioner's residence and the schoolhouse door was according to the route petitioner used in his automotile, that route more likely than not measures more than two miles. However, it is clear from the evidence that that route is not the shortest route available along public roadways and public walkways between the two points.

The evidence further establishes that the Board has a reasonable basis upon which to conclude those pupils not remote from the schoolhouse but who are given school transportation in those areas served by routes WW5 and WW8 face hazardous conditions should they walk to and from school. The curvilinear roads, the volume of traffic, and the absence of sidewalks constitute a reasonable basis upon which the Board may conclude that those pupils face hazardous conditions and that pursuant to its policy it provides such pupils with school transportation. So long as the policy is applied evenly to all pupils resident of the school district with respect to determinations of hazardous conditions, the Board's action is a reasonable and proper exercise of its statutory discretionary authority.

There is no evidence in this record that petitioner's son is in entirely the same circumstances or faces the identical hazards as the pupils who live not remote from the schoolhouse but who are provided school transportation.

CONCLUSION

Having found that petitioner's son does not live remote from the schoolhouse, and having further found that the Board's transportation policy was applied in this case in a reasonable manner, without providing favored treatment to one group as opposed to petitioner's son, I **CONCLUDE** that the Board's determination not to provide petitioner's son with school transportation to and from the schoolhouse is a proper exercise of its discretionary authority. Therefore, I further **CONCLUDE** that petitioner failed to establish the Board's controverted action is arbitrary, capricious, unreasonable, or contrary to law. Thus, the petition of appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, DR. JOHN ELLIS,** who by law is empowered to make a final decision in this matter. However, if Dr. John Ellis 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 **DR. JOHN ELLIS** for consideration.

October 18, 1990
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

OCT 19 1990
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

OCT 25 1990
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

am

LLOYD SOOBRIAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon careful review, the Commissioner concurs with the ALJ that the respondent Board of Education was neither arbitrary nor capricious and acted fully within the scope of its lawful discretion in denying transportation to petitioner's son.

Accordingly, the Commissioner adopts the initial decision of the Office of Administrative Law as the final decision in this matter, which is hereby dismissed for the reasons well stated in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6366-90
AGENCY DKT. NO. 274-7/90

KEVIN A. BABCOCK COMPUTER CORPORATION,

Petitioner,

v.

SOUTHERN REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND IBM CORPORATION,

Respondents.

Richard P. Visotcky, Esq., for petitioner (Masch, Visotcky, Cerefice & Sicheri, attorneys)

Franklin H. Berry, Jr., Esq., for respondent Southern Regional High School Board of Education (Berry, Kagan & Sahradnik, attorneys)

Jeffrey J. Miller, Esq., for respondent IBM Corporation (Riker, Danzig, Scherer, Hyland & Perretti, attorneys)

Record Closed: October 25, 1990 Decided: November 1, 1990

BEFORE ROBERT S. MILLER, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

In this action, Kevin A. Babcock Computer Corporation ("petitioner") seeks to set aside the award by respondent Southern Regional High School Board of Education ("Board of Education") of a contract for the supplying of computer

hardware and software to respondent IBM Corporation ("IBM") and to have the Board of Education award said contract to petitioner.

On or about August 6, 1990 a Verified Petition and Certification seeking an order to that effect was filed by petitioner with the Commissioner of Education and was served on respondents. Treating the Petition as one for emergency relief, on August 9, 1990 the Commissioner of Education filed the instant matter with 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. 15:14F-1 et seq.

Oral argument was held on petitioner's application on August 13, 1990, at which time the Board of Education's Answer to the Verified Petition, together with the affidavit of James A. Moran, were hand delivered to the undersigned and to counsel for petitioner.

By letter ruling dated August 14, 1990, I denied petitioner's application for emergency relief. Petitioner took an interlocutory appeal from said ruling to the Commissioner of Education. By decision dated September 24, 1990, the Commissioner affirmed the ruling "for the reasons expressed in the initial decision and order on emergent relief issued by Judge Miller."

On or about September 27, 1990 respondent Board of Education filed and served a notice of motion for summary decision, or alternatively for dismissal of the verified petition with prejudice. Respondent IBM subsequently did likewise. On October 11, 1990, petitioner filed a letter brief (plus supporting affidavit of Kevin A. Babcock) in opposition to respondents' motions.

Oral argument on the motions was heard telephonically on October 25, 1990.

The essential facts in this case are not in dispute. They are as follows.

FINDINGS OF FACT

1. Kevin A. Babcock is the president and sole stockholder of Kevin A. Babcock Computer Corporation, a corporation of New Jersey having its principal office in Manahawkin, New Jersey.

2. On or about June 13, 1990 and June 14, 1990, respondent Board of Education published notices to bidders for the purpose of obtaining bids for certain computer hardware and software. These notices stated that all bids would be publicly opened on June 27, 1990.

3. In or about the same period of time, the Board of Education mailed to petitioner an invitation to bid, together with the requisite bid forms.

4. Some days before June 27, 1990, petitioner submitted to the Board of Education a bid containing affirmation action affidavit, corporate ownership disclosure, non-collusion affidavit, bid proposal and cashier's check representing bid bond in the amount of $4,500.00.

5. On or about June 25, 1990, respondent IBM corporation ("IBM") submitted to the Board of Education bid documents in the same manner as had petitioner.

6. A number of other bids were also submitted pursuant to the Board of Education advertisements.

7. On June 27, 1990, the Board of Education opened all sealed bids which it had received respecting the contract for computer hardware and software. Formal action on the awarding of the bids was deferred to a subsequent meeting.

8. On or about July 25, 1990, the Board of Education awarded the contract for the supplying of the computer hardware and software to IBM.

9. On or about July 26, 1990, IBM received a purchase order from the Board of Education, which order was subsequently executed and forwarded to the Board of Education for processing.

10. Petitioner's bid for the supplying of the computer hardware and software was approximately $10,000.00 lower, in total, than the bid submitted by IBM.

11. Respondent Board of Education forwarded to petitioner a letter from its secretary dated July 26, 1990 outlining its reason for rejecting petitioner's bid. The reason was an alleged conflict of interest "due to the fact that your mother is a member of the Board of Education." On July 27, 1990, the Board of Education issued and mailed to petition a second letter stating as a second reason for rejection of petitioner's bid that the bid lacked "sufficient documentation to determine any equivalency."

12. In early September 1990, after petitioner's application for emergency relief had been denied by the Commissioner of Education, IBM provided and installed the computer hardware and software called for by the bid specifications and the contract and, on September 7, completed its initial training of staff persons.

ISSUE AND ANALYSIS

For the reasons discussed below I have come to the conclusion that respondents are entitled to prevail on their motions.

1. Substantive Law

The controlling statute in this case is N.J.S.A. 18A:12-2, which, in pertinent part, provides.

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

The above proposition has been recognized, stated and approved for decades. Public service demands an exclusive fidelity. The law tolerates no mingling of self-interest. Ames v. Bd. of Ed. of Montclair, 97 N.J. Eq. 60, 65 (Ch. 1925).

Citizens have the right to expect that in everything pertaining to their business or welfare, public officials will exercise their best judgment, unaffected and undiluted by anything which might inure to their own individual interests. Aldom v. Borough of Roseland, 42 N.J. Super. 495, 501 (App. Div. 1956).

The broad application and scope of the rule and the reason therefor have never been better stated than in the Aldom case, supra, where, at page 502, the court declared:

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

The case of Griggs v. Princeton Borough, 33 N.J. 207 (1960) is in accord. It was there noted (p. 219): "The question is whether there is a potential for conflict, not whether the public servant succumbs to the temptation or is even aware of it." [Emphasis added.]

It is important, moreover, that not even "the faintest shadow be cast on the integrity of the [public] determination." Hochberg v. Borough of Freehold, 40 N.J. Super. 276, 284 (App. Div. 1956).

Petitioner uses a different policy argument to support its contentions, viz., that the pecuniary interest of the public requires that the contract be awarded to petitioner because that will effect a savings of at least $10,000. There is some merit to this argument, both practically and legally. See, e.g., Arthur Venneri Co. v. Paterson Housing Authority, 29 N.J. 392, 403 (1959), wherein the court referred to the basic policy of the bidding laws, i.e., to encourage competition and thus "to protect the public coffers and prevent chicanery and fraud in public office."

The public policy of preventing "chicanery and fraud," however, is served also by precluding the acceptance of bids, even low bids, by public officials under circumstances like those in the instant case.

Furthermore, in my opinion the policy more favored in the law is the one first mentioned, viz., avoidance of conflict of interest, both actual and potential, so that public confidence in government and in governmental action can be maintained.

Petitioner also argues that since Mr. Babcock had not discussed the contract with his mother and that his mother could have abstained from voting on the award of the contract to him, the public was not harmed and no conflict of interest existed or appeared. A similar argument, however, was made and rejected in the case of Elms v. Mt. Olive Tp. Bd. of Ed., 1977 S.L.D. 713 (decided June 10, 1977) (Board of Education's purchase of supplies from a business owned by the son of one of the Board members was criticized and disapproved). In the Elms matter, the Commissioner of Education declared (p. 722):

> The purchase, although nominal, was in fact made and was improper in the context of law. N.J.S.A. 18A:12-2. Accordingly, the Commissioner does not condone but condemns the action and issues a caveat to all boards of education to refrain from the illegality of such practice. While there is, herein, no evidence of conspiracy, no proof of unfair gain, no showing of excessive cost, the practice cannot be sanctioned. [Emphasis added.]

In the Elms case, the Commissioner specifically directed the Board of Education to refrain from purchasing materials or services for the schools from immediate family of board members.

2. Summary Decision

Under N.J.A.C. 1:1-12.5(b), a motion for summary decision may be granted "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."

As previously noted, there is no genuine issue as to any of the material facts in this case. As just discussed, moreover, case law and public policy prohibit the award of public contracts to persons related to officials who are responsible, wholly or in part, for awarding those contracts. That is the case here. Respondents therefore must prevail on their motions.

CONCLUSION AND ORDER

For the reasons stated above, I **CONCLUDE** that respondents' motions for summary decision and for dismissal with prejudice of petitioner's verified petition should be granted. It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 1, 1990
Date

ROBERT S. MILLER, ALJ

Receipt Acknowledged:

Nov 7, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 08 1990
Date

OFFICE OF ADMINISTRATIVE LAW

jz

KEVIN A. BABCOCK COMPUTER CORPORATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SOUTHERN REGIONAL HIGH SCHOOL BOARD OF EDUCATION AND IBM CORPORATION,	:	DECISION
RESPONDENTS.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Petitioner's exceptions were untimely filed but its reply exceptions were timely. Because petitioner's exceptions were untimely filed, the Commissioner does not consider the reply brief submitted by the Board in rebuttal to said exceptions. Similarly, Respondent IBM's response to petitioner's exceptions has not been considered.

The Board concurs with the ALJ's determination that a conflict of interest mandated the Board's rejection of petitioner's bid for computer hardware and software. However, it excepts to what it claims is the ALJ's erroneously implying that petitioner's bid was "responsive to the Board's specifications." (Exceptions, at p. 1) While the Board recognizes that the issue of whether petitioner was the lowest responsible bidder is in dispute and would require a factual hearing in order to dispose of the question, it submits that the initial decision should reflect the fact that this issue has not been adjudicated in petitioner's favor. It quotes the initial decision, in excerpt, at pages 3, 5, and 6 in support of its contention that the ALJ erroneously implied "that Petitioner's bid, which happened to be $10,000 lower than that of IBM Corporation, to whom the contract was ultimately awarded, was a lower responsive (sic) bid." (emphasis in text) (Exceptions, at p. 3) The Board maintains that petitioner's bid was properly rejected not only because of the conflict of interest presented by the fact that Mr. Babcock's mother is a member of the Board, but also because of petitioner's failure to provide documentation to prove the equivalence of the proposed computer hardware with the Board's specifications.

The Board submits that the initial decision should be modified so that it no longer contains any implication that petitioner's lower bid was responsive to the specifications. It also asks that the Commissioner state in his decision that such issue is a factual one which has not been disposed of because of the conflict of interest issue presented, which mandated the granting of summary judgment in the Board's favor. It seeks affirmance of the remainder of the initial decision.

Petitioner's reply exception avers that in the Board's brief dated November 19, 1990 it is alleged that petitioner's bid was not the lowest responsible bid submitted to the Board. Petitioner counters by claiming that at no time during the oral argument, nor in the Board's brief, was petitioner's bid challenged as not being the lowest responsible bid submitted. Had the responsibility of the bid been challenged before its rejection, petitioner contends, then it should have been afforded a hearing pursuant to the New Jersey Administrative Code to determine such responsibility. Petitioner claims that at no time was it availed an opportunity to such a hearing.

Upon a careful and independent review of the record of this matter, the Commissioner adopts as his own the recommendation of the Office of Administrative Law to grant the Board's Motion for Summary Decision predicated on N.J.S.A. 18A:12-2, which along with "*** case law and public policy prohibit the award of public contracts to persons related to officials who are responsible, wholly or in part, for awarding those contracts." (Initial Decision, at p. 6) See Elms et al. v. Mt. Olive Twp. Bd. of Education, 1977 S.L.D. 713, 722.

The Commissioner agrees with the ALJ that avoidance of a conflict of interest, both actual and potential, mandates that petitioner's bid on computer hardware and software in the district wherein his mother is a member of the Board of Education, be rejected. In so deciding, the Commissioner passes no judgment on the issue of whether petitioner was the lowest responsible bidder pursuant to N.J.S.A 18A:18A et seq., in that there was no hearing on the merits of any such claim and, thus, the Commissioner has no facts before him upon which any such determination could issue.

Accordingly, for the reasons stated above, as well as those enunciated in the initial decision concerning conflict of interest, the Commissioner grants summary decision in the Board's favor. The initial decision is dismissed, therefore, with prejudice.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISIONS
OAL DKT. NOS. EDU 9591-89 and
EDU 1666-90 and EDU 6386-89
AGENCY DKT. NOS. 348-11/89
and 43-2/90

VIRGINIA LEWIS, KAREN BARKSDALE,
CATHERINE DISMUKES AND
ANN VANCE,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF TRENTON,
Respondent
AND
KAREN BARKSDALE,
CATHERINE DISMUKES AND
ANN VANCE,
Petitioners,
v.
BOARD OF EDUCATION OF THE
CITY OF TRENTON,
Respondent.

Richard A. Friedman, Esq., for petitioners (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Thomas W. Sumners, Esq., for respondent

Record Closed: September 10, 1990 Decided: October 24, 1990

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

The petitioners allege and the Trenton Board of Education (Board) denies that the Board violated the petitioners' tenure or seniority rights or both by the manner in which the Board filled certain vacancies. The matters were opened before the Commissioner of Education and transmitted to the Office of Administrative Law on December 19, 1989 and March 5, 1990, respectively. Following correspondence with counsel, I consolidated the two matters on March 26, 1990. At about the same time, a related matter, Trenton Education Association v. Board of Education of the City of Trenton, OAL DKT. EDU 6386-89, was proceeding before the Honorable Daniel B. McKeown, ALJ. Following further correspondence with counsel, the last named matter was transferred to me.

I conducted a telephone conference with counsel on July 17, 1990. Counsel stipulated that case no. EDU 6386-89 is settled and counsel will so stipulate. It was further agreed that counsel would submit a joint stipulation of facts in the remaining consolidated matter. They did so, I reviewed it and found no essential facts in dispute. The parties thereupon submitted motions and briefs in support of motions for summary judgment. Reply briefs were received and the record closed on September 10, 1990.

STIPULATIONS

Counsel submitted and I **FIND** as fact the following:

1. The claims of Petitioner Virginia Lewis have been resolved and rendered moot. Virginia Lewis was appointed to a full-time position, retroactive to September 1, 1989, together with all emoluments, benefits and pay attrituable to a full-time regular position.

2. The remaining Petitioners in these matters are Karen Barksdale, Catherine Dismukes and Ann Vance. All are tenured teachers in the Respondent school district, under instructional certificates.

3. Petitioner Barksdale holds an instructional certificate, with endorsements in Data Processing, Accounting, Typewriting and General Business.

4. Petitioner Barksdale's employment history has been as follows: May and June 1984, and 1984-85 through 1988-89 school years.

5. All of Petitioner Barksdale's employment has been in the secondary category, under the aforesaid endorsements. She acquired tenure and seniority under each endorsement.

6. Petitioner Dismukes holds an instructional certificate, with endorsements in Bookkeeping and Accounting, Secretarial Services, and General Business Studies.

7. Petitioner Dismukes' employment, has been for the entire 1984-85 through 1988-89 school years.

8. During Petitioner Dismukes' employment, she has been assigned to serve under all of said endorsements, and acquired tenure and seniority rights under each of said endorsements.

9. Petitioner Vance holds an instructional certificate, with a Comprehensive Business endorsement.

10. Petitioner Vance has been employed by the Respondent for the entire 1985-86 through 1988-89 school years.

11. All of Petitioner Vance's employment has been under her instructional certificate, under the Comprehensive Business endorsement. She acquired tenure and seniority for all of her service under said endorsement.

12. All of the Petitioners were riffed by Respondent effective June 30, 1989.

13. Following said rif, on or about July 27, 1989 and August 31, 1989 Respondent created two (2) new teaching positions, both in the secondary category. Those positions are in dispute herein. The first position was entitled Teacher Specialist for Business and Industry Liaison. It is a twelve (12) month full-time position. The job description for said position is attached as Exhibit A. The position was submitted to the Mercer County Superintendent of Schools on October 19, 1989. The County Superintendent never acted on the submission. This vacancy was filled on November 1, 1989, by the transfer of Donald Cox, a tenured Social Studies teacher, who has been employed for twelve (12) years by Respondent.

14. The second position created by Respondent was entitled Teacher-Job Training Partnership Act. It is a half-time ten (10) month position. It was established on August 31, 1989. The position was subsequently advertised and filled on September 22, 1989 by Michelle Guhl, who was the only applicant. Said teacher is not tenured. The position was neither approved by nor submitted to the Mercer County Superintendent of Schools for approval.

15. Respondent neither notified nor advised any of the Petitioners about the creation, existence, or availability of either of said positions. Nor did Respondent offer any of the Petitioners said positions.

16. Petitioners filed the Petitions in these matters within ninety (90) days of their becoming aware of the existence of said positions, and each Petition was timely filed.

17. The position held by Donald Cox prior to his transfer to the first facancy, was filled by the appointment of Virginia Lewis to a full-time Social Studies position. She had previously served, for a brief period of the 1989-90 school year, in a Social Studies position which Respondent had asserted was a substitute position, and Petitioner Lewis' appointment to the Social Studies position was changed from substitute to regular on November 30, 1989, effective July 1, 1989. Petitioner Lewis holds an instructional certificate, with a K-12 endorsement as a Teacher of Social Studies, and she was employed for the 1984-85 through 1988-89 school years.

18. On or about June 13, 1989, all Petitioners were given the opportunity to apply for a teacher disciplinarian position, a position which Respondent determined they were qualified to fill. The position commenced September 1, 1989. Respondent ultimately filled it with a teacher who was riffed and had more seniority than Petitioners.

19. The above facts constitute the entire and complete Stipulation of Facts in this matter.

PETITIONERS' ARGUMENTS

Petitioners assert that the Board violated their tenure or seniority rights or both by filling a half-time position with a nontenured teacher. The only certificate required for the Job Training Teacher position is a "valid instructional certificate." All petitioners hold such certification. Because teachers acquire

tenure under their instructional certificates, and tenure extends to all endorsements on those certificates, tenured teachers are entitled to a preference; that is, to claim any position for which they hold appropriate certificates and endorsements over any non-tenured teacher. They need not have served under a particular endorsement to exercise this tenure right.

The right extends also to positions which may be created or filled subsequently, after the reduction in force. Irrespective of any requirements the Board may impose in initial hiring, the State Board has made clear that in weighing tenure and seniority rights, the sole criterion for claiming positions is the certification requirements set by law. While education law permits a board to establish qualifications for employment in or promotion to a particular position beyond the threshhold qualification established by statute and regulation, a board's desire to employ or retain individuals with such additional qualifications cannot defeat the seniority rights conferred by statute on teaching staff members. What this means simply is that teachers on preferred eligibility lists, provided they hold the minimum certification, may exercise rights over nontenured or less senior teachers.

Each petitioner in this case acquired tenure under her instructional certificate. Each petitioner could claim any assignment under her instructional certificate over any nontenured teacher, even though the position may have been created after the rif. No matter what qualifications the Board could impose on new applicants, those qualifications could not defeat the petitioners' tenure and seniority claims. Thus, each petitioner was entitled to the half-time position over the nontenured person assigned to it and is entitled to reinstatement, back pay and benefits applicable to that position.

When a Board creates a position in the secondary category, and simply requires a teaching certificate, all tenured staff may assert tenure and seniority right to it.

Because the Board assigned a position to a nontenured teacher—a position the petitioners were entitled to by tenure and seniority status—each petitioner is entitled to be reinstated to the position, together with back pay,

benefits and all emoluments as if employed in the position, retroactive to its inception.

The second position in dispute is the Teacher Specialist position. Although the legal issue surrounding that vacancy is more complex, the answer is the same. The position is a full-time position and it requires an instructional certificate. The position title was never approved by the county superintendent of schools. Therefore, the petition is one requiring any instructional certificate but is one that has not specifically been approved by the county superintendent. Even if the county superintendent approved, however, the approval could not defeat the petitioners' tenure and seniority claims. All certified staff in the secondary category could assert seniority claims to the position. Each petitioner satisfies the Board's criteria for the position. The only arguably inapplicable criterion is employment by the Board. However, because each petitioner was employed in the district and remains on its preferred eligibility list, that status is sufficient to satisfy any employment qualification because any such limitation would be arbitrary and unlawfully violate seniority rights. All petitioners met the state imposed certification requirements and whatever criteria the Board could impose on new applicants could not serve to defeat the petitioners' seniority entitlements.

The Board seems to argue that because it transferred a tenured teacher to the position, it did not violate the petitioners' seniority rights. However, the Board misreads the law. N.J.S.A. 18A:28-12 provides that a person who is riffed shall be placed on and remain on a "preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified." The statute also provides that the person riffed and placed on a seniority list shall be reemployed by the Board if and when a vacancy occurs for which the person is qualified and, further, that in determining seniority and computing length of service for reemployment, the Board must give full recognition to previous years of service.

The statutory language is clear. The rule language of N.J.A.C. 6:3-1.10(l) is equally clear. It says that whenever any person is riffed and cannot revert to a category ("bumping rights"), the person shall be placed and remain upon the preferred eligible list of the category from which he or she reverted until a

vacancy shall occur in that category to which the person's seniority entitles her or him.

Both statute and regulation clearly and unambiguously provide that when there is a vacancy, it cannot be filled by transfer. Rather a teacher who has been riffed and is otherwise qualified must be recalled. Once the Board created a vacancy, it was required to fill the position with a riffed teacher; that is, one on the preferred seniority eligibility list. The Board could not fill the position by simply transferring a different teacher to the position. The plain language of the statute, the plain languatge of the regulation, the philosophy of the seniority system and case law preclude such an action.

If this were not the case, opportunities for manipulation and abuse would be obvious. If the Board's position is sustained, any board could frustrate tenure and seniority recall rights by the simple expedient of transferring the staff.

The Stipulation, above, demonstrates that Virginia Lewis had equal seniority to Cathering Dismukes and two months less seniority than Karen Barksdale. A vacancy was created. Virginia Lewis leapfrogged over Barksdale and Dismukes. The seniority system cannot have been intended to create absurd or unfair results. The Board's actions resulted in Lewis now holding a full-time position, despite the fact that a vacancy arose outside of Social Studies and other teachers had greater seniority rights to that vacancy. The petitioners do not quarrel with the fact of Lewis' employment as a full-time Social Studies teacher. As reflected in the original petition, the petitioners believe Lewis always was serving as a regular Social Studies teacher. The petitioners quarrel only with the Board's legal position.

BOARD'S ARGUMENTS

The Board argues that the petitioners are not entitled to either position. The Board created the position of Teacher Specialist for Business and Industry Liaison, a 12-month position, on July 27, 1989. On November 1, 1989, the Board appointed Donald Cox, a tenured Social Studies teacher who had been employed for 12 years. Cox was selected for the position because of prior experience in the business community. Cox's Social Studies position was filled by Petitioner Lewis,

who was filling a substitute Social Studies position at the time. Lewis had been riffed effective June 30, 1989. She was assigned the Social Studies substitute position at the beginning of the 1989-90 school year. However, when she was appointed to Cox's former position, the appointment was made retroactive to July 1, 1989. The remaining petitioners, Dismukes, Barksdale and Vance, claim they are entitled to the position held by Cox because they were tenured teachers riffed by the Board effective June 30, 1989.

The statute governing rifs directs the Commissioner of Education to establish seniority standards. The Commissioner has done so in N.J.A.C. 6:3-1.10. Among other things, the rule provides that whenever any person's employment is abolished, he or she shall be given employment in the same category to which entitled by seniority. If the person riffed has insufficient seniority for employment in the same category, he or she reverts to the category in which formerly employed. If the person has insufficient seniority to assert the right to some employment, the person shall be placed on a preferred eligible list of the category from which he or she reverted until a vacancy occurs in the category to which the person's seniority entitles him or her.

The petitioners' tenure rights were not violated when Cox was appointed. Their tenure and seniority rights were probably recognized when the Social Studies position Cox previously held was given to petitioner Lewis based on her senior position on the eligibility list. Barksdale, Dismukes and Vance do not hold certificates that entitle them to the position of Teacher Specialist for Business and Industry Liaison. The Board followed statute and code by assigning Cox's Social Studies position to Lewis. No prior decision of the Commissioner or the State Board or of a competent court requires the Board to give the Teacher Specialist position to any of the petitioners. Moreover, Cox is a tenured teacher with more experience than any of the petitioners.

Nor are the petitioners entitled to the Teacher Job Training Partnership Act part-time position. The position was filled by Michelle Guhl on September 22, 1989. Guhl was the only applicant. Although the Board advertised the position, none of the petitioners were personally notified of the position. Guhl was not a tenured teacher. To qualify for the position, the Board specified the following criteria:

1. Valid New Jersey Secondary Instructional Certificate;

2. Two years full-time experience in Adult Education and/or working with out-of-school youth;

3. Experience in recruiting and/or job placement of at-risk school youth;

4. Working knowledge of the Trenton community.

5. Business Education or counselling background preferred.

Guhl met all of the qualifications. The petitioners do not meet qualification number 2 and qualification number 3.

The reemployment rights of tenure teachers are established by N.J.S.A. 18A:23-12. In addition, N.J.S.A. 18A:28-5 provides that all teaching staff members holding positions which require them to hold certificates issued by the Board of Examiners can obtain tenure. Tenure protection attaches to all endorsements upon a teacher's instructional certificate even though the teacher has not actually served the requisite period of time pursuant to N.J.S.A. 18:28-5. The State Board so established in Joseph Grosso v. New Providence Bd. of Ed., OAL DKT. EDU 5253-88 (Apr. 5, 1989), rev'd Comm'r of Ed. (May 22, 1989), rev'd St. Bd. of Ed. (Mar. 7, 1990).

Grosso, however does not require the Board to offer the Teacher Job Training position to the petitioners because of their superior tenure and seniority rights over Guhl. A person can exercise tenure and seniority rights for reemployment only when "a vacancy occurs in a position for which such person shall be qualified . . . ." N.J.S.A. 18A:28-12. Therefore, rights of reemployment can be exercised for a new and vacant position only where the teacher is qualified for the position. None of the petitioners meet the qualifications 2 and 3. Therefore, they have no right to the position over Guhl.

DETERMINATION

Any assertions to the position of Teacher Specialist for Business Industry Liaison must fail. Absent a showing that the petitioners or any of them were more

qualified for the position than Cox, his longer service in the district entitles him to the position. In fact, the record tends to show that Cox not only is more senior in terms of service than the petitioners, but has prior business experience that the petitioners do not assert. There is no reason in law, policy or common sense to conclude that the Board cannot fill a vacancy such as this by transfer. That holding would improperly impinge on the Board's managerial prerogative to assign staff within the scope of their certificates and endorsements. See, discussion of Grosso, infra. I **FIND** and **CONCLUDE** that so much of the petitions as go to this position must be **DENIED**. It is so **ORDERED**.

The Job Training Partnership Act position stands on a different footing. The position title was not submitted to the Mercer County Superintendent of Schools for approval pursuant to N.J.A.C. 6:11-3.6. That rule requires boards of education to assign position titles to teaching staff members that are recognized in the rules. If a board of education determines to use an unrecognized position title, the board must submit a written request for permission to use the proposed title to the county superintendent of schools prior to making such an appointment. The request must include a detailed job description. The county superintendent exercises his or her discretion regarding approval of the request. If the request is granted, the county superintendent makes a determination of the appropriate certification and title for the position. None of this was done in the present case and I am denied the benefit of the county superintendent's reasoning and determination.

As a general proposition, tenured persons qualified for a position by certification, whether they have served in the precise category or not, prevail over non-tenured persons in rif situations. Capodilupo v. West Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988), have made this quite clear. In Grosso v. New Providence Bd. of Ed., OAL DKT. EDU 5253-88 (Apr. 5, 1989), rev'd Comm'r of Ed. (May 22, 1989), rev'd St. Bd. of Ed. (Mar. 7, 1990), the State Board, building upon Capodilupo and Bednar, expanded on the statutory scheme.

Grosso, a tenured teaching staff member, served as a high school business teacher. His position was riffed and Grosso, who has an elementary

endorsement on his instructional certificate, alleged the board violated his tenure rights when it appointed non-tenured individuals as elementary teachers. Grosso's only elementary level experience consisted of teaching introductory computer science skills for two periods a day to groups of third grade pupils. He had done this for three years prior to the rif and he had taught Business Education at the high school level since 1985-86. He also had service as a business supervisor, a business department head and a business education coordinator.

Grosso asserted that by virtue of his tenure status he was entitled to any teaching assignment covered by his endorsements over any non-tenured individuals. The board took the position that tenure was achieved as defined by the certification under which a teacher actually served. Therefore, in the board's view, petitioner had never served as an elementary teacher and thus had no tenure rights to an elementary assignment.

The State Board agreed with the ALJ decision, specifically the judge's conclusion that

> Petitioner acquired tenure as a teacher pursuant to N.J.S.A. [18A:28-6]. Having acquired tenure as a teacher, he could be reassigned within the scope of his instructional certificate to any assignment covered by the endorsements on his instructional certificates. When his position as "teacher" was abolished, he became entitled to any teaching assignment covered by the endorsements on his certificate to which respondent Board had assigned non-tenured teachers. Notwithstanding that the respondent Board believes it had educational reasons for not appointing petitioner to one of the elementary school positions, lack of service as an elementary teacher cannot thwart petitioner's tenured rights over non-tenured individuals. Initial decision at 12.

The State Board went on to say

> Given the staturory scheme, we have no choice but to conclude that tenure is achieved in and tenure protection attaches to all endorsements upon a teacher's instructional certificate, not just those under which the individual has actually served for the requisite period of time pursuant to N.J.S.A. 18A:28-5 or 18A:28-6. Tenure attaches to a position, and "teacher" is a separately tenurable position under N.J.S.A. 18A:28-5. See Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner, 1982 S.L.D. 1554.

> Petitioner was authorized to serve under all the endorsements on his instructional certificate, including his elementary education endorsement. N.J.A.C. 6:11-6.1 et seq. We stress that, as correctly pointed out by the ALJ, Petitioner could have been transferred by the Board to any other assignment within the scope of his endorsements within that tenurable position. Thus, he could properly have been transferred without his consent to an elementary teaching assignment, even if he had never previously served under his elementary eduation endorsement. See Howley, supra.
>
> We find no basis in Capodilupo or Bednar for concluding that tenure is obtained "within an endorsement on an instructional certificate." To the contrary, we find that those Appellate Division decisions are clear expressions of Petitioner's assertion that the scope of his tenure protection extends to all endorsements on his instructional certificate. The scope of the position in which a teacher may be entitled to tenure protection is merely limited by the scope of his or her endorsements. This limitation is predicated on the fact that the assignments that a staff member is qualified to fill are similarly limited. Capodilupo, supra.

This reasoning controls the present case. I **FIND** that the petitioners here achieved tenure as "teacher" by virtue of their service for the requisite time under N.J.S.A. 18A:28-6. Their tenure protection extends to all of the endorsements on their instructional certificates. They may assert rights over non-tenured teachers limited only by the scope of their endorsements.

As the State Board noted in Grosso, above, this result does no violence to seniority regulations. N.J.S.A. 18A:28-10 declares only the rights between themselves of tenure teachers in a rif. In those circumstances, seniority is determinative. In today's case, seniority is not determinative. Seniority rights are not even at issue.

The Board advances and "educationally based reasons" argument. The State Board also addressed that question in Grosso stating "in light of the Appellate Division in Bednar, supra, [we] reject the continuing viability of such a standard in assessing the rights of tenured teachers in a RIF."

I therefore **CONCLUDE** that the petitioners' tenure rights were violated when the Board abolished their teaching positions pursuant to N.J.S.A. 18A:20-10 and employed a non-tenured individual as Job Training Partnership Act teacher on

a half-time basis. The petitioners hold valid New Jersey secondary instructional certificates.

I **ORDER** that the Trenton Board of Education submit the unapproved title, and a job description therefor, to the Mercer County Superintendent of Schools for approval pursuant to rule. I further **ORDER** the Trenton Board of Education to assign petitioner Barksdale, the most senior of the petitioners, to the controverted position and I **ORDER** that she be awarded back pay and emoluments from the beginning of the 1989-90 school year less mitigation.

I **ORDER** that petitioners Dismukes and Vance remain upon all eligibility lists to which their endorsements entitle them. They are under no obligation to apply for posted positions. If their endorsements entitle them to any vacant position the Board has a duty to inform them of such position.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

24 OCTOBER 1990
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

OCT 25 1990
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 27 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

km

VIRGINIA LEWIS ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
KAREN BARKSDALE ET AL.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions.

Petitioners rely upon and incorporate by reference their brief submitted to the ALJ in which they contend that the Board could not legally fill the vacancy in the unrecognized title position of Teacher Specialist for Business and Industry Liaison by transfer, despite the fact that the teacher transferred, Mr. Cox, may have been more senior or had more experience than petitioners. For this proposition, petitioners rely on Baruffi v. Board of Education of Morris Hills Regional School District, Morris County, decided by the Commissioner May 16, 1990. Petitioners contend that in light of Baruffi, the ALJ erred in concluding that the vacancy could be filled by transfer. They aver that the Board was required by law to fill the vacancy by application of seniority from among the tenured individuals on the preferred eligibility list.

Petitioners distinguish the State Board's decision in Joseph Grosso v. Board of Education of the Borough of New Providence, Union County, decided by the Commissioner May 22, 1989, rev'd State Board March 7, 1990, claiming that case is inapposite to the instant matter because Grosso addressed the rights of tenured teachers to claim positions over nontenured teachers under any endorsement on their instructional certificates. Petitioners argue that Grosso did not address the rights of tenured staff to assert seniority rights to vacant positions following a RIF.

Petitioners also find the ALJ's analysis flawed in referring to Mr. Cox's alleged prior business experience and qualification as a reason for assigning him the position in question. They submit that the position was never approved by the county superintendent and that the Board simply required that the holder of the position have an instructional certificate. Thus, petitioners avow, all tenured teachers employed by the Board in the secondary category could assert seniority rights to said position. Petitioners cite Sharon Rogan v. Edison Township Board of Education, 1985 S.L.D. 635 and Susan Data-Samtak v. Board of Education of the Scotch Plains-Fanwood Regional School District, Union County, decided by the Commissioner January 27, 1988, aff'd State Board June 1, 1988 for this proposition. Petitioners further claim that even if higher qualifications may be imposed on new staff in initial hiring, they cannot be applied to defeat seniority claims, citing South River Education Association et al. v. South River Board of Education, Middlesex County, decided by the Commissioner September 9, 1985, rev'd State Board November 4, 1987, aff'd N.J. Superior Court Appellate Dvision April 16, 1990, and Constance Johnson v. Board of Education of the City of Englewood, 1985 S.L.D. 618, aff'd State Board October 1, 1987. Thus, petitioners submit, the ALJ's decision must be reversed, and the Commissioner must declare that each petitioner was entitled to the position, not Mr. Cox. They further ask that each petitioner be reinstated to the position, together with back pay, benefits, and all emoluments as if assigned to it since its inception date.

Petitioners concur with the ALJ's position on the Job Training Partnership Act position, but claim that if Petitioner Barksdale is unable to accept the position, or declines it, the position must be offered to Petitioners Dismukes and Vance, together with back pay, and all benefits and emoluments of employment as if they had been assigned the position from its inception.

The Board's reply exceptions assert the ALJ was correct in holding that the Board did not violate petitioners' tenure rights by giving the position to Mr. Cox, stressing that Mr. Cox had both greater seniority rights and more experience in the business community. It claims its managerial right of assignment would be abrogated if it were determined that petitioners had a right to Mr. Cox's position.

The Board notes that Petitioner Lewis accepted the position vacated in social studies by Mr. Cox. The Board suggests that to follow petitioners' argument would limit respondent's right of assignment and would promote a "shell game" (Reply Exceptions, at p. 2) of taking a teacher off a preferred eligibility list for a vacant position and thereafter reassigning him or her to another position because it would better enhance the Board's educational goals to put another person in the once vacant position. Thus, the Board requests that the ALJ's decision upholding the assignment of Donald Cox to the position of Teacher Specialist for Business and Industry Liaison be affirmed.

Upon a careful and independent review of the record of this matter, the Commissioner reverses the ALJ in his conclusions of law regarding position 1, Teacher Specialist for Business and Industry Liaison. He further modifies the ALJ on the remedy regarding position 2, Teacher-Job Training Partnership Act.

The Commissioner does not agree with the ALJ's conclusion that because petitioners were not more qualified for position 1 than Mr. Cox, they may not assert entitlement to the position over Mr. Cox. N.J.S.A. 18A:28-5, 18A:28-6, 18A:28-9 and N.J.A.C. 6:3-1.10 et seq. provide that when a vacancy occurs following a reduction in force, the district must first look to its preferred eligibility list for qualified candidates and recall any such qualified tenured candidates. Only if no such candidate exists, may the Board then consider transferring a continuously employed teacher to fill the vacancy. See Baruffi, supra, where it is stated:

> The Commissioner does not accept the ALJ's conclusion, however, that Mr. Losey was entitled to one of the ISS/Remedial positions as he was the most senior of the teaching staff members in the matter. Nowhere in the record is it demonstrated that he was subject to a reduction in force, thus his tenure and seniority are not at issue in the dispute. Rather, the record demonstrates that he requested a voluntary transfer to an ISS/Remedial position which the Board granted.
>
> Petitioners were subject to abolishment of their positions in April 1989. Therefore, when the vacancies for ISS/Remedial teaching positions became open in May 1989, petitioners should by virtue of their tenure rights have been assigned to them as they were qualified for the positions. A voluntary transfer of a tenured teacher not subject to a reduction in force may not abrogate petitioners' entitlement to the vacant positions. (Slip Opinion, at p. 16)

See also Balczun v. Board of Education of the Borough of Medford Lakes, Burlington County, decided by the Commissioner July 16, 1987. (Voluntary transfer of a tenured teacher from teacher of the handicapped position to an elementary teacher position after the abolished teacher of the handicapped position was recreated was set aside because to rule otherwise would have eroded the tenure and seniority rights of petitioner who had been subject of a RIF and was on a preferred eligibility list for an elementary teacher position.) In the instant matter all three tenured, riffed petitioners herein held the necessary certification to assume the duties of the position at issue. Thus, as tenured board employees on a preferred eligibility list, their eligibility superseded Mr. Cox's candidacy for the position.

Moreover, because all three petitioners meet the certification requirements set down by the Board, those criteria set forth in the Board's job description beyond the requirement that the person holding the position hold an instructional certificate may not defeat their seniority entitlement to the position. Thus, the Board may not select Mr. Cox to hold the position merely because it believes he has more business experience without first considering the tenure and the seniority entitlement of the three qualified riffed employees. To do so would contravene N.J.S.A. 18A:28-5, 18A:28-6, 18A:28-9, N.J.A.C. 6:3-1.10 et seq.

As to position 2, the Commissioner agrees with the ALJ's legal conclusion that petitioners' tenure rights were abrogated by hiring a nontenured teacher for the position of Job Training Partnership Act. See initial decision "Determination" section at pages 9-13. See also N.J.S.A. 18A:28-5, Bednar, supra, Capodilupo, supra, and Grosso, supra.

Having said that the Board inappropriately hired a nontenured teacher in contravention of petitioners' tenure rights regarding position 2, the matter thus also becomes one of seniority, as is the case in position 1, because as among those three petitioners all of whom have seniority in the secondary category, one must be selected. (N.J.A.C. 6:3-1.10(i)) Seniority entitlement is based upon service within the category under the appropriate endorsement for the position. In the instant matter, any instruction endorsement is sufficient to hold either of the two positions in question. All three petitioners have the appropriate secondary instructional certificate within the secondary category for the position and, thus, all three have a seniority claim to the positions.

However, in selecting which petitioner is entitled to which position herein, the Commissioner would distinguish the selection process applied in the matter captioned Schienholz and Fuller v. Board of Education of the Township of Ewing, Mercer County and Wayne E. Pickering v. Board of Education of the Township of Ewing, Mercer County, decided by the Commissioner June 19, 1989, aff'd in part/rev'd in part State Board February 7, 1990, aff'd N.J. Superior Court Appellate Division November 19, 1990. In that case, three elementary principals were determined by the Commissioner, State Board and Appellate Division to have tenure claims to a position of high school principal, notwithstanding the fact that they had never served in the category of high school principal. Thus, because their claim was one based exclusively on tenure, and not seniority because they all lacked service in the category of high school principal, it was directed that the board interview all three and choose the one whom it felt was best qualified for the position. However, in this case, all three petitioners have served in the secondary category under the appropriate certification and therefore have seniority claim to the positions. Therefore, the Board is hereby directed that its selection of the appropriate petitioner to hold both positions at issue shall be based upon seniority under the appropriate certification in the secondary category. The Commissioner so finds and directs.

Last, the Commissioner does not adopt the ALJ's recommendation that the Trenton Board of Education submit the two unapproved titles, herein at issue, and a job description for each to the Mercer County Superintendent of Schools for approval pursuant to rule insofar as N.J.A.C. 6:11-3.6(b) is no longer in effect. However, the Commissioner admonishes the Board for failing in its duty to construe strictly and to pursue diligently the procedures as then set forth at N.J.A.C. 6:11-3.6(b) for gaining approval of the use of an unrecognized title before assigning such a position, as a means of avoiding in the future the need for this kind of litigation.

Accordingly, the Commissioner rejects the initial decision as it pertains to the conclusion relative to the position of Teacher Specialist for Business and Industry Liaison. He adopts that conclusion of the ALJ pertaining to the position Teacher-Job Training Partnership Act but modifies the remedies as stated herein.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY, Petitioner, v. **ANN CHARLTON,** Respondent.	OAL DKT. NO. EDU 7495-89 AGENCY DKT. NO. 236-7/89
ANN CHARLTON, Petitioner, v. **BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,** Respondent.	OAL DKT. NO. EDU 9262-89 AGENCY DKT. NO. 344-11/89

Lester Aron, Esq., for the Paramus Board of Education
(Sills Cummis Zuckerman Radin Tischman Epstein & Gross, attorneys)

Robert M. Schwartz, Esq., for Ann Charlton

Record Closed: August 23, 1990 Decided: October 26, 1990

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

The Board of Education of the Borough of Paramus, Bergen County, filed and certified charges of unbecoming teacher conduct against Ann Charlton, a tenured teaching staff member, under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. The charges, respondent's response, a statement of evidence by the school superintendent, and a certificate of determination that the Board had resolved there was probable cause to credit the evidence in support of the charges, and that

the charges, if true in fact, were sufficient to warrant dismissal or reduction of salary, were filed with the Commissioner of the Department of Education on July 25, 1989. Respondent was suspended without pay by action of the Board on July 17, 1989. In her answer, respondent denied the charges generally. No claims of procedural irregularities were raised by respondent under N.J.A.C. 6:24-5.1 et seq. The Commissioner transmitted the matter to the Office of Administrative Law on September 29, 1989 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 the matter came on for prehearing conference in the Office of Administrative Law on December 6, 1989, and an order was entered establishing hearing dates beginning April 23, 1990. The matter was heard on April 23, 24, 25, 26, 27, 30, and May 1, 1990. Thereafter, time for transcript preparation having been allowed, as well as posthearing written submission, the record closed on August 23, 1990. At prehearing, the parties advised the administrative law judge that respondent filed a petition of appeal against the Board to challenge its action in withholding her salary and/or adjustment increments for 1989-90. Such a petition had, in fact, been filed in the Bureau of Controversies and Disputes of the Department of Education on November 13, 1989; the Board's answer was filed there on November 29, 1989, alleging, inter alia, that respondent's conduct, which was the subject of pending tenure charges, were sufficient grounds for withholding of her increments, under N.J.S.A. 18A:29-14. The Commissioner transmitted to the Office of Administrative Law on December 14, 1989 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq. By agreement of the parties at prehearing conference of the tenure charge matter, and in acknowledgment that the two matters raised the same and/or common questions of law and fact, the two matters, the latter under OAL Dkt. No. EDU 9262-89, are consolidated for hearing and will be disposed of on the same evidence adduced and determined herein.

At issue in the tenure matter are (1) whether the Board shall have established by a preponderance of the credible evidence that the charges against respondent were true; and (2) if so, whether the charges are sufficient to warrant respondent's dismissal or reduction of salary, in accordance with N.J.S.A. 18A:6-10 et seq.

At issue in the increment withholding matter are (1) whether respondent (as party petitioner) shall have proven by a preponderance of the credible evidence that Board action in withholding her salary and/or adjustment increments for 1989-90 was arbitrary, capricious, without rational basis or otherwise illegal under standards and criteria in N.J.S.A. 18A:29-14; and (2) if so, whether such increments, or either of them, should be restored.

The two matters were consolidated by the administrative law judge pursuant to N.J.A.C. 1:1-17.1(a, b).

EVIDENCE AT HEARING

I

Called by the Board, Dr. Harry Galinsky, superintendent of schools in Paramus for the past five years, testified he has been in public school education for 41 years as classroom teacher, guidance counselor, supervisor and administrator. He was voted New Jersey Superintendent of the Year for 1988-89. He has known respondent for the past 16 years as teacher and supervisor of music. He has known the Board's present assistant superintendent, Dr. Janice Dime, for the past five years. He became aware of friction between respondent and Dr. Dime that flared over a dispute about an early primary grade pilot music program that as designed by respondent involved an objectionable pull out of students from class hours. Dime found it should not have been put in place by respondent without prior sanction. In October 1988, he said, respondent asked to see him urgently, saying she became convinced that if he, Galinsky, left the district that Dime would then become superintendent and respondent thus would be unable to stay in her position any longer. Galinsky assured respondent, noted she became tenured in September 1988 as music supervisor, and had been recommended for a supervisor-12-month position by Dime. At the time, Galinsky said, he valued and needed, as well, harmony among personnel in the district. P-1 was a memorandum from Dime to Galinsky on June 19, 1987 endorsing respondent's for a K-12 supervisory position. Galinsky noted respondent never told him at the time that Dime had made a sexual overture to her.

Galinsky said he met with the two in late November 1988. He noted respondent's feeling that Dime was out to get her and asked what evidence of that there was. He recalled the episode at the curriculum meeting apparently was a

trigger, according to respondent. Dime's position was supportive about the pull out program, noting only that it should be instituted after school hours and not during school hours. Although Dime told him respondent had bad-mouthed her, respondent denied that. At the time, Galinsky said, he thought the air had been cleared and the issues or misunderstandings resolved.

In a meeting in February 1989 with respondent, Principal Richard Zanella, Dime and himself, called at respondent's request, Galinsky said her concerns seemed to have been overwork, excessive responsibility, no cooperation and abusive administrative people who were "s... heads." Galinsky became concerned, he said, made suggestions to respondent to relieve her anxiety and suggested she get psychological counseling.

At a May 1989 retirement dinner for Carmen Panebianco, Galinsky said Richard Schweidel, vice chairman of the Paramus Board of Education, sought him out to report he had been threatened by respondent, who he said stated, "I'll blow this district away. I have compiled a dossier on Dr. Dime, unless I get a 12-month job." [See R-2; and see II T at 69-71.] Galinsky discovered in late April 1989 through Marie Hakim, a teacher, that she had been told that respondent had organized a group in the district to hire a detective to investigate Dime's private life, results of which were to be relayed to the Board of Education in order to prevent Dime's ever becoming superintendent when Galinsky left.

Concerning Dime herself, Galinsky said, she usually sits with him in the interviewing process for hiring administrators and her opinion is solicited, although Galinsky makes final decisions to recommend hiring to the Board. Galinsky's opinion was that Dime was the most outstanding administrator he had ever worked with. He denied any sexual relationship with her, to the extent it was ever alleged or intimated by anyone.

He specifically recommended to the Board that it withhold respondent's salary and adjustment increments for 1989-90 and 1990-91 for reasons made subject of the present tenure charges.

Hakim's statement to Galinsky was transcribed and received as R-6.

On cross-examination, Galinsky noted he had asked for meetings with respondent and Dime in late November 1988 because he sensed trouble looming. His intention was to dispel respondent's obsession that Dime was out to get her; Dime's complaint was that respondent had bad-mouthed her private life. The meeting of February 10, 1989, requested by respondent, was marked by respondent's statement she might have to leave the district because of problems in her personal life. She said at the end of it she had intended to file a civil rights action against the district on the ground of gender discrimination in the appointment of two male K-12 supervisors to 12-month status while she, a woman, was refused such status and suffered salary differentiation, and thus discrimination, to the extent of some $2,000. Her letter to Galinsky to that effect is R-1. Galinsky's reply to R-1 is P-2 in evidence; he thanked her for her letter and expressed gratitude for her decision then not to take action by institution of suit, action that might have negative impact on the high school's application for its secondary school recognition program. Galinsky noted that until September 1988, he had been satisfied with respondent's performance. While he did have arguments, he recognized she was a negotiator and that such arguments had never risen to the level that eventuated then. He noted he had recommended her for music supervisor tenure.

Joy Perraudin, a high school music teacher for some 15 years, and one of the music teachers supervised by respondent, testified she was present at a January 1988 curriculum committee meeting attended by Dime and respondent, in which a third grade music pilot program was discussed. She heard all that transpired. She said Dime never threatened to get even with respondent nor indeed threatened her at all then. Beginning after the curriculum committee meeting and thereafter as frequently as weekly and even daily, respondent said to Perraudin she would like to discredit Dime as a lesbian so as to remove her from the district. Respondent called Dime a dike. In the summer of 1988, respondent told Perraudin she would start an investigation of Dime to find out details of her private life. A specific occasion of that, Perraudin said, was in the nurse's room at the high school during summer school. Respondent wanted Dime followed and suggested "we all chip in" to hire a private detective for the purpose. The suggestion was made to Lisa Kennedy, Thomas Winter, Emil Granquist, Bruce Rainsford and Ron Kalman, all summer school music faculty. Respondent's suggestion that the group chip in, however, was never carried out. Later, in March 1989, respondent said she was keeping a file on Dime, had copies of her divorce judgment, pre-divorce papers, car registrations. One car

belonged to Joanne Rogers, who owned a home jointly with Dime. Respondent said a teacher, Carolyn Strakas, and her husband Frank, and Joseph Zarro, a teacher, were involved with her in following Dime and tracing license plates for the purpose of proving Dime a lesbian and to block lesbians from running the school district after Superintendent Galinsky retired.

Perraudin said respondent asked Thomas Winter to follow Dime and he agreed to do it. Respondent would go out drinking with him after school meetings to discuss ways to discredit Dime. Perraudin said she asked respondent if what she was doing was legal; she replied she had consulted a lawyer. Respondent said she had discovered a "Nyack connection," namely a Dr. Barbara with whom respondent said Dime slept. Respondent expressed the fear the Paramus school district would be run by lesbians or weak men; she characterized their investigation as "Paramus Gate." Perraudin said respondent also stated Dime slept with Superintendent Galinsky to further her career, that two female district teachers were lovers, and that Dime had spread rumors that two other female district teachers were lovers. Perraudin said respondent said Dime's former husband caught her in bed with another female, according to a dossier obtained from Frank Strakas. Respondent asserted Dime hired only homosexual females or very weak men who would do her bidding. She claimed Dime had a love-hate relationship with her.

Lisa Kennedy, a teacher of instrumental music for the past four years, who knows respondent as music supervisor and who has gone out socially with respondent and their husbands, testified respondent had talked to her often of Dime, referring to her as a dike, as an a.....e or f.....g dike at music department meetings. The characterizations appeared to affect the whole department, especially during the spring of the 1988-89 school year, when atmosphere at meetings was very tense. Kennedy said respondent had many phone calls with her, as often on occasion as every two weeks. At the end of June 1989, on the last day of school at about 5:30, respondent called Kennedy at home to say that Allison Marty, a teacher, was fired that day. Kennedy said respondent kept repeating the word fired louder and louder. She felt Bruce Rainsford and Kennedy were responsible; she was loud and angry. Allison Marty was the best teacher, respondent said, everyone else sucks. Kennedy said respondent threatened to kill her, saying I want someone f.....g dead; "you better f.....g believe I want you dead." Kennedy said she was in fear for her life. Later, when Thomas Winter called her that day, he advised

her not to say anything because respondent appeared upset. She thought of calling the police, later deciding not to for fear a report would only feed the situation and make it worse. The particular conversation with respondent, Kennedy said, lasted about 23 minutes.

She heard respondent speak in derogatory fashion of Dime at curriculum meetings when her music program was blocked. Of Dime, Kennedy said, respondent used the words dike and lesbian.

Bruce Rainsford, a music teacher in the district for 19 years, testified he talked with respondent about Dime many times during the 1988-89 school year; respondent frequently spoke of her in derogatory fashion using terms like dike and f.....g dike. At music department meetings, he said, respondent would often issue a barrage of such remarks, causing those attending to become very tense and often leaving him with a headache. The same was true for other teachers; one teacher felt so bad she had to leave to go home to lie down. The meetings were in charge of respondent as supervisor and leader of the agenda. Respondent tended to blame all problems on Dime, particularly the pilot string program about which respondent became very loud, shaking her head and referring to Dime as "the dike." In summer school of 1988, in July, respondent while in the nurse's office but in the presence of several music teachers announced that "we" have followed Dime, noted her license plate was traced to ownership by another woman. According to Rainsford, respondent laughed and said that showed Dime was a dike. "Where have you all been," she said. "Everyone knows this." At a party in August that summer, which Rainsford attended with his wife at Allison Marty's house, vulgarity and use of the "f" word became constant. Forty or more people attended; several left because of the tone of the activity. There was a microphone, respondent sang using vulgarities. She was totally smashed, he said. Rainsford said he has been in the district music department for 19 years and is now head teacher. He applied for the supervisor position when respondent did and was disappointed he did not get it. He conceded he did not report respondent's conduct at the party immediately because felt he was between a rock and a hard place. He did say he later, for the course of these proceedings, consult with Board counsel. He said he respected respondent's teaching abilities and even joined with other teachers in support of her being given tenure, in a document drafted in July 1988. P-6.

Testifying for the Board, Richard Schweidel, a teacher employed by the New York City Board of Education, Paramus resident and a fifth year member or trustee of the Paramus Board of Education (he is presently vice president of the Board), recalled an incident at a retirement dinner on May 9, 1989 for Carmen Panebianco. At the end of dinner, he said, he was approached by respondent who said she was tired of the Board "jerking me around" about a 12-month teaching position. She said she had hired a private detective and had derogatory information or dirt about the system; she said she would bring it down if she did not get her 12-month post. She was "tired of all this s...." Schweidel told her she had had some drinks and that he would report her conduct to the superintendent if she did not stop. Respondent replied Galinsky "knew." Upset, Schweidel said he reported to Galinsky, Joseph Cadello, a past president of the Board, and Joanne Bergman, a Board member.

Schweidel said he took respondent's statements as a serious threat. R-2 is a transcription of Schweidel's statement made to Galinsky. II T 69-71.

Called by the Board, Beverly Barbour, a supervisor of guidance 5-12, who has known respondent as an employee of the district for more than ten years, testified that respondent spoke to her several times during the school day about Dr. Dime during the 1988-89 school year. Barbour said respondent was worried that Dime would become district superintendent when Galinsky retired. There was tension between respondent and Dime: one reason, according to Barbour, was that respondent said Dime was a lesbian and was hiring gay or lesbian friends.

Sometime in April 1989, Barbour said she had dinner with respondent, who said then she had formed a committee to gather information about Dime: Frank and Carolyn Straka, and Joseph Zarro. Its purpose was to establish that Dime was a lesbian. The committee had obtained copies of Dime's divorce papers, a deed to property and information concerning ownership of motor vehicles. Also obtained were xeroxed yearbook pictures of Dime and another woman. Respondent brought all papers to the dinner to show to Barbour.

Barbour said she became concerned about what respondent had set out to do. She said she should stop. Respondent replied she was not doing anything wrong; but, according to Barbour, she seemed obsessed. Respondent said Dime had been followed.

Respondent also said she had been sexually harassed by Dime, that Dime was attracted to her because of the way she looked at her during meetings. Respondent felt Dime was out to get her. Respondent did not report that Dime had made a pass at her, however.

For the Board, Ronald Kalman, high school band director for the past 13 years, said he had a conversation with respondent in the spring of 1989 in which she said that Dime was a lesbian, that she could prove it, that a private detective was hired to secure the proofs, and that Dr. Barbara Hyde was a member of the "lesbian connection." Hyde had been hired the previous school year.

Respondent appeared concerned that superintendent Galinsky would retire and that Dime would become superintendent; respondent feared that as a lesbian Dime would attack the more dominant women, like respondent, in the district.

Robert DeBlasi, a science supervisor for the district, noted that at the Carmen Panebianco retirement dinner on May 9, 1989 he sat next to respondent to his left. During dinner, he said, respondent told him personally "I finally got her a..; she's a lesbian, a dike," referring to Dime. Charlton said she hired a private detective to secure information about Dime. Respondent told DeBlasi if she did not get a 12-month position, she would hold a press conference and would disclose how the Board discriminated against her and would disclose the fact that Dime is a lesbian. Dime, she said, was divorced because her husband had found her in bed with another woman.

DeBlasi said he was convinced respondent was serious in her threats and felt she meant to do what she said.

Delores Lowry, a teacher employed by the Board for 21 years but with no connection to the music department, said she has know respondent for 12 years as a member of the PEA. About April 1989, she said, respondent told her she wanted to get a 12-month position and wanted to know about Dime's experience in Nyack schools. Lowry said respondent said she had papers concerning Dime's divorce and would be using them.

Andrew DeStefano, an eighth grade teacher employed by the district for 27 years, testified that at a party for another teacher in May or June 1988, respondent told him that Dr. Dime, that "dike b...h" was after her job. She said she had proof Dime was a dike and said, laughingly, she was after her (respondent's) body.

Called by the Board, Marie Hakim, a health educator in the district for 28 years, said she had a conversation with respondent in early 1989 in which respondent said she had obtained Dime's mortgage papers and divorce papers, the latter of which revealed that she had been caught in bed with another woman. She also had names and license numbers of visitors to Dime's home. Respondent told Hakim she would use the information to give to superintendent Galinsky in order to get rid of Dime. If he knew of her sexual persuasion, respondent told Hakim, he would fire her. Respondent said she would show them to Galinsky because she had received a letter asking her to go to his office. She said she wanted the Board to know of Dime's sexual persuasion. Respondent's group consisted of the Strakas, Joseph Zarro and herself, according to Hakim.

About May 1, 1989, Hakim went on, she had a talk with respondent in the student common area. Respondent said she did not think Dime had the intelligence to have earned a doctorate and had only a "dike" degree instead. At the time, according to Hakim, a student walked by and was noticed by respondent, who covered her mouth and said "Oops, I think they heard me." Respondent was talking loudly; students were but a short distance away.

Hakim's transcribed statement to superintendent Galinsky made before hearing is R-6 in evidence.

Called by the Board, Carmen Panebianco, a June 1, 1989 retiree from principalship of an elementary school and a 35-year Board employee, testified he knew respondent as a music teacher in his building and as a music supervisor in the district, for in all about ten years. Prior to April 1989, he said, he had a conversation once with respondent concerning Dime at an administrator's gathering that occurred at the end of 1988. Respondent asked him "What are we doing here with a homosexual in charge?" referring to Dime.

In April 1989, respondent again spoke to him about Dime in a telephone conversation when respondent called him at home. She told him she and others had uncovered evidence about Dime that she thought he could use in order to "do something to her." The information concerned Dime's divorce and related to her sexual preferences. Respondent inquired what Panebianco thought should be done with the information, to which he replied she should refer the matter to the superintendent. Respondent apparently felt Panebianco was an appropriate repository for the information in view of his imminent retirement, since he could use it for good effect for the district.

In earlier conversations with respondent in late 1988, Panebianco said, he cautioned the constant reference to Dime was not having a beneficial effect on the district nor, more specifically, on morale in his building. Panebianco noted he told her she was continuing to "stir the pot" about Dime; the divisiveness hurt morale.

Called by the Board, Patrick Cappucci, a vice principal at the high school, testified he talked with respondent concerning Dime a number of times in 1988-89, most often, he said, in his office. Respondent characterized Dime as having a lesbian lifestyle; she said Dime was standing in her way as an obstacle to getting a 12-month position. Others, Cappucci said, from a secretary to the high school principal, the principal himself and a supervisor of guidance, all repeated to him generally what respondent alleged.

On one occasion, Cappucci said, respondent came to his office to say that Joan Hyde, who had just been hired to the middle school principalship and who was a friend of Dime, was an example of "one swinging the other way," or conducting a homosexual lifestyle. Respondent repeated that as long as Dime had her position as assistant superintendent, she, respondent, would never get a 12-month position. On no occasion, Cappucci said, did respondent ever claim Dime had improperly touched or sexually harassed her.

Richard Zanella, presently principal of Paramus High School, testified he has known respondent for about five years as a music teacher and music supervisor. He recommended her supervisory appointment to the superintendent. He said he often talked with respondent about Dime beginning about the spring of 1987 and since. He said respondent felt Dime was sexually attracted to her because she, respondent,

was then president of the Paramus P and S Association. She never said she touched her or verbally propositioned her, according to Zanella. Respondent said she knew by Dime's body language and how she looked at her, as would all women know. She said if Dime had ever touched her, she would have made sure Dime would be selling life insurance. Respondent said she did not respond to Dime; that was why Dime was out to get her. Another reason was the dispute concerning the third grade music pull out program, about which Dime and respondent differed.

When other staff members came to him, Zanella said, he decided to go to the superintendent to report the situation. Some of the other teachers were upset about the collection of information against Dime. Once, in his office, Zanella said respondent complained to him of ethnic groups: one had to be Italian, male or Jewish to get promoted, she said. This was said in his office during the 1988-89 school year.

Testimony about Zanella's opinion on the destructiveness to morale was this:

> THE COURT: You said you had some reports or information from other staff members about statements that Miss Charlton had made --
>
> THE WITNESS: Yes.
>
> THE COURT. -- concerning Doctor Dime dealing with sexual orientation or preference -- general.
>
> THE WITNESS: Yes.
>
> THE COURT: Before or after you received those reports, did you form any opinion as to the risk of any potential adverse effect on the administration in the district and the morale of teachers, supervisors and then the welfare --
>
> THE WITNESS: Most --
>
> THE COURT: -- of students, perhaps?
>
> THE WITNESS: Most definitely. I --
>
> THE COURT: You did form --
>
> THE WITNESS: Yes.
>
> THE COURT: -- certain opinion?

THE WITNESS: I was very concerned --

THE COURT: Do you still hold that opinion? Do you still hold such an opinion?

THE WITNESS: That this situation --

THE COURT: Whatever your opinion is, do you still hold it?

THE WITNESS: Yes.

THE COURT: All right. What is your opinion?

THE WITNESS: My opinion is I -- I feel that this wasn't a constructive thing, that it could only be destructive and quite honestly, because of that, that's why I went and initiated a conversation with Doctor Galinsky wherein I shared with him some information that was shared with me, specific with -- from Beverly Barbour. And although I think you -- a couple of statements (indiscernible - garbled) but specifics --

THE COURT: That's why I -- that's what I started my question with. You use the word destructive but can you be more perceptive? Destructive of what?

THE WITNESS: Well, I think a -- a high school -- a principal of a high school of 1,000 students, it's a fragile organization in that --

THE COURT: How would the fragility be affected by any --

THE WITNESS: Well, I think --

THE COURT: -- if you have an opinion?

THE WITNESS: Yes. I think the -- something like this coming out -- the allegations that were -- were being circulated and made would divide the staff. It would hurt morale, I think. I think it would polarize people in the camps and one of the things that a principal is always trying to do is to --

THE COURT: And if that were --

THE WITNESS: -- (indiscernible - two people talking) --

THE COURT: -- to happen, what would suffer?

THE WITNESS: Well, I think ultimately the educational process. What is delivered to students. Cause if they're preoccupied with other things, than you know, I want to preoccupy the teachers for example. I want them to be preoccupied with delivering the best possible education to students. If they're worried about who's side I am on, am I for

this one or that one, am I -- you know, is this person homosexual or that person homosexual. And they're preoccupied with those kind of things, they're not going to be spending as much time as I would like to see them spend on the main business at hand. The education of the children.

THE COURT: Do you think it would have any affect on the reputation of the persons whose names were involved?

THE WITNESS: Most definitely. I think it would hurt their -- the -- to many people, it would -- you know, it -- the perception of the individuals involved, I think they'd lose credibility, possibly. Most probably.

THE COURT: Mr. Schwartz.

[III T 152 to 156.]

The Board rested.

II

Recalled for testimony as respondent's witness, Dr. Harry Galinsky, who has spent 17 years in the district and is in his fifth year as superintendent and who has known respondent during that time, reviewed his meetings with respondent in late 1988 and early 1989, during which she presented a litany of urgent problems with Dime. Dime was out to get her, respondent said. Galinsky urged calm, suggesting the three meet to air our problems and thus assure harmony in the district. Galinsky, Zanella, Dime and respondent met in early February 1989, an occasion for discussion of respondent's evaluation and her evaluator's concern for "lack of team play." Respondent's position was outlined again, he said: she felt overworked, suffering curriculum deadlines, personal problems and needing help. Galinsky felt respondent needed counseling, such as by a psychologist for stress, even if it might be at Board expense. Galinsky's ultimate investigation into the matter presently at issue was initiated after his discussion with Marie Hakim in late April or early May 1989. Her broad outline was that respondent, the Strakas, and Zarro had formed a committee to discredit Dime. Hakim's transcript of Galinsky's interview (R-6) prompted his investigation, which ultimately encompassed some 16 people in all.

He was concerned about respondent's due process rights throughout; the Board attorney was consulted in course of the investigation.

Galinsky's ultimate opinion was this:

> Q Upon completing your investigation, Dr. Galinsky, did you form an opinion as to the impact of Miss Charlton's statement and behavior upon the school district?
>
> A I did.
>
> Q Can you tell us what that opinion is, please?
>
> A I thought that these activities would have and have proven to have a deleterious affect upon the district. It has --
>
> Q In what ways?
>
> A -- it has caused a great deal of concern among people, parents, Board members, teachers, faculty, staff members, even students. It has hurt the reputation of the district. There have been newspaper articles as a result of these -- these activities. And I think it has taken the focus from the educational program into a focus that was absolutely unnecessary.
>
> Q Thank you.
>
> THE COURT: Thank you, sir.

[IV T 22 to 23.]

Called by respondent, William J. Darragh, a physical education teacher and football coach, has known respondent for 17 years in the district, said she had never talked to him concerning Dime nor her problems in the district. In his opinion, she was a fine teacher and head of the music department. The band was especially good. He only heard of Galinsky's investigation after the fact.

Catherine Parowski, school nurse and health education teacher for the past nine years, has been acquainted with respondent for the past eight or nine years. Parowski said she never recalled respondent using foul language or having spoken ill of Dime.

Dr. Edward Younken, a senior minister at respondent's church, who has known her for the past nine years, discussed her employment situation with her. He

thought respondent to be a gifted woman of good character with a good reputation for veracity.

Called by respondent, Carolyn Straka, an elementary teacher employed by the Board for 21 years, testified that about two years ago, when she was at a retirement party for Paramus teachers in May 1988, Janice Dime came over to her, looked down her dress and pushed her, moving her hip against Straka's in the process. Straka felt the action was inappropriate; she felt mortified. Respondent was at the party and recalled to Straka that something similar had happened to her (respondent) that evening, namely, an inappropriate advance.

At a curriculum council meeting in January 1988, Straka said, she recalled a contretemps between Dime and respondent. According to Straka, Dime questioned respondent's integrity, later telling respondent that if she did not get her then, she would get her later.

Straka denied she was part of any "committee" to get Dime, an allegation she said she first heard from the superintendent, who informed her she had been disloyal to the system in the judgment of many people in the district. The conversation was in the presence of her PEA representative. Straka's salary increment was withheld after the 1977-78 school year. Her husband, another teacher, has had his increment withheld three times. In 1988, he resigned from the district. She was aware that her husband had sought Dime's divorce papers; he told her he had them although, Straka said, she thought the action was inappropriate.

Emil Granquist and Thomas Winter, district music teachers, disavowed any recollection of respondent's use of the word dike or lesbian when referring to Dime.

Respondent Ann Charlton, a 17-year Board employee, holds the B.A. degree in music arts and musical education from Montclair State College 1966 and the M.A. degree in applied music and voice performance from the same institution in 1976. She has done graduate work in educational administration for a masters degree. She holds certifications as teacher of music K-12, vocal and instrumental, supervisor 1985 and principal 1986. She was vocal music teacher at Westbrook Junior High School for four years and continued there as vocal music teacher. She also served as vocal music teacher at Memorial, Parkway and Story Lane Elementary Schools. From

1985 to 1989 she was choral music director at the high school. In 1986 she became supervisor of the music department K-12, vocal and instrumental, and director of the high school choral program. She is now tenured as supervisor. She is recipient of professional awards: she was appointed to Who's Who in American Education in 1990. She is a member of the Bergen County Musical Education Association, New Jersey Music Educators, Music Educators National Conference, Association of Curriculum Development, Bergen County P/SA and New Jersey Associations. In 1987 she was nominated by her principal to receive the Westminster Choir College 1987 award for excellence in teaching. R-8. Her annual summary evaluations for 1987, 1988 and 1989 were uniformly good; her salary increments were given. R-9, 10 and 11.

In 1986-87, Dime was respondent's primary evaluator. In that year, however, she said she began to feel uncomfortable with Dime over the way conferences were conducted. Dime would pull her chair next to hers, side by side; that seemed to occasion what respondent felt was unnecessary if not unusual physical contact between the two. In September 1987, respondent spoke to Principal Zanella as P/SA president. She wanted to go on record that Dime had touched her. Then in May 1987, after respondent had spoken to a Board member at Westbrook Middle School at a spring concert, Dime reproved her because she had spoken to a Board member without "process." She was cautioned not to do it again; respondent thought her conversation was entirely innocent. In September 1987, on a day of holiday when respondent was to conduct a music practice with a group of students, she was unable to get entry to the building and called a Board member for assistance in getting a custodian to open the building. Police arrived when a student pulled the door open and an alarm went off. Dime became enraged, respondent said, because she had called Board members.

At a curriculum counsel meeting on January 26, 1988, respondent made a presentation regarding a third-grade pull out program, for which Dime criticized her for not having obtained prior approval. Respondent conceded she had never received any written authorization to implement the program, but felt everyone knew about her plans in advance. Those plans were included in R-12A, B, C and D. The program had been instituted as a pilot program; at the curriculum counsel meeting it was presented in order to have it adopted as a regular program. Begun with a video tape, the presentation was lengthy, respondent said; Dime spoke,

complaining the program had never received prior approval and she stood against it. Respondent felt her professional integrity was being openly and unfairly questioned in public. Dime, she said, said she would get even somewhere down the line with her.

At a PEA retirement dinner on May 18, 1988, respondent said she had an experience of physical contact with Dime. While sitting in a booth, respondent said, she felt someone rubbing against her back, turning to see Dime standing there, with a glass of wine, having rubbed the back of her hip and buttocks. Respondent said she could not believe what she saw and felt.

Respondent said she first began to believe she had basis for an affirmative action claim against the district in the spring of 1987, and began to compile information on it then. Her contention was that of three supervisors K-12 with the same title and same basic functions, two were men who received a 12-month contract while the third, respondent, a woman, did not, for the school year 1987-88. She complained to the district affirmative action officer and to principal Zanella, who was president of PSA. Ultimately, as outlined in her letter to the superintendent the following year on October 20, 1988 (R-1), respondent decided not to press the claim for fear that had she done so the district would not receive favorable national recognition by the United States Department of Education. Respondent believed that her relationship with Dime was beginning to deteriorate because of what she said Dime had done to her by making advances and because respondent was a "straight female." V T 98-100.

Respondent denied ever having referred to Dime as a dike or lesbian at departmental meetings during the 1987-89 school years. V T 100-1. She did have discussions during those years outside of department meetings about Dime's sexual preference. V T 104. One occasion was with a friend, Adele Stern, but respondent denied having initiated the topic of Dime's sexual preference. At a party at Allison Marty's home, respondent conceded, she did refer to Dime.

> Q Was there a party during August of 1988 at Allison Mar -- Marty's house?
>
> A Yes. There was.
>
> Q -- did you make reference to Doctor Dime?

A Yes. I did.

Q The allegation has been that you made certain statements referring to her as a dike and without my going into what the other statement was, it was an ob -- obscene word or what is perceived to be an obscene word, did you make that statement at that party?

A I --

MR. ARON: I -- I object, I would like a --

Q Sh --

MR. ARON: -- clearer --

MR. SCHWARTZ: Okay.

MR. ARON: -- question.

Q Did you --

MR. ARON: So that I can --

Q -- did you

MR. ARON: -- get a clear answer.

Q -- did you -- did you -- did you refer to Doctor Dime as that fucking dike?

A -- I said and I quote, why doesn't that fucking dike leave me alone.

Q Okay.

A What does she want from me?

Q Who did you say in front of?

A Bruce Rainsford and I believe Lisa Kennedy's husband. And I'm not sure if my husband was there.

Q Had you ever referred to Doctor Dime that way before?

A No.

Q Did you refer to Doctor Dime that way again at that party?

A No.

Q Did you speak into the microphone and use expletives, use obscene words?

A Not that I remember.

Q Okay.

A I went to the microphone to sing.

Q Okay. Did you refer to Doctor Dime that way, that term, fucking dike, again during the '88, '89 school term?

A Never during the school day.

Q In private discussion?

A I may have used the term once or twice in discussions following dinner -- dinner discussions following rehearsals for the musical Oliver with Allison Marty and Joe Zarro in February --

Q For what --

A -- of 1989.

[V T 108 to 110.]

Respondent denied she had ever caused a committee to investigate Dime's personal life. She conceded she learned from Frank Straka about Dime's divorce papers when he called her in April 1989 to say that he had information that might be beneficial to respondent's affirmative action claim for a 12-month job. Respondent felt those papers proved her sexual harassment claims. She "shared" those papers with Beverly Barbour in April 1989 when the two discussed her 12-month position. Barbour was a member of the administrative staff.

Respondent admitted that in a conversation with Principal Zanella when the two were discussing her future, and her professional improvement plan for the following year, the following occurred:

THE COURT: And that would be the pip for the '88, '89 year. All right.

Q Tell me about the context in which you said --

A We were --

Q -- this --

A -- discussing where I was going with my future education and I said I hoped to begin to work on a doctorate. I said my first desire was to achieve my (indiscernible - garbled) school administrator certification. I said I was going for it. He said, well then what do you plan to do with it? I said well, I'm really seriously going to have to consider moving out -- moving out of Paramus. He said why do you say that? I said look around you. Look at the Paramus administration. I said seriously, Richard, consider it. The Paramus administration is male, Jewish or Italian.

Q And you said that statement. When you said it, did you intend it as an anti -- let's start Italian remark?

A Never.

Q Anti-Semitic remark?

A Never. It was a fact.

[V T 140 to 141.]

In a conversation with Lisa Kennedy about Allison Marty who had just been fired, respondent gave her version:

Q Lisa Kennedy, did you have a discussion with Lisa Kennedy in or about June of 1989?

A Yes. I did.

Q How did that discussion start? Who -- who started the discussion?

A I called Lisa.

Q What did you say?

A Lisa and I --

Q Actually before what you said, why did you call her?

A Lisa was like a daughter to me. I felt we were very close. And Allison Marty, with whom I was also very close, had just been fired. And I called Lisa to tell her that Allison had been fired, thinking that she was unaware of it. And when I picked up the phone, I was crying and I said Lisa, do you understand, Allison has been mar -- Marty has been fired. Have you heard? Allison has been fired? And she started to scream at me, it's not my fault. I had nothing to do with it. And I said what are you talking about? I didn't think you had anything to do with it. I said, but she's been fired. Allison, do you understand what

I'm saying to you Lisa? And I started to cry. And she's screaming on the other end of the phone, getting hysterical. I had nothing to do with it. I had nothing to do with Allison's firing. Why are you calling me? I said, because Lisa, I thought Allison was your friend and I can't -- what do you mean you had nothing to do with it? What are you talking about? And I said to her, someone's going to die for this , Lisa. I could just kill for this, Lisa. And she said, are you threatening me? I said threatening you? Lisa, you're like a daughter to me. I would never threaten you. What are you talking about?

I have a daughter two years younger than Lisa Kennedy.

Q At that point, was the conversation over?

A Yes. It was. Cause I was crying.

Q Did you hang up.

A Yes. I did.

Q Did you call back?

A No. I didn't.

THE COURT: Excuse me. You said some -- you said somebody is going to die from this?

THE WITNESS: I wanted somebody to die for this. That's what I said. Yes, Your Honor, I said that.

THE COURT: Meaning what?

THE WITNESS: Oh just --

THE COURT: The termination of --

THE WITNESS: No. Just --

THE COURT: Allison Marty?

THE WITNESS: Because Ali -- yes. I was just -- it was an expletive because I was upset. I mean, I wasn't serious. Do you know what I'm saying? I was very upset. Allison Marty is a very fine teacher.

Q You testified earlier that because you called up some Board member, Doctor Dime had come up to you and had admonished you and said I don't know what I'm going to do with you, I could kill you. That's what you testified to. Did you think that she was actually going to kill you?

A No.

Q And you didn't intend any physical harm when you told this to Lisa Kennedy? Correct?

A No.

THE COURT: Well, was the remark directed at Kennedy?

THE WITNESS: No.

THE COURT: To whom was it directed?

THE WITNESS: It was just like I said someone. Okay. I used the term someone -- someone.

[V T 143 to 146.]

Respondent's feelings of oppression in the Paramus district were explained this way:

Q You said a little earlier that you told Zanella that it may be time for you to leave Paramus. Did you want to leave Paramus?

A No.

Q What was that?

A No.

THE COURT: Are the teachers and staff of the Paramus school district still predominantly male, Jewish or Italian?

THE WITNESS: The administration? Yes.

THE COURT: Still are.

THE WITNESS: And there are no black employees in the Paramus school district.

THE COURT: Then apparently you've changed your mind since then. The way it was last year or the year before.

MR. SCHWARTZ: Changed your mind about what, Judge?

THE WITNESS: I don't think so.

THE COURT: About moving out of Paramus.

THE WITNESS: It wasn't that I was moving because I wanted to, I thought I had to.

THE COURT: You --

MR. SCHWARTZ: And that was --

THE COURT: You changed your mind about that?

THE WITNESS: About what? I'm not -- I don't understand.

THE COURT: Moving out of Paramus.

MR. SCHWARTZ. Having to leave Paramus --

THE WITNESS: Having to leave --

MR. SCHWARTZ: -- is that the question

THE WITNESS: -- Paramus? I didn't want to have to leave Paramus. I felt I was going to have to leave Paramus.

THE COURT: I see. I'm not sure I understood that one. Why did you feel that way?

THE WITNESS: It had nothing to do with the administration. It had to do with the conflict with Doctor Dime. I didn't feel I could really moved forward in -- in the situation.

THE COURT: And have you changed your mind about that?

THE WITNESS: Not really.

THE COURT: All right.

[V T 152 to 154.]

On cross-examination, respondent was asked to recall a party at Allison Marty's house in the summer of 1988. The respondent insisted that several days before the party she had received an ostensibly anonymous telephone call, which upset her, and which she concluded was made by Dime. She received a second anonymous telephone call that upset her before the party; it was under that framework, respondent insisted, that she was drawn to characterize Dime as a f.....g dike. That was the only time respondent used that term, she said.

In a meeting with the superintendent on November 22, 1988, respondent said:

Q On November 22nd, 1988, did you express to Dr. Galinsky that at that time you wanted him to know that Janice Dime

had made several sexual advances towards you? Did you tell your mentor that?

A I told him there was a problem with her sexual preference.

Q You did?

A Yes, I did.

Q On November 22nd, 1988 --

A Yes, I did.

Q -- that's your testimony. What did you tell him the problem was with her sexual preference?

A We began by discussing my affirmative action case. He told me that he had -- originally, he told me he was going to call me in to discuss it. We had discussed a few other things, housekeeping type natures, I had spoken to him about my concern about the treatment by husband was receiving as a custodian at this time in the school district, and I began to speak about my affirmative action case. He told me he would deal with it and hadn't called me, and I assumed he was busy. At that time, I told him that I did not care what people did in their private lives, what they did in their private lives was their own business, I had no problem with that. I began to have a problem when people brought what they did in their private lives into the workplace, that Dr. Dime made me extremely uncomfortable, that she gave me a funny feeling in the pit of my stomach, and I was very uncomfortable in her presence.

Q Did you tell him that she had touched you inappropriately?

A No, I did not go that far.

Q Did you tell him that the way she looked at you made you uncomfortable?

A I believe I might have mentioned that, that was part of the uncomfortable feeling I was having.

Q And that's all you said, nothing about the touching?

A No.

[VI T 60 to 62.]

In a subsequent meeting among Galinsky, Dime and respondent the following week, respondent contented herself with merely explaining to Galinsky in Dime's presence that the two had entirely different philosophies of life as females.

Respondent believed Galinsky was unaware that Dime was a lesbian, a sexual preference respondent was convinced Dime had. At the time, the elements of respondent's affirmative action unpressed claim included only the fact that she, a female, was the only K-12 supervisor to have a ten-month contract, while two other supervisors, males, held 12-month contracts.

Respondent said Frank Straka called her one occasion in June to ask if she could come to his house, meet him outside and pick up a packet of papers concerning Dime he had for respondent. She said he cautioned her as to the packet's contents, asked her not to open it for the time being and asked her not to take it into the school building when she went back. Later, respondent said she found the packet contained yearbook pictures of Dime from Palisades Park, yearbook pictures of Dime from Nyack High School, yearbook pictures of Dime in Englewood, her divorce papers, a property settlement, and a deed and mortgages. Asked whether she felt possession of such documents about Dime was appropriate, respondent answered she thought "it was self defense." VI T at 70.

About two weeks later, Marie Hakim came to respondent and offered to help with her affirmative action suit. Hakim suggested she go to inquire of an acquaintance concerning Dime's past while teaching in Nyack. Respondent went to the acquaintance, Delores Lowry, and asked her if she had information about Nyack High School and Dime; respondent desired the information expressly, to seek corroboration of Dime's lesbianism. She did not feel the action inappropriate; she felt "frustrated." VI T at 75.

Respondent denied being a member of any anti-Dime "committee." Her testimony was this:

> THE COURT: Did you say you were a member of a committee formed of --
>
> THE WITNESS: No, I was not a member of a committee.
>
> THE COURT: Oh. Of a group?
>
> THE WITNESS: No, not of a group.
>
> THE COURT: Did you have any connection with reference to obtaining information about Dr. Dime with any of those persons mentioned?

THE WITNESS: Just that I had gotten the papers from Frank Straka.

THE COURT: What use were you going to put --

MR. SCHWARTZ: I didn't hear the question.

THE COURT: -- what use -- to what use were you going to put those papers?

THE WITNESS: I was sitting on those papers waiting to find out where the PASA contract went.

THE COURT: Then what would you have done with them?

THE WITNESS: I would have used them when I filed my case.

THE COURT: In what way?

THE WITNESS: As affir --

THE COURT: In order to do what?

THE WITNESS: -- as affirmation of the fact that I was being discriminated against and sexually harassed.

THE COURT: By whom?

THE WITNESS:: By Dr. Dime.

THE COURT: What did you view those papers as being probative of?

MR. SCHWARTZ: Do you mean relevance, Judge?

THE COURT: Sexual orientation of Dr. Dime?

THE WITNESS: Yes.

THE COURT: You felt that?

THE WITNESS: Yes.

THE COURT: You recognized those papers for what they were?

THE WITNESS: Yes.

THE COURT: You felt those papers constituted strong proof in your mind that --

THE WITNESS: Yes.

THE COURT -- that was the case?

THE WITNESS: Yes.

THE COURT: -- That's why you found them relat -- or relevant?

THE WITNESS: Yes.

THE COURT: Okay.

[VI T 77 to 79.]

Called by respondent, Kathlyn Newbert, a mathematics teacher for 29 years presently assigned at Westbrook Middle School, has known respondent and Dime for many years. She was chairman of the curriculum instructional council in 1987-88. She recalled respondent in January 1988 made a presentation for a pilot program for third grade strings. There was a discussion; parents and staff responded including Dime. Some of the responses were supportive, she said, some were not. The discussion became heated. Newbert felt both respondent and Dime had lost their tempers. She said she did not hear any threats by Dime to respondent at the meeting.

Called by respondent, Joseph Zarro, a teacher of English at the high school since 1968, testified he was present at the curriculum council meeting in January 1988 as a representative of the high school. The discussion became heated over the scheduling of a third grade music program. Dime, he said, said to respondent she would get her "now" or she would get her later.

He said his professional relationship with Dime was neutral; he is evaluated by the English department chairperson. He denied having socialized with Marie Hakim. He denied respondent ever asked him to spread rumors about Dime.

Called by respondent, Daniel Rothermel, a field representative of Paramus Supervisors and Administrators Association, recalled respondent's concern about obtaining a 12-month contract. Once, peripherally, he said, respondent told him that at a social function Dime made a physical advance to her. He recalled she said she had certain papers concerning Dime's sexual preference. He never saw such papers, however.

Rothermel received the impression respondent's sexual harassment allegation was bound up in the anti-discrimination claim. His testimony was this:

> Q Just to clarify, Mr. Rothermel, when she talked to you about her intention to file the suit, was the -- was the purpose to attack the claimed discrimination because two other men who were supervisors, K to 12, had 12-month positions, was -- or was it for that and also because of a claim of sexual harassment against Dr. Dime?
>
> A That's hard for me to say. It pro -- possibly could be intertwined but essentially it was against the district and it had to do with the 12-month employment, the lack of that.
>
> Q Did you have meetings with her subsequent to the -- to the meeting at which she made the statement to you about Dr. Dime touching her, did you have subsequent meetings with her?
>
> A I -- I had, at most, four meetings with her and one other meeting which was the superintendents hearing. It occurred at maybe the third or fourth meeting, I'm -- I'm vague on that.
>
> Q Okay. Other than that one peripheral comment, did she ever talk to you about Dr. Dime's sexual harassment of her?
>
> A No.

[VII T 20 to 21.]

III

On rebuttal, the Board called Sandra Gunderson, a 12-year resident whose children attend school in the district and whose husband is a Paramus police officer. She testified that in the spring of 1988 at a little league baseball game, Carolyn Straka asked if her husband knew of a private detective. Gunderson gave her the name of a retired police officer, presently licensed as private investigator. Straka said she needed the name "for personal reasons." Later, Straka told Gunderson she wanted to hire a private detective in order to "get the goods on Dr. Galinsky" and another school Board employee who were having a long-term love affair.

Called by the Board, Eva Sandrof, a Board employee for the past 15 years as a social worker assigned to the child study team, testified she attended the retirement

dinner in the spring of 1988 and talked there with Carolyn Straka. She did not see Dime approach Straka and touch her inappropriately.

Called by the Board, Roger Bayersdorfer, an elementary principal who served on the curriculum council and attended the January 1988 meeting where the third grade pilot strings program was presented, denied Dime had ever threatened anyone then.

Both sides rested.

DISCUSSION

The Board argued (1) that respondent's statements and actions constituted unbecoming teacher conduct by reason of their being a breach of her duty of loyalty to the district not protected by the First Amendment of the Constitution; (2) that respondent engaged in unbecoming conduct by making repeated discriminatory and profane statements in educational milieu; (3) that respondent can no longer function successfully as a teaching staff member and supervisor in the district; (4) that by her own actions and statements, respondent has forfeited her tenure protection; and (5) that any defense based on the alleged homosexuality of the assistant superintendent is without merit. Pb-i.

Respondent argued generally that any information she obtained about the sexual persuasion of the assistant superintendent was intended to be filed in support of a sexual discrimination claim that she was discriminated against in favor of two male supervisors who were favored with 12-month contracts while she, a female, was not. Respondent asserted a spurned sexual, physical relationship with the assistant superintendent created friction between the two and prompted attacks on respondent's conduct of a third grade pilot pull out program. In this context, respondent argued, her quest for adverse information about the assistant superintendent was set in motion. Respondent disputed much of the testimony concerning her alleged use of obscene language. Action of the Board in initiating tenure charges against her, respondent contended, was bizarre: it translated what was a private dispute into public charade and can have only the effect of impeaching the integrity of respondent and the assistant superintendent. Rb-6, 7-12.

As urged by the Board, teaching staff members do not enjoy unlimited constitutional rights of free expression in their districts; rights of free expression in an educational context must be balanced against a district's duty to furnish taxpayers and students a thorough and efficient education. See, generally, Pietrunti v. Brick Township Board of Ed., 72 S.L.D. 387; affirmed State Board of Ed., 73 S.L.D. 782; affirmed, 128 N.J. Super. 149, 162-6 (App. Div. 1974); cert. den., 419 U.S. 1057 (1974). In that case tenure charges of unbecoming teacher conduct and insubordination were leveled against a teaching staff member because of an orientation day speech given in her capacity as president of a local education association. She attacked the administration in general and the superintendent in particular, using aspersive, defamatory, obscene words. The Appellate Division concluded the fact of delivery of the orientation speech by the teacher, considering its content, which amounted to nothing but "billingsgate," was sufficient in itself to warrant her dismissal from employment by the school district. In so doing, the court addressed the teacher's argument she was deprived of a constitutional right of free expression. The court balanced the facts of the case before it with those in Pickering v. Board of Ed., 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed. 2d, 811 (1968), in which a teacher had written a letter to the editor of a local newspaper to criticize the manner in which the board of education and superintendent of schools had handled past proposals to raise new revenue from the public for the school system. The letter had complained that too much money was being sought for the athletic program and not enough money for teacher's salaries. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing a proposed bond issue. The Supreme Court held the letter did not justify the teacher's dismissal and that its contents and publication were protected by the First Amendment. But the Pietrunti court distinguished the Pickering facts from those before it. It noted the Pickering letter did not contain insulting or vituperative language or make an attack upon the character of superiors. It found Pietrunti had chosen to ignore issues of public concern, to distort them into a vehicle to bring scorn and abuse upon the school administration in general and the superintendent of schools in particular. In so doing, it said, she forfeited her claim to First Amendment protection--and to continued public employment. 128 N.J. Super. at 167-8.

There were no issues of public concern in this case of sufficient gravity to prompt or justify respondent Charlton in her campaign of vilification and aspersion

against Janice Dime. I **FIND** incredible respondent's statements in testimony that Dime pressed physical sexual advances upon her, nor do I credit the assertion that respondent's campaign to collect information against Dime was no more than a tactical adjunct to her gender discrimination claim against the district broadly for failing to have hired her, a female, on a 12-month contract that two other male supervisors were given. My impression, on the contrary, is that respondent's understanding of the difference between gender discrimination claims and sexual harassment in the workplace claims was confused. Testimony remained clear, in any event, that respondent's plainly stated purpose was to force Dime from the district and to assure she never became superintendent of schools on Galinsky's retirement. The record is clear also that respondent's aspersive and defamatory comments about Dime were not limited to non-school time affairs; her vituperations echoed in school meetings, social affairs involving school personnel and retirement dinners attended by Board members, administrators and teachers. Respondent's abusive language reached even to the level of students in the school building.[1] There is no competent evidence in the record as to the sexual preference of Dime, nor should there have been permitted any. The Board stipulated it did not intend to proceed in support of tenure charges with proofs of what Dime's sexual preference was. The Board kept to that line; to have failed to do so may have represented an unwarranted invasion of her privacy.[2] That respondent had long since failed similarly to respect that right of privacy is both plain and tragic.

I **FIND** from the above that Board charges of unbecoming teacher conduct against respondent have been fully and fairly **SUSTAINED**, specifically, charges A 1 through 7, B 1 through 8, C 1 through 8, D 1 through 5, E 1, 3 and 4, F 1 and 2, G 1 and 2, H 1 through 4, I 1 and 2, J 1 through 4, and K 1 through 4. The question remains, therefore, whether charges as specified and sustained warrant removal or some lesser sanction. I have considered respondent's educational background,

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[1]Use of offensively coarse and abusive language in public places, like schools, is a disorderly persons offense, under N.J.S.A. 2C:33-2(b).

[2]Sexual proclivities and activities between adults are protected by the right of privacy under Art. 1, par. 1, N.J. Const. of 1947. See State v. Saunders, 75 N.J. 200, 210-4 (1977).

experience and to recent date her progress to the position of music supervisor K-12 in the district. While she has demonstrated talent, she has also demonstrated there exists behind outward facade a vulgar and coarse woman who was unafraid to defame an individual and threaten a school district in order to attain a selfish ambition for full-time employment. Her conduct was neither circumspect nor private; it involved predation, a planned campaign and foresight. It went beyond militancy. Of importance, in my view, is the circumstance that Board members and the chief executive officer of the district concluded that respondent's actions caused concern among townspeople, parents, Board members, faculty, staff members, even students. "[She] has hurt the reputation of the district. There have been newspaper articles as the result of her activities. It has taken the focus from the educational program into a focus that was absolutely unnecessary." The words are those of the superintendent [IV T 22 to 23].

Under the circumstances, I **CONCLUDE** respondent's continued employment in the district is insupportable. She is removed from her tenured position as of date of final agency decision herein. Judgment is **ENTERED** accordingly; respondent's complaint to challenge increment withholding under OAL Dkt. No. EDU 9262-89 is **DISMISSED** Under N.J.A.C. 6:11-3.7(b)(ii), the matter is referred to the State Board of Examiners for its consideration.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

October 26, 1990
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

10/30/90
Date

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 01 1990
Date

OFFICE OF ADMINISTRATIVE LAW

amr

IN THE MATTER OF THE TENURE HEARING OF ANN CHARLTON, SCHOOL DISTRICT OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	
AND	:	
ANN CHARLTON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by Charlton and replies by the Board of Education were timely filed pursuant to N.J.A.C. 1:1-18.4.

Charlton's exceptions primarily allege that, in rendering his initial decision, the ALJ began with a predisposition toward the Board and therefore did not give appropriate weight to Charlton's testimony or that of her witnesses. The ALJ failed, according to Charlton, to examine the facts in their totality and give a balanced recitation of them in his decision. Instead, he merely adopted the allegations of Board witnesses as his own while ignoring conflicting evidence. To so demonstrate, Charlton reviews the testimony of each witness in turn as discussed below.

In reply, the Board contends that the ALJ's assessments were accurate and overwhelmingly supported by the totality of evidence presented and that, as a matter of decisional style, the ALJ need not have described and specifically discredited every detail of the testimony of Charlton and her witnesses. The Board then reviews seriatim Charlton's challenges to the ALJ's treatment of witnesses.

TESTIMONY OF DR. HARRY GALINSKY

Charlton's essential objection to the ALJ's treatment of Dr. Galinsky's testimony is that it fails to note the critical role of Marie Hakim. According to Charlton, it is of paramount significance that Dr. Galinsky knew nothing of the matters which ultimately led to filing of the instant tenure charges until his meeting with Marie Hakim in April or May of 1989. The entire foundation of Dr. Galinsky's investigation and the ensuing tenure charges, therefore, was information provided by a woman whose motivation was never questioned and whose credibility should have

been in doubt due to her own history of false allegations and the improbability of Charlton making intimate revelations to someone she barely knew. The Board in turn characterizes this argument as "absurd," noting that the fact that Ms. Hakim was the first staff member to approach Dr. Galinsky proves nothing and that, regardless of how Dr. Galinsky initially learned of Charlton's actions, the Commissioner must decide this case on the totality of evidence produced as a result of the district's investigation. (Exceptions, at pp. 2-5; Reply Exceptions, at pp. 3-5)

TESTIMONY OF JOY PERRAUDIN

Charlton's primary objection to the ALJ's treatment of Perraudin's testimony is his failure to mention that Ms. Perraudin's allegations regarding Charlton's behavior at faculty meetings and "committee" members trailing of Dr. Dime were specifically contradicted or refuted by Charlton's witnesses Emil Granquist and Thomas Winter. In reply, the Board notes that Perraudin's testimony was corroborated by Lisa Kennedy and Bruce Rainsford, and that Winter, as demonstrated by his conduct following Charlton's call to Lisa Kennedy, is rendered less than credible by his obvious alliance with Charlton. (Exceptions, at pp. 5-7; Reply Exceptions, at pp. 5-6)

TESTIMONY OF LISA KENNEDY

Charlton similarly claims that the ALJ failed to present a balanced view of Kennedy's testimony by not comparing it to the contrary testimony of Winter and Granquist, yet again demonstrating the ALJ's predisposition toward the Board and cavalier treatment of testimony favoring Charlton. Further, Charlton notes that while she did use bad judgment in the language and tone of her call to Kennedy, the ALJ failed to consider that someone who had had a good relationship with Kennedy and recommended her for reemployment would not have evinced the degree of ill will described by Kennedy in her testimony. In reply, the Board again recommends the ALJ's assessment of witness credibility and notes that Charlton's generally positive relationship with Kennedy would not have precluded a threatening telephone call, as the record established without dispute that an overwrought Charlton made the call to Kennedy in a state of extreme agitation and anger. (Exceptions, at pp. 7-9; Reply Exceptions, at pp. 6-7)

TESTIMONY OF BRUCE RAINSFORD

Charlton next alleges that the ALJ failed to note that in Rainsford's account of the party at Allison Marty's home, Rainsford admitted he never heard Charlton refer to Dr. Dime by name and could only speculate as to why people were leaving the party and how much they had heard. Further, notes Charlton, the ALJ disregarded Thomas Winter's testimony to the effect that he had heard no obscenities. In reply, the Board again notes that Rainsford's testimony was corroborated by Perraudin's and Kennedy's and that Winter's persistent failure to hear any improper comments not surprisingly reflects his consistent support of Charlton. Further, the Board notes that Charlton's failure to mention Dr. Dime by her proper name is meaningless in a situation where cohorts were

accustomed to Charlton routinely referring to Dime as "the dyke" and other pejorative appellations and where most anyone present would have known exactly to whom she was referring in making such comments. (Exceptions, at pp. 9-10; Reply Exceptions, at pp. 7-8)

TESTIMONY OF RICHARD SCHWEIDEL

Charlton objects to the ALJ's failure, when setting forth Charlton's alleged threatening comments to Board member Schweidel, to note the undisputed fact that Charlton chose not to file her affirmative action complaint rather than risk potential damage to the district to which she was devoted. She also points to the ALJ's failure to mention Schweidel's very positive assessment of Charlton's teaching abilities. In reply, the Board protests Charlton's attempt to characterize her comments to Schweidel as an "oblique reference," contending instead that they were threatening to the district in no uncertain terms. The Board further notes that Charlton's professional competence is not, and has never been, at issue in this case, and observes that Charlton's true reasons for dropping her affirmative action complaint can only be a matter of speculation regardless of what she professed those reasons to have been. (Exceptions, at pp. 10-11; Reply Exceptions, at pp. 8-9)

TESTIMONY OF BEVERLY BARBOUR

Charlton alleges that the ALJ failed to note Barbour's testimony to the effect that Charlton had discussed her affirmative action claim on occasions prior to 1989, that Barbour never testified that Charlton was seeking to undermine Dr. Dime or the district, and that the most Barbour's testimony can be said to represent is that a "committee" existed at one point, not that it was ongoing, disruptive to staff or undermining the school district. Moreover, had it been any of these things, Barbour, as president of the teachers' association during 1988-89, would surely have been able to so state. In reply, the Board reiterates its general position that the ALJ's failure to mention in his decision every factual statement made by every witness is of no moment and that, while Barbour may not specifically have used the word "undermine," she clearly testified as to Charlton's stated intention to ensure that Dr. Dime did not succeed Dr. Galinsky as superintendent and to her own view that Charlton was "obsessed" with Dime. Moreover, there is no reason to suppose that Barbour would have been told of employee disruption in Spring of 1989, as her term as president expired in July 1988 and music department staff might well have felt uncomfortable discussing their supervisor with others outside the department. (Exceptions, at pp. 11-13; Reply Exceptions, at pp. 9-10)

TESTIMONY OF RONALD KALMAN

Charlton here generally objects to the ALJ having permitted Kalman to testify to facts that were beyond the pertinent tenure charge (Charge C-8) and the scope of discovery, then using the information provided as "one more nail" to bring Charlton's career to an end. In reply, the Board argues that while irrelevant testimony is subject to exclusion, evidence reasonably related to issues at hand may be permitted to assist the court in assessing the

overall climate in which events under discussion occurred. (Exceptions, at p. 13; Reply Exceptions, at p. 10)

TESTIMONY OF ROBERT DE BLASI

Charlton states that the "sum and substance" of DeBlasi's testimony was a conversation wherein Charlton had merely stated to DeBlasi, a long-standing colleague and friend, that, if she did not get a 12-month position, she would hold a press conference to let the public know how Paramus discriminates against females and disclose information she had about Dr. Dime. In reply, the Board claims that DeBlasi's testimony was much more damning than Charlton indicates, as he also attested to Charlton's statement that she finally had the information she needed to bring down the district and her pejorative appellations regarding Dr. Dime. The Board further notes that DeBlasi's relationship with Charlton enhances his credibility as someone with no "ax" to grind, compelled to speak truthfully against a friend who had lost control. (Exceptions, at pp. 13-14; Reply Exceptions, at p. 11)

TESTIMONY OF DELORES LOWRY

Charlton claims that Lowry's testimony is in complete contradiction to the ALJ's recitation, as Lowry had denied that Charlton sought from her information regarding Dr. Dime's divorce or sexual preference. The Board counters that the ALJ recited Lowry's testimony verbatim as evidenced by the hearing transcript. (Exceptions, at p. 14; Reply Exceptions, at pp. 11-12)

TESTIMONY OF MARIE HAKIM

Charlton views the credibility of Marie Hakin as central to her case, arguing that the ALJ should not have accepted at face value the testimony of someone whose veracity is rendered suspect by a past history of false allegations and to whom it is unlikely Charlton would have made intimate revelations in their first substantive conversation in 16 years. In reply, the Board notes that this position might have had merit were it not for the fact that Hakim's account of what Charlton purportedly told her was independently corroborated by several other witnesses, most notably her account of the committee to gather information to discredit Dr. Dime. (Exceptions, at pp. 14-16; Reply Exceptions, at p. 12)

TESTIMONY OF CARMEN PANEBIANCO

Charlton raises the same objection here as in her comments on Ronald Kalman's testimony, namely that information was allowed into the record beyond the precise wording of the charges. (e.g., charge B-10 alleges that Charlton told Panebianco that she had damaging information on Dr. Dime, but does not indicate that Charlton told Panebianco what the information was; therefore Panebianco should not have been allowed to testify as to the informational content of Charlton's alleged remarks.) The Board reiterates its prior response as to the scope of testimony and further notes that Panebianco's testimony regarding teacher complaints about Charlton's statements on Dr. Dime supports its contentions on the disruptive and demoralizing effect of Charlton's

behavior on the school staff. (Exceptions, at pp. 16-17; Reply Exceptions, at p. 13)

TESTIMONY OF PATRICK CAPPUCCI

Once again, Charlton objects to the ALJ's having allowed testimony beyond charge A-1, wherein it is alleged that Charlton told Cappucci that the only way to get ahead in Paramus High School was to be a lesbian or homosexual. The Board retierates its prior response to this type of objection. (Exceptions, at p. 17; Reply Exceptions, at p. 13)

TESTIMONY OF RICHARD ZANELLA

Charlton charges that the transcript excerpt cited by the ALJ himself on pages 12-14 of the initial decision shows how the ALJ not only examined the witness, but actually led him to the conclusion he (the ALJ) wanted to reach. Comments favorable to Charlton, however, were omitted; such comments included Zanella's assessment of Charlton's professional capacity and his belief that Charlton's opinions about her colleagues were generally positive. In reply, the Board attributes the ALJ's questioning of Zanella on the effect of Charlton's activities to the ALJ's legitimate need to satisfy himself and complete the record even where a conclusory statement could be plainly implied from the witness's earlier statements. The Board further notes Charlton's failure to acknowledge the more pertinent aspects of Zanella's testimony, as summarized by the ALJ, regarding Charlton's allegations of sexual harassment by Dime. (Exceptions, at pp. 17-18; Reply Exceptions, at pp. 13-14)

TESTIMONY OF DR. EDWARD YOUMKEN

Charlton here notes that Youmken's testimony credits Charlton, whom he has known for nine years, as being talented, hard-working, sensitive to other people's rights and opinions and accepting of people of other colors, creeds and cultures. Charlton further contrasts this with the testimony of Marie Hakim, with whom she had only one substantive conversation. In reply, the Board notes that Youmken was without knowledge of Charlton's behavior in the school environment and that his testimony regarding Charlton's broadmindedness is not probative in the present context in view of the wealth of testimony about Charlton's derogatory comments on Dr. Dime. (Exceptions, at pp. 18-19; Reply Exceptions, at p. 15)

TESTIMONY OF CAROLYN STRAKA

Charlton observes that, in contrast to his treatment of Marie Hakim, the ALJ saw fit to set forth not only Mrs. Straka's employment history, but that of her husband Frank Straka. He then failed to mention that Mrs. Straka categorically denied acting in concert with Charlton or any committee to gather information about Dr. Dime. In reply, the Board notes three witnesses (Perraudin, Barbour and Hakim) who testified that Charlton told them Straka was a member of her "committee." The Board further notes that Straka's testimony about an inappropriate advance toward her by Dr. Dime was

discounted even by the person (Eva Sandroff) alleged by Straka to have witnessed the event and comforted her afterward. (Exceptions, at pp. 19-20; Reply Exceptions, at pp. 15-16)

TESTIMONY OF JOSEPH ZARRO

Charlton here notes Zarro's categorical denial of being part of any conspiracy, of having been approached by Charlton to spread rumors about Dr. Dime, and of having ever passed information about Dr. Dime to Marie Hakim. In reply, the Board notes that Hakim's testimony was corroborated by Barbour and Perraudin, and that Zarro's credibility is diminished by the fact that, because the Board has withheld his increment due to his involvement with the "committee" (a determination presently on appeal to the Commissioner), Zarro has a strong personal stake in the outcome of this case. (Exceptions, at p. 20; Reply Exceptions, at pp. 16-17)

TESTIMONY OF ANN CHARLTON

Charlton finally reviews her own testimony to demonstrate that any information she obtained on Dr. Dime pertained to the affirmative action claims she had planned to file as a result of her denial of a 12-month supervisory position based on gender discrimination and because of her sexual harassment by Dime. She notes that during the fall of 1988 she made arrangements with the New Jersey Principals and Supervisors Association to assist her in filing a complaint with the Division on Civil Rights, but ultimately decided not to file because it might jeopardize the district's chances for national recognition. She further notes that, although Dr. Dime became increasingly familiar with her, she did not communicate her discomfort to anyone because she was embarrassed and feared for her status as a nontenured supervisor. In Fall of 1987, she complained to Richard Zanella about Dr. Dime, and in Spring of 1988 she complained to Dr. Galinsky as a result of an inappropriate advance made to her at Carmen Panebianco's retirement dinner (an advance of the same type reported by Carolyn Straka). The relationship between Charlton and Dime then deteriorated to the point where Dime was alleged to have said, during a heated public debate, "If I don't get you now, I'll get you later." It was in this context that Charlton began collecting information, "not to get Dr. Dime or anyone else, but to support what she believed to be a legitimate, rational, and lawful discrimination claim against the Paramus School District." (Exceptions, at p. 20-22, citations at pp. 21-22)

In reply, the Board notes that Charlton's now-stated purpose for collecting sensitive information about Dr. Dime is contrary to her prior behavior as attested to by Perraudin, Barbour and Hakim, to whom she either showed or described sensitive documents with the express intent of discrediting Dr. Dime. Further, the Board notes certain facts in the chronology of events herein:

> In the spring of 1987 Ann Charlton was being considered for tenure in her position as music supervisor. Dr. Dime vigorously supported

> Charlton for tenure and Exhibit P-9 is a memo from Ms. Charlton to Dr. Dime thanking her for her generous support.*** Simultaneously, Dr. Dime also recommended to Dr. Galinsky that Ms. Charlton be granted a twelve-month position. The Board chose to grant tenure to Charlton but not to grant the twelve-month position. One year later, in the spring of 1988, Dr. Dime again recommended to Dr. Galinsky that Charlton be granted the twelve-month position.*** Again the Board of Education did not accept Dr. Galinsky's recommendation to do so.
>
> If Dr. Dime was ever interested in "getting" Charlton, she had golden opportunities to do so. Her unwavering support of Charlton completely belies the sentiment Respondent expressed to several staff members that it was necessary, in order to advance her career, to ensure that Dr. Dime not succeed Dr. Galinsky.
>
> In the fall of 1988, Dr. Galinsky held two different meetings at which he, Dr. Dime and Charlton were present.*** The purpose of these meetings was to show Charlton that Dr. Dime had no intention to "get her" and that they were there to work out any concerns which she had.
>
> At no time during her initial meeting with Dr. Galinsky, or during the two subsequent meetings at which Dr. Dime was present, did Charlton raise sexual harassment as a basis for her "dispute" with Dr. Dime.***
>
> ***As Dr. Dime's supervisor, Dr. Galinsky was the only person in the district who could remedy her claims of sexual harassment. She never told him, however, about any alleged sexual harassment by Dr. Dime. Not, that is, until he read those claims in her answer to the tenure charges.
> (Reply Exceptions at pp. 18-19, citations omitted)

Turning to the ALJ's conclusion, Charlton asserts that if the facts and testimony of this case are examined in their totality, they will not support the ALJ's summation and disposition. Nowhere, Charlton claims, does the ALJ state his basis for concluding that she used abusive language within earshot of students; her alleged "vituperations" are disputed by some witnesses (Winter and Granquist); and her "inappropriate" behavior at social events (Allison Marty's party and Carmen Panebianco's retirement dinner) constituted no more than a few references, one of them oblique, to Dr. Dime.

Instead, Charlton argues as she did before the ALJ, the present matter is a private dispute made into a public spectacle by the Board of Education. Charlton characterizes herself, citing Dr. Galinsky's testimony, as an outstanding teacher and music

department head whose contribution to Paramus has been considerable, and whose concern for the district led her to sacrifice a legitimate discrimination claim rather than risk the district's reputation. This is not a case, she holds, of calculated, premeditated action to undermine a school district through public pronouncements as in In re Pietrunti, supra; rather, it is a case of an occasional lapse in conversational judgment and a sincere desire to gather information to use in a possible discrimination claim before the Division on Civil Rights. Moreover, no evidence was presented by the Board to support its claim that her alleged activities undermined the district.

Finally, Charlton urges the Commissioner, should he find the Board to have sustained any of its charges against her, to consider her prior exemplary service, devotion to the district and acknowledged effectiveness as a teacher and supervisor. (Exceptions, at p. 26)

In reply, the Board reiterates that Charlton's performance as a music professional is not at issue herein, so that relying on that performance as a defense does not address the true issues at hand. Neither do her actions constitute a private dispute with her assistant superintendent. Rather, they constitute an

> extraordinary effort to discredit and [vilify] Dr. Dime and remove her from the school system. In that effort she has elicited the support of other current and former teachers, sought and obtained copies of personal documents about Dr. Dime's private life, and admitted that the purpose of these activities was to remove Dr. Dime from the school district. She has also disrupted the working of her department with her anger and her outrageous statement.***
>
> ***This is not a private dispute. This is insurbordination and disloyalty of the most extraordinary kind.
>
> (Reply Exceptions; at pp. 19-20)

The Board further urges application of Pietrunti, supra, noting that

> Charlton's behavior was not directed at public issues before the Board of Education. She was not angry about budget, curriculum, staffing or other matters before the Board. She was angry and obsessed with the Assistant Superintendent of Schools and engaged in a program to get rid of her. This is not a private dispute and this is not a constitutional right. It is a perverse abuse of the employment relationship.
>
> (Id., at p. 20)

Charlton's personal derogatory statements, threats of harm to the district by exposure of information about Dr. Dime, and disruptive

effect on school staff are well documented and warrant her dismissal for the reasons expressed by the ALJ.

* * * *

Upon careful consideration, the Commissioner has determined, for the reasons set forth below, to affirm the initial decision of the ALJ.

The Commissioner finds no merit in Charlton's extensive criticism of the ALJ's use and presentation of testimony. After reviewing all seven volumes of hearing transcript and carefully examining the testimony of witnesses in view of Charlton's exceptions, the Commissioner has found the ALJ's summations to be uniformly balanced and accurate, with no material omissions of fact and no suppression of conflicting evidence as alleged by Charlton. Where Charlton's witnesses disputed the Board's (most notably in the testimony of Winter and Granquist), the initial decision so states; and where the ALJ did not quote witnesses verbatim, the Commissioner was unable to identify a single instance where the ALJ's account conveyed a sense other than that clearly given by the transcript. As noted by the Board, the ALJ was under no obligation to structure his findings in a way that would set forth and then corroborate or discredit each piece of testimony; what each witness had to say is self-evident from the ALJ's summation, and the degree of weight accorded to a particular account is manifest in his discussion and conclusions. Moreover, the testimony of both Charlton's witnesses and the Board's was treated in the same manner, so that Charlton was not in any way disadvantaged by the ALJ's method.

The Commissioner has also carefully considered Charlton's other objections, and likewise finds them to be without merit. That certain of the Board's allegations elicited conflicting testimony is not in and of itself evidence that the allegations are untrue, only that they remain disputed by Charlton. It is clear from the record that the ALJ considered all testimony and weighed it according to the credibility of the witness and the plausibility and consistency of its content. That he permitted certain witnesses to speak of matters beyond the strictest literal reading of the particular tenure charges in which their names were mentioned is of no moment in view of clear pertinence of their testimony to issues raised elsewhere in the charges. Moreover, none of the testimony so criticized by Charlton can fairly be said to have been crucial in reaching either the ALJ's or the Commissioner's ultimate conclusions in this matter, so that any disadvantage to Charlton, accepting her position arguendo, was minimal.

Further, the Commissioner finds absolutely no basis in the record for overturning the credibility assessments of the ALJ, who not only had the benefit of transcripts but observed the witnesses first hand. Indeed, many of the witnesses Charlton seeks to discredit are shown by the record outside the transcript (Exhibits P-6, R-8) to have been her supporters in other matters. The Commissioner further finds that there is a compelling consistency in the accounts of the witnesses, not so much in that their specific

stories corroborated one another, although many did, as in the underlying cohesiveness of their recurrent references to modes of expression, manner of behavior and attitudes attributed to Charlton over a period of time. Those witnesses who did not contribute to this impression offered nothing to counter it; they simply claimed not to have heard anything or had never known Charlton in the settings under review in this case. Moreover, this same consistency is found in incidents and documents undisputed by Charlton, who obviously was inclined to speak freely about things that troubled her (Exhibit P-3); was identified by her evaluator in a neutral context as someone who did not take well to criticism and tended to be intent on her own views to the exclusion of broader perspectives (Exhibit R-11); confessed to at least one crucial conversation where her emotions got the better of her good judgment and self-control (Initial Decision, at pp. 21ff.); and admitted to at least some use among friends and colleagues (Initial Decision, at pp.18ff.) of the very expletives and pejorative assessments of Dr. Dime that form the leitmotif of seven volumes of testimony.

It is this consistency that likewise undercuts Charlton's attempt to dispute the validity of tenure charges originating in the report of a witness who, according to Charlton, should have been suspect and was merely indulging in harmful gossip (Marie Hakim). Regardless of the source of his initial information, it is clear from the record that the results of Dr. Galinsky's investigation stand on their own merit and actually corroborate much of Hakim's story.

Neither is the Commissioner persuaded by Charlton's attempt to enhance her own credibility by arguing that she, who now stands accused of undermining the district, is the selfsame person who could have deprived the district of national recognition through filing of a discrimination claim but elected not to do so out of professional dedication. Even if the Commissioner accepts this as true, and there appears to be no reason why he should not, it would not necessarily follow that Charlton's choice not to engage in litigation equaled a decision not to take any action at all. Indeed, in view of her insistence that her gathering of information on Dr. Dime was a private matter, the most plausible conclusion suggested by the present record is that she simply chose to address her problem in a less obvious way.

Likewise incredible is Charlton's contention that any investigating she did, or any discussion she had, was an outgrowth of her preparation for a possible discrimination/harassment claim arising from her failure to obtain a 12-month supervisory position and Dr. Dime's alleged thwarting of her professional efforts because of spurned sexual advances. Despite Charlton's claims, the disobliging facts are that Dr. Dime enthusiastically supported both her bid for tenure and her efforts to obtain a 12-month supervisory position at the very time when Dime was allegedly "out to get her." Dime's attempts to provide Charlton with precisely what she sought to obtain through her discrimination complaint, at least as she set it forth in her letter to Dr. Galinsky and in records of other meetings (Exhibits P-3, R-1), came during the very period (Spring

and Summer 1988) when Charlton was professing to be persecuted by Dime and well after Dime's alleged comment to the effect that she would "get" Charlton either now or later (curriculum meeting in January of 1988). Moreover, given that the decisions regarding Charlton's 12-month position and salary placement were the Board's and not Dr. Dime's--indeed they were contrary to her recommendations--it is difficult to understand how collecting sensitive information about Dr. Dime's private life was necessary for Charlton to pursue her discrimination complaint against the district. This is particularly so in view of the fact that Charlton at no time raised Dime's alleged inappropriate advances as a factor in her complaint. Charlton's statements that she did not do so because she feared for her nontenure status are plainly belied by the fact that she had several discussions with Dr. Galinsky after she had obtained tenure and still never mentioned the alleged "advances" as part of her problem.

Nor does the Commissioner find substantive merit in Charlton's comments on the ALJ's concluding discussion. As indicated above, the fact that certain testimony about Charlton's comments and behavior remains disputed does not negate the judicial process wherein the trier of fact reached determinations about what actually happened and drew conclusions from those determinations. As the Courts have stated on numerous occasions,

> ***the standard to govern appellate intervention with respect [to review of factual determinations made by administrative bodies] is the same as that on appeal in any nonjury case, i.e., "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record," considering "the proofs as a whole," with due regard to the opportunity of the one who heard the witnesses to judge of their credibility.***
> Close v. Kordulak Bros., 44 N.J. at 599 (1965)

(also, e.g., Jackson v. Concord Co., 54 N.J. 117-118 (1969); Parker v. Dornbierer, 140 N.J. Super. 188 (1976); Dore v. Bedminster Twp. Bd. of Ed., 185 N.J. Super. 453 (1982))

Also contrary to Charlton's claim, the basis for the ALJ's comment about derogatory remarks within earshot of students is clearly stated on page 10 of the initial decision.

The Commissioner further finds Charlton's contention that this case is essentially about a private dispute made public by the actions of the Board of Education to be disingenuous in the extreme. While the circumstance that Charlton's comments were not made in an official public forum may distinguish the facts of this case from those of Pietrunti, supra, it is inescapable that Charlton's efforts in collecting and spreading negative personal information about Dr. Dime (including threats to hold a press conference) were directed at discrediting a public official in the eyes of the community and its elected representatives--a public action fully comparable to the situation in Pietrunti and a spectacle entirely of Charlton's own making.

The Commissioner thus concurs with the ALJ that the Board's charges against Ann Charlton have been fully and fairly sustained and that they are sufficient to warrant her dismissal from tenured employment. Despite Charlton's exemplary prior service and acknowledged professional skill, the Commissioner simply cannot condone, or even make allowances for, the extraordinary course of action she chose to follow in response to her professed concerns in this matter. With total disregard for Janice Dime's rights to privacy and due process, and with no thought as to the broader implications of her actions for the district, Charlton consistently and effectively sought to take the law into her own hands rather than have her allegations of discrimination and harassment fully and fairly adjudicated through proper channels readily available for this purpose. The truly ugly, vindictive and persistent nature of her actions, and the disruption, disrepute and divisiveness they have brought to the district, have made it effectively impossible for her to continue as a credible teaching staff member in Paramus notwithstanding her undisputed excellence as a music director. That a long and distinguished career should end in this manner is deeply regrettable, as is the loss to Paramus students of Charlton's obvious talents; but permitting a lesser alternative would, in the Commissioner's view, be an unconscionable abrogation of the fundamental principle articulated in Pietrunti, supra, and endorsed by the New Jersey Supreme Court:

> ***the Commissioner holds that [Pietrunti's speech], even standing alone, warrants a finding that respondent has foreited her right to continued employment***. This holding is grounded on the belief that local boards of education which are required by constitutional prescription to operate thorough and efficient systems of public education, cannot be expected to carry out this mandate in an atmosphere of turmoil and conflict between school administrators and other employees. When such an atmosphere clearly exists, as herein, and when the atmosphere was created by a teacher acting in a premeditated and calculated manner *** the Commissioner believes that the tenure rights of the teacher are forfeit to the needs of the district as a whole for a cooperative effort in the education of children. It is this effort of local boards of education, the representatives of the people through the electoral process, and of school administrators, entrusted by the boards with duties of school management, which, in the Commissioner's judgment, must be supported.
> (1972 S.L.D at 427-428)

Accordingly, the initial decision of the Office of Administrative Law removing Ann Charlton from tenured employment and dismissing her appeal of the withholding of her increments is

affirmed for the reasons stated therein. The instant matter is hereby transmitted to the State Board of Examiners for consideration pursuant to N.J.A.C 6:11-3.6(a)1.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5110-90
AGENCY DKT. NO. 203-6/90

H.A. DE HART & SON,
Petitioner,
v.
BOARD OF EDUCATION OF KINGSWAY REGIONAL HIGH SCHOOL DISTRICT AND JERSEY BUS SALES, INC., GLOUCESTER COUNTY,
Respondents.

Thomas H. Ward, Esq., for petitioner (Albertson, Ward & McCaffrey, attorneys)

Robert Hagerty, Esq., for respondents (Capehart & Scatchard, attorneys)

Milton H. Gelzer, for intervenor Jersey Bus Sales (Gelzer, Kelaher, Shea, Novy & Carr, attorneys)

Record Closed: September 24, 1990 Decided: November 7, 1990

BEFORE JOSEPH LAVERY, ALJ:

This is an appeal by **H.A. DeHart & Son (petitioner)**, asking that, as the lowest bidder, it be awarded the contract for purchase of a new 54-passenger school bus, pursuant to N.J.S.A. 18A:18A-37. Toward that end, it asks that the existing award of that contract to **Jersey Bus Sales, Inc. (Jersey Bus)** be set aside as unlawful.

Kingsway Regional High School District Board of Education (Board), and Jersey Bus oppose the petition, and ask that the current award to Jersey Bus be upheld.

PROCEDURAL HISTORY

Petitioner moved for emergent relief through a motion filed in the Division of Controversies and Disputes, Department of Education, on June 28, 1990. The Commissioner of Education then forwarded the matter to the Office of Administrative Law (OAL) for disposition, filing it in the OAL on June 29, 1990. On July 5, 1990, the Honorable Naomi Dower-LaBastille, ALJ, granted the motion for emergency relief, and recused herself thereafter.

On July 12, 1990, the respondent Board sought summary decision through notice of cross-motion, which was accompanied by an answer to the original petition, and brief in opposition to the motion for emergent relief, notwithstanding the issuance of Judge LaBastille's order. On the same date, July 12, 1990, petitioner filed a response to the cross-motion for summary decision. On the afternoon of July 12, hearing convened on the motions, and an order issued on July 20, 1990, continuing the emergent relief, and denying summary decision. Following issuance of the order, the Commissioner of the Department of Education affirmed, in his decision of August 17, 1990.

Thereafter, plenary hearing convened on August 22, 1990, in the Trenton hearing rooms of the OAL. At that time, Jersey Bus had not responded to the original petition, nor participated in any prior proceedings, thus effectively having removed itself from the case. Nevertheless, prior to plenary hearing, at the urging of newly retained counsel, and for good cause, Jersey Bus was admitted to the proceeding as an intervenor, N.J.A.C. 1:1-16.1, et seq.

Post-hearing briefs were submitted by the parties and intervenor, the last of which was filed on September 24, 1990. On that date the record closed.

ISSUES

The issue, generally stated, is whether the contract for the sale of a 54-passenger school bus, which has been awarded to Jersey Bus by respondent Board, was in violation of N.J.S.A. 18A:18A-37, for failure to contract with Petitioner, the lowest responsible bidder.

Burden of Proof:

Notwithstanding the general statement of the issue, this matter turns on the instructions of the Commissioner of Education in the case of DeHart v. Kingsway Regional High School District BOE and New Jersey Bus Sales, Inc., OAL Dkt. EDU 3475-89 (August 9, 1989); rev'd, Commr. of Ed. (August 31, 1989); Commr. aff'd by St. Bd of Ed (May 4, 1990) That decision, which must control here*, states in pertinent part.

> The Board is hereby advised that several of its existing specifications have been shown by these proceedings to be proprietary in effect absent a clearly stated and sincerely meant intention to entertain consideration of equivalent offerings. The ***Board*** is further cautioned that, if subsequently challenged by an unsuccessful bidder on its application of specifications, ***it will bear the burden of showing*** that its decision was based upon a careful and legitimate determination of non-equivalency (not merely difference, as this is an unacceptable distinction within the context of public bidding laws) that is clearly reflected in Board discussion and/or materials presented to the Board as a basis for action. ***[At pp. 26-27; emphasis added]***

Undisputed Facts:

The orders and decisions by the State Board of Education, the Commissioner of Education, Judge LaBastille and this administrative law judge (ALJ), mentioned above, adequately outline the history of this matter and its undisputed facts. That outline extends to the critical time that the Board readvertised, and opened the resubmitted bids on June 20, 1990.

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*This tribunal observes that the customarily prevailing evidentiary standard is: whether the preponderating evidence overcomes the presumption of correctness to which a Board of Education action is entitled. A petitioner would normally be required to show that the action sought to be overturned was arbitrary, capricious or unreasonable. Parsippany-Troy Hills Ed. Assn. v. Bd. of Ed. of Parsippany-Troy Hills Twp., 180 N.J. Super. 161 (App. Div. 1983), certif. den., 94 N.J. 527 (1983). However, notwithstanding the foregoing, the standard quoted above from the Commissioner's decision of August 31, 1989, must prevail here as the "law of the case".

The bids submitted were as follows:

DeHart Body Company	$31,961
Jersey Bus Sales	32,403
Wolfington Body Company	34,400

(Exhibit P-1)

At the Board's meeting of June 25, 1990, the contract for the 54-passenger school bus was awarded to Jersey Bus. The minutes (Exh. P-1) recorded seven votes in favor, and one opposed.

Prior to the voting, Dr. Philip Nicastro, Secretary to the Board and Assistant Superintendent for Business, made a short presentation, the content of which is somewhat in dispute. Of those Board of Education members present, three had no knowledge of the litigatory background to the case.

In the audience were two representatives of DeHart, Richard T. Hoffman, Jr and Thomas Perry. Subsequent to the vote and award of the contract to Jersey Bus, Mr. Hoffman was for the first time given an opportunity to state his objections on behalf of petitioner.

No clerical secretary or recording device was available to transcribe the meeting, which was a "special" rather than "general" proceeding of the Board.

Following this meeting, petitioner brought the instant appeal.

ARGUMENTS OF THE PARTIES

Petitioner's Argument:

Petitioner presented its case through the testimony of a witness, introduction of documents, and prehearing as well as post-hearing submissions:

Richard T. **Hoffman**, Jr., an employee of petitioner DeHart since September 1978, recalled that he attended the Board meeting at 7:00 p.m. on June 25, 1990, with the expectation of making his employer's views known. Before the meeting convened, he received a copy of (Exh. P-2), the agenda at that time. It did not include, however, the "attachment" referred to, an additional document

"Kingsway Regional High School District Bus Bid Opening Results" (Exh. R-1). This document was later attached to Exh. P-1, the ultimate minutes of the special meeting of June 25, 1990

Mr Hoffman contended that he had been assured before the meeting by Dr. Nicastro that the attachment would be read aloud. The Board President, as well as Dr. Nicastro, also led him to believe he would be afforded an opportunity to comment before the vote occurred. This did not happen, Mr. Hoffman related Once Item 15, the school bus question, was reached on the agenda, Dr Nicastro began a presentation without the use of any document. Mr. Hoffman was adamant in his insistence that he did not see Dr. Nicastro at any time read from the "attachment", (Exh. R-1). Dr. Nicastro also indicated there were "differences" between the bid specifications of De Hart and Jersey bus. He never used the words "equivalency" or "nonequivalency." He did disclose to the Board the bid dollar amounts, but declared that the De Hart bid did not meet the minimum specifications of a responsible bid.

As to technical discussion by the Board, Mr. Hoffman was certain that there had been none whatsoever. On the other hand, he conceded there had been some discussion of the roof bow, the construction of the rear of the bus, steel gauges, and dimensions of the windows (Jersey Bus' 4-piece, as opposed to DeHart's 2-piece front windshield). To some extent, Mr. Hoffman recalled, Dr. Nicastro highlighted his concern over safety factors.

Recalling his location during the meeting, Mr. Hoffman stated that he sat only 10 to 12 feet away, and sought on several occasions to be recognized before the Board's vote on the contract award. His efforts were ignored.

After the vote and the completion of the entire agenda, Mr. Hoffman testified, he was afforded time to speak to the Board. At that time, he told them that the DeHart bid was certainly "equivalent" to the minimum bid specifications, as well as those of Jersey Bus (the "Bluebird" model). He added that Dr. Nicastro's mention of the prior Initial Decision by Judge La Bastille was improper as misleading, since that recommendation had been reversed. Dr. Nicastro had erroneously told the Board that their present acceptance of the bid would be supported by Judge LaBastille's opinion. He said this in explicit response to a Board member's concern over whether the Board would get "in trouble." Dr. Nicastro further lulled the Board, in Mr. Hoffman's view, by adding that the county superintendent had approved the

award to Jersey Bus. At no time did he mention that the ALJ had been reversed, nor did he describe the plain instructions from the Commissioner in his final administrative decision of August 31, 1989.

By way of post-hearing legal briefs, petitioner argued that this case involves the identical issues previously treated on appeal in 1989 by the Commissioner and State Board of Education. The record, there and here, reflects the continuing protective bias of Dr. Nicastro toward Jersey Bus. It confirms that the specifications, altered since those 1989 appeals, only includes insertion of the language "or equivalent". This perfunctory response to the decision of the Commissioner and State Board leaves the specifications in a continuing proprietary, and thus illegal, condition. The Commissioner, in his decision of August 31, 1989, supra, when he invalidated the prior contract awarded to Jersey Bus, called for new bids. In doing so, he unmistakably prescribed the degree of scrutiny to be exercised and memorialized by the Board. He noted in his decision that "several of its existing specifications" were "proprietary in effect" (*Id*, at p. 26). The Commissioner's decision, in petitioner's view, placed the burden squarely on the Board to demonstrate that it grounded its contract award on "a careful and legitimate determination of non-equivalency (not merely difference, as this is an unacceptable distinction within the context of public bidding laws) that is clearly reflected in Board discussion and/or materials presented to the Board as a basis for action." *Id*, at p. 27.

Petitioner argues that this tribunal and the Commissioner are restricted to the record of the Board meeting of June 26, 1990, when determining whether that test has been satisfied. That record is limited to the mandatory minutes maintained under the Open Public Meetings Act, N.J.S.A. 10:4-14. Petitioner finds significance in the decision of the Board Secretary, Dr. Nicastro, not to rely on a tape, or a secretary's shorthand to compile these minutes, as it normally does at its general meetings. At this crucial juncture, petitioner theorizes, where the Commissioner's directive was explicit, and the need for full documentation of Board action on the bus bids was inescapable, Dr. Nicastro, with calculation, foreclosed the possibility of comprehensive minutes. This shortcoming, in petitioner's opinion, is exacerbated by the Board's failure to demonstrate a "sincere intent to consider equivalent offerings and undertake a course of careful and legitimate determination on equivalency." Dr. Nicastro's presentation was less than five minutes, and, in any event, the opinions of staff (Exh R-1) cannot be substituted for an articulated decision of the

Board, which is the sole entity with authority to decide the award Moreover, contrary comment by petitioner before the vote was barred.

Petitioner contends further that lack of a record demonstrates that neither expert opinion, nor traffic studies, nor history of the case, was provided to the Board Consequently, it is not possible to adequately assess the presence or absence of "equivalency" in the Jersey Bus and DeHart specifications. The only history of the Board's deliberation is a brief segment of the minutes from the June 25, 1990 meeting Those uninformative minutes were prepared by the same business administrator and Board Secretary, Dr. Nicastro, who was found to have improperly altered minutes of the Board in 1989 (DeHart, supra, at p. 24). For all these reasons, petitioner insists, the Board has not satisfied the ineluctable demands of the Commissioner quoted *supra* from his decision of August 31, 1990.

By way of request for relief, petitioner emphasizes that there have been two failed efforts to comply with the law, rules and orders of the Commissioner of Education. The legislative intent of N.J.S.A. 18A:18A-37 should now be honored, and the lowest bidder should be awarded the contract for the bus. No other remedy is available to petitioner in this case. Moreover, after all this time and expense, award to the company offering the lesser purchase price is consistent with the interests of the taxpayers of the school district.

The Board's Argument:

The Board presented its case through the testimony of its Secretary, Dr. Nicastro, and through the submission of pre- and post-hearing briefs.

Dr. Philip Nicastro testified that he prepared Exhibit R-1, but only as far down as the portion beginning "Notes." After that, the substantive work product was prepared by Mrs. Cristido and Mr. Morgan of the District transportation staff (Exh. R-1). He stated that this was the document he relied upon at the Board meeting of June 25, 1990. He read from it to explain the differences between the Jersey Bus, Wolfington Body and DeHart body specifications.

Dr. Nicastro recalled that he gave a presentation of 5 to 10 minutes, during which he reiterated each and every line of this comparison (Exh. R-1). He focused on the differences between four-piece and two-piece windshields, the roof bow, the disparities in steel gauges, and the construction of the rear of the bus. He recalled

that his emphasis was on safety rather than money. The Board members at the meeting acknowledged that they understood the issues involved. Dr. Nicastro also recalled that he told the Board that Judge LaBastille in her initial decision had said that the differences he now outlined between Jersey Bus and DeHart were "material." He also told the Board that her decision had been superseded because of her impermissible validation of penalties. Nevertheless, Dr. Nicastro conceded that all Board members were not familiar with the problem. He estimated that six knew of the difficulties involved, and three did not. The vote, he thought, had been eight to one in favor of an award to Jersey Bus, despite the lower bid submitted by petitioner.

As to taping of the "special" meeting, Dr. Nicastro stated that the the customary practice was to tape only the regular or general Board of Education meetings. The sole purpose of the tape was to assist the clerical secretary in preparation of the minutes, which were not verbatim, but recorded items such as the nature of motions, the vote, and members present. The tapes were erased and reused once the minutes were promulgated. In contrast, special meetings, like that of June 25, 1990, were rarely taped. Given their typically short agendas, there was no need to rely on more than notes for the minutes. In this special meeting of June 25, 1990, it was Dr. Nicastro who took the notes. The clerical secretary, Betty Crate, did not attend special meetings, except in isolated instances.

Dr. Nicastro agreed there had been no discussion of reports, safety or engineering research, rollover capacity test results, or equivalency. No technical supporting documents were provided, only the expression of his opinion On the other hand, Dr. Nicastro stressed that the reading of Exh. R-1 was the distillation of extensive research by him and his transportation staff. He was sure that although the bids themselves were not part of the meeting record, each Board member had Exh. R-1 in front of him when he or she voted, and when Dr. Nicastro read from it during the meeting. Dr. Nicastro conceded that DeHart personnel did raise their hands prior to the discussion and vote. He also admitted that they did not have a copy of the R-1 attachment at the time. He explained that his was because, at special meetings, the public normally does not speak before a vote. He had intended to give them a copy after the meeting, but they left beforehand.

By way of legal brief, the Board asserted that it had complied with the Commissioner's mandate in his decision of August 31, 1989. This occurred when Dr Nicastro outlined the distinctions between the buses in question, and evaluated

the safety factors. Moreover, the findings of fact of Judge LaBastille were never disavowed by the Commissioner in his decision

Further, the Board argued, since the Board's decision was not arbitrary, capricious or unreasonable, it must be presumed correct, and therefore should be upheld. On the law as it now exists, the Board was within its power when it awarded a contract to a bidder who substantially complied with the bid specifications, rather than a low dollar bidder like DeHart, which did not.

As to recording of the meeting, the Board pointed out that it was not required by law to do so Neither was it required to have expert testimony on the safety features of the buses since this was not mandated by the Commissioner in his August 31, 1989 decision. The Board relied on the rational opinion of its assistant superintendent for business and Board Secretary. To compel boards of education to convene lengthy hearings with a parade of witnesses whenever a contract is awarded would be unrealistic. The preceding litigation only rejected the bid because of reliance on an illegal penalty clause.

Finally, the "differences" referred to during Dr. Nicastro's presentation, when taken in context, were obviously meant to describe non-equivalencies. Their rational relationship to safety makes them so. Neither this tribunal nor the Commissioner may substitute its judgment for the Board on such matters as the proper and gauge of steel or assessment of safety. Yet, if this tribunal and the Commissioner were still to determine that the Board somehow had fallen short of its duty, it should be taken into account that no specific guidelines were provided to carry out a "careful and legitimate determination of non- equivalency". The Board was satisfied at its meeting that it had complied in good faith with the Commissioner's mandate, as it was worded. If the Commissioner disagrees, then the remedy is full plenary hearing on the entire merits. Alternatively, rebidding should be directed. Under no circumstances, however, is an uncritical award to petitioner justified.

In post-trial reply brief, the Board added that petitioner had made factual assertions unsupported by the record, which must be disregarded as a matter of law

Argument of Jersey Bus:

Jersey Bus contended, in supplement to the Board's position, that the Board acted within its authority. Further, it awarded the contract to Jersey Bus after

careful and deliberate determination of non-equivalency among bid proposals. It believes there is no evidence of a proprietary application of specifications to exclude all other bidders but Jersey Bus. Nevertheless, if this tribunal and the Commissioner should find against the Board, the appropriate remedy would be readvertisement for bid proposals.

FINDINGS OF FACT

Therefore, after considering the testimony previously set forth, and independently assessing the credibility of witnesses and parties, as well as reviewing the record as a whole, I make the following **FINDINGS OF FACT:**

As to **UNDISPUTED** facts, I **FIND** those designated on pages 3 through 4 of this opinion

As to matters which are **DISPUTED** or **CONTESTED**, I **FIND**:

1. At the meeting of June 25, 1990, all Board members had in front of them the attachment making comparisons between Jersey Bus, DeHart and Wolfington bid specifications.

2. At the same meeting, Dr. Nicastro reiterated to the Board members the content of this attachment, highlighting the differences between the two and four-piece windshields, relative strengths of steel gauge, and discussing construction of the rear of school buses. Dr. Nicastro emphasized safety factors when recommending an award to Jersey Bus.

3 At the meeting of June 25, 1990, no expert testimony was given. No supplemental reports were provided, and Dr. Nicastro's 5-to-10 minute reiteration of Exhibit R-1 (with comments) was the full extent of Board staff presentation before the vote.

4. Three Board of Education members prior to the vote were unaware of the background to the bids.

5. Dr. Nicastro did *not* provide a full explanation of the legal history, including the directions of the Commissioner as a result of his August 31, 1989, decision. He *did* note that Judge LaBastille's Initial Decision had

been overturned for improperly allowing penalties. He added that findings of fact on material differences had not been overturned.

ANALYSIS AND CONCLUSION

Although the background arguments of the parties are wide-ranging, and the technical materials accompanying the bids (Exhs. I-1, I-2 and I-3) are substantial, the focus of this tribunal must be restricted, and its decision straightforward. It must determine whether or not the Commissioner's directive in his decision of August 31, 1989, which should have been followed at the Board proceedings of June 25, 1990, have been satisfied. Those instructions were repeated verbatim under "Burden of Proof", p. 3, *supra*.

Satisfying The Commissioner's Standard:

The Board has not created a record of its decision which satisfies the Commissioner's standard.

The sum total of time consumed by Dr. Nicastro's presentation, calculated by his own reckoning, was from 5 to 10 minutes. Most of his talk was devoted to restating the elements of the one-page bus body comparison which the Board members had in front of them (Exhibit R-1). Significantly, the Board did not have copies of the bids themselves. Dr. Nicastro went beyond the written words only to highlight the safety aspects. The record does not disclose that any copies of the Commissioner's decision were made part of the meeting materials. Dr. Nicastro only briefly adverted to it. He concedes he did not convey to Board members the critical, and case-specific, language of the decision. He did not alert the Board to the Commissioner's expectation of what measure of intensity should mark its deliberations.

This presentation of Dr. Nicastro was simply a summary of staff opinion, the substantive portion of which was gleaned from the work of two members of the district transportation staff. Those staff members were not called upon to participate. There is, of course, nothing improper about a Board secretary expressing his opinion. Neither must he bring his staff before the Board. Yet, given the unusual circumstances of the Commissioner's admonition, a fuller Board review than this record reveals was called for. There is no articulation of the Board's findings , much less the rationale for its conclusions. All that marks the result of the

Board's deliberations is the record of voting and acceptance of the Jersey Bus bid contained in the minutes prepared by Dr. Nicastro. Those minutes state.

> Dr Nicastro made a presentation to the Board of Education regarding the information on the attached sheet.
>
> Motion by Grasso, second by DeSimone, the Board of Education accept and award the bid as per the attached for one new 1990 54-passenger school bus as per the bid opening of June 21, 1990. Motion carried on the following roll call vote: "yes" - Cianciulli, DeSimone, Gahrs, Grasso, Midili, Weigelt, and Gray; "no" - Steward. (Exhibit P-1)

This limited Board sequel to the Commissioner's decision, even with the most liberal interpretation, cannot serve as an adequate response to the decision's above-quoted guideline. It is not persuasive that a bid treatment of the magnitude suggested by the Commissioner ignores customary Board procedure, or that it will be unduly burdensome if followed henceforth. "Administrative convenience" is rarely a successful defense. Moreover, the decision of the Commissioner and State Board was not brought before the Appellate Division. It therefore must be obeyed. For all these reasons, it cannot be held that the Board satisfied its burden. This was clearly allocated by the Commissioner in his decision of August 31, 1989: the Board must demonstrate that it engaged in close scrutiny of the bidding results, and rendered an explanation of its decision:

> The ***Board*** is further cautioned that, if subsequently challenged by an unsuccessful bidder on its application of specifications, ***it will bear the burden of showing*** that its decision was based upon a careful and legitimate determination of non-equivalency (not merely difference, as this is an unacceptable distinction within the context of public bidding laws) that is clearly reflected in Board discussion and/or materials presented to the Board as a basis for action. ***[At pp. 26-27; Emphasis added]***

The cases cited by the Board and intervenor Jersey Bus offer no holdings which offset the binding legality of this incident-sensitive command.

Remedy:

The remaining consideration is remedy.

It has been suggested that the matter be rebidded, or that the case be calendared for plenary hearing on the total legal and factual merits of the

competing bids. Either of these alternatives is premature. The Board has still not reviewed the bid awards in a fashion and to a degree contemplated by the Commissioner. It is neither lawful nor in the public interest to remove from the Board that function which it alone is elected and authorized to perform.

The remedy therefore should be to return the matter to the Kingsway Regional High School District Board of Education. The Board should have an opportunity to reconsider its decision, and to explain in detail how and why it sustains, modifies, or reverses that decision. It should be able to do so after adequate review. That review must extend beyond study of the short bid comparison by its staff (Exh. R-1). Its decision should be accompanied by findings and conclusions, rather than solely through vote tabulation in the minutes. If the parties are still dissatisfied with the result, their entitlement to appeal to the Commissioner anew remains in place.

ORDER

I **ORDER**, therefore, that this matter be remanded to the Kingsway Regional High School District Board of Education for reconsideration of the present bid award, pursuant to the instructions of the Commissioner of Education set forth in his decision of August 31, 1989.

I **ORDER** further that, as part of this reconsideration, the Board sustain, modify, or reverse its decision awarding the bus sale contract to Jersey Bus only after specifying its underlying reasons. This should be done, after adequate review, through findings and conclusions, placed on the record orally or in writing.

I **ORDER** further that all parties' briefs and submissions which are currently before the OAL and the Commissioner also be made available to the Board of Education, to assist it in its reconsideration.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days

and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 7, 1990
DATE

JOSEPH LAVERY, ALJ

Receipt Acknowledged:

NOV 8, 1990
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

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H.A. DE HART AND SON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT GLOUCESTER COUNTY, AND JERSEY BUS SALES, INC.,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and the Board of Education were timely filed pursuant to N.J.A.C. 1:1-18.4, as were the Board's replies to petitioner's exceptions.

In its exceptions, Petitioner DeHart argues that the ALJ erred in not awarding it the disputed contract outright. The ALJ should not, according to DeHart, have remanded this matter to the Board of Education for yet another opportunity to comply with law, particularly in view of the Commissioner's clear directive to the Board to make a legitimate determination as to the non-equivalency of any rejected bid. According to DeHart, the ALJ's decision "clearly sets forth the finding that, in dereliction of the duty prescribed by the Commissioner, 'the Board has not created a record of its decision which satisfies the Commissioner's standard.' Judge Lavery further found that the Board articulated neither findings nor rationale for its conclusions." (Exceptions at pp. 2-3) Given that the Board's argument throughout the present proceedings has been that it did comply with the Commissioner's directive, DeHart argues, no reasonable purpose can be served by a remand; indeed, remanding the decision to the Board actually nullifies the effect of the prior decisions of the Commissioner and State Board, as well as the public bidding laws.

Further, DeHart contends, the equities in this matter lie in its favor given the prior history of the matter and the quality of its product. In DeHart's view, a remand after the Board has twice acted improperly would simply

> compound the already immeasurable hardship inflicted upon Petitioner***.
>
> [Its] buses meet all bus standards of the Commissioner***[and are] used by a great number of school districts, as well as the State of New Jersey. The sole factor preventing the mandated award to the lowest bidder DeHart, is the

> outlawed "favoritism" shown by Respondent Kingsway to Respondent New Jersey Bus Sales, Inc.*** (Exceptions, at p. 6, citations omitted)

For its part, in its primary exceptions the Board also objects to the ALJ's decision to remand, contending instead that it had fully complied with the Commissioner's prior directive and should have prevailed on a summary basis as originally moved. According to the Board, the Commissioner did not require expert witnesses, or indeed any witnesses, but merely required the Board to have demonstrably made distinctions which rise to the level of non-equivalency when determining to reject a low bidder's product. This the Board clearly did, the Board argues, as demonstrated by previously submitted affidavits which show the Board's decision to have been based on safety factors relating to windshield construction and gauge of roof and body steel. (EXCEPTION ONE)

The Board further excepts to the ALJ's having construed the Commissioner's prior decision as shifting the burden of proof, rather than merely the burden of persuasion, to the Board. The Board contends that once it demonstrated its essential compliance with the Commissioner's directive, i.e., that it considered and acted upon determinations of non-equivalency, the burden to show that those determinations were arbitrary or capricious should have shifted back to the party challenging the bid award. Since DeHart did not meet this burden, the Board's action should have been upheld. (EXCEPTION TWO)

Finally, the Board requests that, if the Commissioner concurs with the ALJ that the Board did not comply with the Commissioner's prior directive, the Commissioner set forth specific guidelines on how to proceed on remand. (EXCEPTION THREE)

Without waiving its primary arguments as summarized above, the Board also notes in reply to DeHart's exceptions that this case represents the first, not the second, challenge to the Board's compliance with the Commissioner's directive, DeHart having chosen not to participate in the rebid ordered by the Commissioner in his earlier decision. Moreover, the Board argues, given the ALJ's belief (which the Board disputes) that the Board had the right to make its own decision but did not sufficiently follow the Commissioner's instructions, there is nothing illogical about his having returned this matter to the Board for remedy.

Upon careful review, the Commissioner determines to adopt the initial decision of the ALJ for the reasons stated therein. In the present situation, where prior proceedings have shown the Board's specifications to be proprietary in at least two critical areas (four-piece windshield and body frame construction) absent meaningful entertainment of alternatives, the Board may not meet its burden by simply noting that unsuccessful bidders did not comply with those specifications, as in P-1, or by relying on general expressions of preference by staff. Rather, to comply with the spirit of law requiring free and competitive bidding, there must be on record an articulated, specific demonstration as to how the

alternatives proposed by unsuccessful bidders were in fact not equivalent to the item(s) requested, not merely that the Board preferred to have its original, proprietary item based on vague or anecdotal perceptions of relative safety.

The Commissioner further concurs with the ALJ's choice of remedy in this matter, as the determination of award of contract rightfully belongs to the Board absent a demonstration that the Board in fact applied its specifications in a proprietary manner. Because the Board's failure, as far as the present record shows, is one of omission rather than commission, no equities on the part of any bidder can fairly be said to overcome the Board's right of determination at this point in these proceedings.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons stated therein and the Kingsway Regional Board of Education directed to comply with the clear and specific orders of the ALJ.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1951-90
AGENCY DKT. NO. 38-2/90

GEORGE WATSON, JR.,
Petitioner,
v.
MARLBORO BOARD OF EDUCATION, SUPERINTENDENT OF SCHOOLS FRANK DEFINO, ASSISTANT SUPERINTENDENT OF SCHOOLS MARC GASWIRTH, BOARD SECRETARY RAYMOND PROIETTI, ASSISTANT BOARD SECRETARY GARRETT VOORHEES, ASSISTANT BUSINESS ADMINISTRATOR EDWARD ALLEN, TRANSPORTATION COORDINATOR TERESA DONDERA, AND DIRECTOR OF FOOD SERVICE BEVERLY JACKEY,
Respondents.

George Watson, Jr., petitioner pro se
Vincent DeMaio, Esq., for respondents (DeMaio & DeMaio, Attorneys)

Record Closed: October 25, 1990 Decided November 29, 1990

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

George Watson, Jr. (petitioner), employed by the Marlboro Township Board of Education (Board) as a bus driver, filed a 21 count Petition of Appeal to the Commissioner of Education against the Board by which he claims he has been subjected to unlawful discrimination. After the Commissioner transferred the matter on March 15, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., the Board filed a Notice of Motion to dismiss on or about October 4, 1990

because of petitioner's failure to answer interrogatories and for his asserted misuse of the administrative process to harass the Board and its employees. At or about the same time, petitioner filed what purports to be a Notice of Motion to "Arbitrate and Stay of Action Pending Arbitration."

Oral argument on the Board's motion to dismiss was heard by telephone conference call October 25, 1990. The conclusion is reached in this initial deicision that the Petition of Appeal must be dismissed.

FACTS

The facts of the matter as established by the record developed thus far are these. Petitioner alleges in his 21 count Petition, many of which counts are repetitive, that he is American Indian and black; that the Board failed without explanation to provide the same training to him that it provides other white bus drivers despite his request; that the Board applies a more strict absence policy to him than to white bus drivers, the result of which is, he says, he was given a second 90 day probationary period; that the evaluations of his performance were so poor he was overcome by stress and had to absent himself from his employment duties; that he was subjected to insults and jokes by supervisors because of his race; that the Board created false records for insertion into his personnel file; that after he "filed" charges of discrimination he was suspended for two days; and, the Board refuses to meet with him. On these allegations, petitioner alleges he is subjected to unlawful discrimination by the Board under state and federal law. He demands that asserted discriminatory documents be removed from his file, that the Commissioner award him lost wages, punitive damages, and to Order the Board "* * * to stop the racial discrimination and employ miniority supervisors." (Count 21, Petition).

In answer to the Petition, the Board denies the factual allegations and it maintains that petitioner's suspension from employment was for cause, not for discriminatory reasons or in retaliation of any lawful conduct by petitioner. The Board also asserts as separate defenses that petitioner, in addition to this Petition, filed similar charges against it with the Office of Equal Employment Opportunity, with the New Jersey Division on Civil Rights, and, with the Public Employment Relations Commission. Furthermore, the Board says petitioner filed a grievance concerning some of the allegations contained within the peitition and, following procedure and at petitioner's

request, it scheduled a hearing into the matter at which petitioner failed to appear. Finally, the Board says the Commissioner of Education does not have jurisdiction over the charges contained within the Petition.

It is noted that petitioner did file an unfair practice charge against the Board with the Public Employment Relations Commission in which he alleges, among other matters, that a series of adverse letters were placed in his personnel file contrary to the New Jersey Employer-Employee Relations Act; that the Board violated his civil rights by insisting that he take a medical test; that a shop steward refused to file a grievance on his behalf; that the Board unlawfully discriminated against him; and, that the Board has no black administrators and refuses to employ any. PERC dismissed all allegations filed against the Board and against the Association except the one concerning the alleged refusal to file a grievance on his behalf.

After this matter was transferred on March 15, 1990 the parties were notified in writing in due course that a telephone prehearing conference was to be conducted May 14, 1990 at 4:30 p.m. At the designated date and time on May 14, this judge placed a telephone call to petitioner's home with counsel to the Board already on the line. While petitioner did not answer the telephone, an telephone answering machine was activated. I identified myself, the purpose of the call, and the fact that Board counsel was also on the phone with me. I left the message requesting petitioner to return the call. Two days later, on May 16, 1990 at 4:40 p.m., petitioner did return the call. In a letter sent the parties by this judge on May 17, 1990 the following was said:

> At that time [May 17] you [petitioner] told me you had no knowledge of a scheduled prehearing conference because you believed a hearing was scheduled for sometime during July 1990. When asked upon what you based that belief, you claimed that was simply your understanding. In response to your inquiry regarding the purpose of a prehearing telephone conference, I explained that the notice you received outlined the purpose of the conference as being, among other matters, to settle the issues and decide the hearing date. You then declared that a prehearing is unnecessary unless I was prepared to issue a restraining order against the Board because the Board is racist, bigoted, and prejudice. At that point I tried to explain that it was improper to continue the telephone conversation with you because of the absence of Board's counsel. I

> told you that the purpose of the prehearing conference was not for me to issue any restraint against the Board at which point you advised me 'well, judge then thats pretty stupid to have a prehearing conference.' At that point, Mr. Watson, I terminated the telephone call. * * *
>
> Consequently, please advise me in writing of when your schedule will permit you to be available for a telephone prehearing conference in this matter so that a hearing on the merits of your claims may eventually be conducted. I shall not discuss this matter in any respect with you personally without the presence of Board's counsel, nor with Board's counsel without your presence.
>
> You will note that the copy of the notice of telephone prehearing conference enclosed within this letter lists your address as P.O. Box 502, Farmingdale, New Jersey 07727. That is the address you included on your formal petition you filed to the Commission, a copy of the first page which is also enclosed. When on May 16, 1990 I terminated the telephone call you called my secretary and demanded once again to speak with me. On my instructions, my secretary told you I was otherwised engaged. Nevertheless, you then proceeded to give my secretary your address as P.O. Box 1651, Toms River, New Jersey 08754. I have taken the liberty of causing this letter to be sent to both addresses. Mr. Watson, along with a date from you in writing when you will available for a telephone prehearing conference call, I need to know which of the two addresses is your correct address.

No response was received from petitioner by June 14, 1990 when Board counsel submitted a letter, with a copy to petitioner, that absent a response to my May 17 letter the Board intended to move to dimiss for lack of prosecution. On June 19, 1990 a mailgram was received from petitioner as follows:

> Please be advised that I may be reached at 201-938-6066. You may call me the day before you set up the conference. Any day at 0900

> a.m. would be fine with me. No matter where I am I will call and give you the telephone number so that you may call me and start the conference. However, I must say this could have been handled the day I phoned. I don't understand this method of handling the case. It seems to me administratively discriminatory and in violation of New Jersey's law against discrimination since you knew the urgency of this entire affair as you related in your letter. Waiting for your response.

By letter dated June 21, 1990 I advised the parties that a telephone conference call would be initiated July 5, 1990 at 9:00 a.m. Unfortunately, on that scheduled day and days after, this judge was ill. However, a telephone call was made to the parties that day and the conference was rescheduled for July 24, 1990. Written notices of such scheduled telephone prehearing conference were subsequently mailed to petitioner and to Board counsel.

On July 24, 1990, I initiated the telephone conference call to petitioner by dialing the number he provided in the mailgram. Petitioner did not answer the call; his telephone answering machine did. I left a message that I called with Board counsel on the line. Petitioner was requested to return the call. Petitioner did not return the call by August 27, 1990 when another writing from this judge was sent him.

But, in the meantime Board counsel had served interrogatories upon petitioner. Petitioner failed to answer the interrogatories within 15 days as required by N.J.A.C. 1:1-11.5(f). Furthermore, petitioner did not seek an extension of time within which to file such answers. Consequently, Board counsel moved for an Order by which petitioner was directed to answer interrogatories served upon him by the Board on and that failure to provide such answers no later than September 28, 1990 would result in the petition being dismissed with prejudice. Petitioner was sent a copy of the Order on August 27, 1990, along with a letter reminding him again that he must advise of a convenient time for him to participate in a conference call.

Nothing was heard in response from petitioner and he did not answer the interrogatories by September 28, 1990. Consequently, the Board filed the instant motion to dismiss on October 4, 1990. On October 4, 1990 petitioner personally appeared in my office and submitted his earlier referenced motion to arbitrate. I advised him that before a ruling on the Board's motion to dismiss was reached, a telephone conference call might be beneficial. This telephone conference call was successfully initiated on October 24, 1990 at 11:00 a.m. as scheduled.

MOTION TO DISMISS

The motion to dismiss is in large measure based on petitioner's failure to answer interrogatories despite the administrative rule and despite the Order issued him to serve answers by September 28, 1990. The motion is also based upon what the Board asserts to be petitioner's intent to use the administrative hearing process soley to harass it and its employees by virtue of his stubborn and willfull refusal to comply with requests made of him to move this matter towards resolution. The Board does acknowledge that purported answers to interrogatories were filed with it by petitioner on October 2, 1990 but it says that those supposed answers are nothing more than evasion on petitioner's part to providing the information sought. In this regard, it is noted as fact that of 26 interrogatories propounded, petitioner's answer to 20 were in one the of three following forms:

1. I would be delighted to answer this question. However, I must have my interrogatories answered first.

2. After my discovery interrogatories are served and ordered answered I then can answer this question.

3. As stated in the past, I must have my discovery interrogatories in order to answer this question.

As of the date the Board filed its motion, petitioner did not serve interrogatories upon the Board and he did not serve interrogatories upon the Board as of October 2, 1990. Moreover, petitioner did not move for an Order to compel the Board to answer any interrogatories that may have been served upon it by him.

In apparent response to the Board's motion to dismiss, petitioner filed the earlier referenced asserted "motion to arbitrate and stay of action pending arbitration 2A:24-3 and 2A:24-4" on October 4, 1990. The substance of that document is reproduced here in full as written:

> It is clear to me that fairness in this case is not a fact, Mr. Demaio has made all sorts of Verbal Abuses and statements about me, he is only a lawyer not a fortune teller. I was the victim of the Discrimination and most of the items that he is asking for he already has .
>
> I asked you for an order to stop the discrimination and you told me no and Proceeded to give Mr. Demaio an Order for things that he already has , to me another act of Discrimination.
>
> I moved this case out of Superior Court when the White Judge made smart remarks and Gestures that were inappropriate to Mr. Demaio about me.,When I asked him a Question .
>
> Their is alot more that I could say on the subject ,however this is not the Time or forum to discuss the same.
>
> Mr. Demaio is in a big hurray to violate my rights and dismiss this case so that he can use the forum that a citizen has to try and redress his complaints.
>
> MR. DEMAIO IS AN ATTORNEY AT LAW IN THE STATE OF NEW JERSEY AND WHAT HE SHOULD BE ASKING IS FOR AN ORDER TO FORCE THE BOARD TO ARBITRATION AS REQUIRED BY LAW 2A:24-3 and Stay of Action Subject to Arbitration 2A:24-4(2A:24-3) NONPERFORMANCE OF AGREEMENT ; ACTION FOR ORDER OF ARBITRATION.
>
> The Marlboro Board of Education is covered by a Labor Agreement and Mr. George Watson Jr. a Black Bus Driver is also covered by that Agreement and that agreement calls for a final step of Arbitration (See Page Four of the Contract) Part only.
>
> I therefore request from you an Order to strike their motion to Dismiss and Order the Board of Education to Arbitrate as Required by Law, An I want a Black Arbitrator of My choice. An Order these Proceedings stayed until that Arbitration is complete as required by Law. Also any of Proceedural defects can be corrected during that time.

1. Mr. George Watson Jr was and is covered by the Labor Agreement between the Marlboro Board of Education and the Marlboro Township Bus Drivers Association

2. That agreement was in effect before Mr. George Watson Jr and a New Contract was signed after his Employment began.

3. The Marlboro Board of Education Has not complied with the provisions of the Contract or 2A:24-3.

4. An Order for Arbitration would be proper in this matter in my opinion .

5. A Stay of the Action would be Proper in this matter in my opinion.

6. In View of the treatment of this case todate ,I request an order for a Black Independent Arbitrator.

7. It is My Feeling that Mr. Demaio's failure to notify your Honor of the Labor Agreement , is another example of the Race Discrimination by the Board.

Interrogatories to which petitioner provided one of the three answers set forth above include the following:

-State specifically how the absentee policy alleged applied to Petitioner differed from the policy allegedly applied to white bus drivers.
-Give the date 'second 90 day probation' alleged in Count Eight of the Petition. (b)G give the date of the first such probation.
-State specifically the facts upon which it is alleged that 'race discrimination' motivated the poor evaluation received by the Petitioner as alleged in Count 10.

-With respect to Count Twelve, state (a) the date and manner in which the respondents allegedly engaged in retaliation; (b) the alleged conduct which caused the retaliation.
-State specifically the dates of all documents alleged to constitute false documentation in Count Eighteen, and attach a copy hereto.

The foregoing interrgatories are but examples of answers to questions the Board sought from petitioner.

ANALYSIS

Under the Uniform Administrative Procedure Rules N.J.A.C. 1:1-1.1 et seq., written interrogatories are authorized pursuant to N.J.A.C. 1:1-10.2(a). When served, answers to interrogatories are to be served no later than 15 days from receipt or a schedule for reasonable compliance must be submitted by the party who must supply the answers. N.J.A.C. 1:1-10.4(c). Should a party upon whom interrogatories are served wish to object, that party is obliged to place a telephone conference call to the judge and to the other party within 10 days from receipt of the interrogatories. Failure to comply with discovery requirements pursuant to the rules subjects the offender to sanctions under N.J.A.C. 1:1-10.5. Sanctions allowable for failure to comply with discovery requirements or any order of a judge include dismissal of the petition, suppressing a defense or claim, excluding evidence, or other appropriate case-related action. N.J.A.C. 1:1-14.4(c).

In this case, the Board served interrogatories which, by any reasonable standard, are legitimate requests for information from petitioner; petitioner was obliged to provide answers to interrogatories or a reasonable schedule when such answers would be supplied the Board. Petitioner failed in those obligations. Petitioner did not object to any interrogatories served upon him prior to the expiration of the time contained within the Order by which he was obliged to provide answers to interrogatories by September 28, 1990. The purported answers supplied the Board by petitioner are, in fact, no answers at all to the questions posed. In fact, such answers constitute nothing more than an absolute abuse by petitioner of his obligation to provide answers to legitimate interrogatories

served upon him in a good faith manner. For petitioner to state that he would answer the question after his interrogatories are answered when, if fact, at the time he supplied that answer he had not served interrogatories, is conduct designed soley to frustrate the administrative process. This is not a case where petitioner failed to comply with either the Board's request for answers to interrogatories or with the Order issued him to supply answers to interrogatories through forgetfullness or simple neglect. Rather, the facts disclose that petitioner knowingly and purposefully refused to answer legitimate interrogatories for reasons designed soley to frustrate, harass, and cause undue delay to the administrative process and to the Board. In short, petitioner has engaged in conduct which is inexcusable. Petitioner's apparent defense to such conduct is that when he, ex parte, requested an Order against the Board on May 17 his request was denied. (See, ante.) Consequently, he seems to argue that until he receives an order of his choosing he would not comply with any discovery rule or Order the Board secured.

In consideration of petitioner's willfull refusal to answer interrogatories without legitimate reason, sanctions are necessary. I have considered the various sanctions which may be applied. I **CONCLUDE** that dismissal of the Petition is the only sanction that should be applied in this case. Petitioner's conduct is so egregious and so inexcusable that there is no other appropriate case-related action which may be taken by way of sanction. Therefore, the petition of appeal filed by George Watson, Jr. against the named respondents above is hereby **DISMISSED** for failure to comply with the Uniform Administrative Procedure Discovery Rules and for failure to comply with the Order issued him by which meaningful answers were to be served by him no later than September 28, 1990.

Therefore, the Petition of Appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 29, 1990
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

NOV 30, 1990
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 06 1990
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 1951-90

GEORGE WATSON, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MARLBORO ET AL., MONMOUTH COUNTY,	:	DECISION
RESPONDENTS.	:	

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 and independent review of the instant matter, the Commissioner concurs with the findings and determination of the Office of Administrative Law that the Petition of Appeal filed by petitioner against the named respondents be dismissed for failure to comply with the Uniform Administrative Procedure Discovery Rules and for failure to comply with the Order issued him by the ALJ whereby meaningful answers were to be served by him no later than September 28, 1990.

Accordingly, the Commissioner adopts 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.

DECEMBER 27, 1990

DATE OF MAILING - DECEMBER 27, 1990

ACTING COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6384-89
AGENCY DKT. NO. 221-7/89

CARMINE FORTE, and THE RED BANK REGIONAL EDUCTION ASSOCIATION,
Petitioners,
v.
RED BANK REGIONAL DISTRICT BOARD OF EDUCATION,
Respondent.

Lee A. Emmer, Esq., for petitioners (Chamlin, Rosen, Cavanagh & Uliano, attorneys)
Robert H. Otten, Esq., for respondent (Crowell & Otten, attorneys)

Record Closed: October 1, 1990 Decided: November 14, 1990

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

Carmine Forte, employed as a teaching staff member on a part-time basis following a reduction in force by the Red Bank Regional High School District Board of Education (Board), is joined by the Red Bank Regional Educational Association (petitioners) in his tenure and/or seniority claim to entitlement to full time employment with the Board. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted December 14, 1989 during which the issues of the case were agreed upon and the matter was scheduled for hearing to commence June 20, 1990.

Prior to receiving live testimony at the scheduled hearing, the parties agreed that all relevant facts of the matter were stipulated and that the matter could be adjudicated on those facts, agreed upon exhibits as set forth in the attached exhibit list, and briefs of counsel. The record closed October 1, 1990 when it was determined petitioner elected not to file a reply to the Board's brief as had been earlier requested.

Conclusions are reached in this initial decision that neither petitioner's tenure rights, nor his seniority rights, are violated by the Board through his present part-time employment.

STIPULATION OF FACT

The following facts have been stipulated (J-1) by the parties:

1. [The Red Bank Regional Education Association] is the agent for petitioner for the purposes of collective negotiations in Respondent School District.

2. The Respondent Red Bank Regional High School District Board of Education is the statutorally charged public body responsible for maintenance and direction of public education in Red Bank Regional High School District.

3. Carmine Forte is a teacher in the employ of the Red Bank Regional Board of Education and has been employed by Red Bank Regional High School Board of Education as a certified Art Teacher since 1972 during which time Mr. Forte taught art classes and courses related to the field of Art.

4. John Orr, who was the In-School Suspension Room Teacher for the 1989-90 school year has been employed by the Red Bank Regional High School Board of Education since September 1, 1970. James Dadenas, who is assigned to one duty period in the In-School Suspension Room, has been

employed by Red Bank Regional since 1962, and William Kunze, who is assigned to the other duty period in the In-School Suspension Room, has been employed by Red Bank regional since September 1, 1973.

5. Mr. Forte is at the present time (1989-90 school year) employed as a part-time Art instructor.

6. On April 27, 1989 Mr. Forte was advised that the Board of Education had abolished a full-time Art Teacher position and that he was the last senior teacher in his department and was being terminated as a full-time Art Teacher and being rehired as a half-time Art Teacher at a salary of $18,016.00. Half-time consists of four periods. At the same time, Mr. Forte was informed of his position on the preferred eligibility list.

7. In the 1982-83 school year, Petitioner Forte taught Art for three periods and was assigned for three periods to the in-School suspension Room and this latter assignment was an aide although Petitioner was paid teacher's salary. Barbara Greenwald was also an Art Teacher in the district and she taught Art three periods a day and was assigned as an aide for three periods in the In-School Suspension room in the 1982-83 school year.

8. No special certification is required for an In-School Suspension Room Teacher. All that is required is certification in any instructional subject.

9. The In-School Suspension Room Program was not formalized into an instructional program with the requirement of a teacher until the 1986-87 school year and after adoption of

Policy No. 321 on July 16, 1986.

10. Respondent Red Bank Regional Board of Education has assigned one staff member to the In-School Suspension Room for six periods and two other staff members have been assigned duty assignment to cover the remaining two periods for the 1989-90 school year.

11. By agreement with the Red Bank Regional Education Associatin which represents Petitioner, a staff member who covers an assignment for another staff member absent for less than a full day is paid the amount of $9.00 per period covered.

DOCUMENTS STIPULATED BY CONSENT

[J-1] [Stipulation of fact]

[J-2] Policy 321 - In School Suspension Room Teacher

[J-3] Student Handbook - Page 31.

[J-4] [J-5] Pages 26 and 28 of Coverage of In-School Suspension as attached to Answer to Interrogatories.

[J-6] Page 21 of Contract between Red Bank Regional High School Board of Education and Red Bank Regional Education Association.

From the foregoing stipulations, I specifically find that petitioner served sufficient time under N.J.S.A. 18A:28-5 to have acquired a tenure status of employment in the position of teacher. I further specifically find that petitioner has accumulated 17 years of seniority as a teacher in the employ of the Board which, it is noted, operates only a high school. In addition, I also specifically find that John Orr, James Dadenas and

William Kunze each have served a sufficient period of time under N.J.S.A. 18A:28-5 to have acquired a tenure status of employment as a teacher. Finally, I specifically find that John Orr has accumulated 19 years seniority as of June 30, 1989; James Dadenas has accumulated 27 years of seniority as a teacher as of June 30, 1989; while, William Kunze has accumulated 16 years seniority as a teacher as of June 30, 1989.

It is noted that the parties stipulate that while the Board had what was referred to as an in-school suspension room as early as the 1982-83 academic year, an In-School Suspension Room Program was not formally adopted by the Board as part of the instructional program until July 16, 1986. That Program, as articulated in Board Policy 321 (J-2), sets forth the function of the in-school suspension program teacher to organize, implement and supervise the in-school suspension instructional program including associative duties prescribed by the principal. Twenty-two specific duties are assigned the in-school suspension room teacher to carry out the assigned function. The 1989-90 student handbook (J-3) for pupils who attend the Board's high school define in-school suspension as placement of a pupil before out-of-school suspension occurs as, in this judge's words, a cooling-off period. Students are advised that if they are assigned to the in-school suspension room program they must remain there the entire school day and failure to obey all rules and regulations in that Program will result in out-of-school suspension.

Finally, it is inferred from the foregoing stipulations that full-time employment for a teacher consists of being assigned to six teaching periods, a preparation period, and lunch. Full-time attendance for pupils assigned in-school suspension consists of eight periods, including lunch and study periods. Pupils assigned In-School Suspension remain in the same classroom all day.

ARGUMENTS

Petitioner claims that he has an enforceable tenure and seniority right to be assigned the two periods in the In-School Suspension Room which are presently assigned James Dadenas and William Kunze as duty periods. Petitioner's claim is anchored upon his

assertion that each of the eight pupil periods in In-School Suspension must, from a teacher's perspective, be teaching assignments and that, as such, the Board may not treat two of the eight periods as duty assignments for teachers already employed full-time, specficially Dadenas and Kunze, without the expectation of a formal teaching-learning environment occurring. Moreover, petitioner asserts that because Dadenas and Kunze are already assigned a full teaching load of six teaching periods neither may now be assigned duty periods. Consequently, petitioner maintains that he, the next individual on the preferred eligibility list, has a seniority entitlement to be assigned those two periods as instructional periods. That way, petitioner explains, he would have a full assignment of six teaching periods per day.

In petitioner's words, the issues presented are as follows:

> Whether a Board of Education may implement a full-day program, but elect to staff such a program with an instructor who teaches six periods and two instructors who watch or supervise the class for two periods, but give no instruction
>
> and
>
> Whether the Board has a duty to assign the remaining two periods to a teacher who is next on the preferred eligibility list, assuming all other staff members not riffed have full teaching programs.

In petitioner's words, "A program which is intended as an all-day instruction program must have teachers assigned to such programs as instructors and not as teachers with a duty assignment." Because the Board did not assign petitioner the two asserted instructional periods it determined were duty periods, petitioner contends that the Board violated his tenure rights by refusing to assign him those periods which he is eligible to teach.

At various times throughout his argument, petitioner cites State v. State Supervisory Employees Association, 78 N.J. 54 (1978), Baruffi, Lehner and Gaynor v. Morris Hills Board of Ed, 1990 S.L.D.-(March 29, 1989), Marandi v. West Orange Township Board of Ed, 1988 S.L.D-.(Aug. 2, 1988), Nazarechuk and Cancialosi v. North Caldwell

Borough Board of Ed, 1989 S.L.D.-(Dec. 15, 1989), Savarse v. Bernadsville Board of Ed, 1989 S.L.D.-(July 24, 1989), and Hart v. Ridgefield Borough Board of Ed, 1989 S.L.D.-(June 7, 1989). Petitioner also cites other administrative decisions which, similar to the preceding cases, are not on point with the argument advanced.

The Board argues that it was well within its discretion when it assigned two teachers to duty assignments in the in-school suspension room and that petitioner presented no authority in support of his position that his tenure rights were violated or that his seniority rights were not honored by it. The Board notes that no one of the cases cited by petitioner supports his argument that it, the Board, must consider the two duty periods to be instructional periods and that he is entitled to be assigned those two periods. To the contrary, the Board maintains it is not required to accommodate petitioner's part-time position by assigning him two duty periods in-school suspension in order to provide him with full-time employment.

ANALYSIS

As pointed out by the Board, its Policy 321 (J-2) regarding the In-School Suspension Program makes no reference to a full-day program; rather, the policy merely creates a classroom teaching program for pupils who have committed disciplinary infractions. The Policy requires only that the teacher in the program have pupils complete specific objectives on a daily or weekly basis; demonstrate interest and enthusiasm in subject matter; utilize adequate resources; maintain official records, provide opportunities, and develop a classroom atmosphere conducive to learning. Nothing in the Policy requires a student who is assigned In-School Suspension be exposed for eight periods a day to a formal teaching-learning process. While it is true everyone learns something at every given minute of the day, such a truism does not translate into a recognized goal of having pupils in a formal teaching-learning situation every minute they are in the schoolhouse.

Furthermore, as pointed out by the Board, petitioner provides no evidence that the assignment of two teachers to two periods in the In-School Suspension Program as duty periods is in conflict with Board Policy 321. Nothing in Board Policy 321 prohibits the Board from assigning two teachers to cover two periods in the Program as duty programs. The evidence in this case shows that the duty assignments are just that; assignments given teachers ancillary to their teaching assignments. No teacher, including petitioner, has an enforceable claim for assignment to any duty period.

In short, petitioner presents absolutely no authority to support his position that the Board must align duty assignments in the In-School Suspension Program to his part-time employment in order for him to achieve six teaching periods per day. If the Board determines that the instructional program for the In-School Suspension Program shall consist of six periods per day and that the two remaining periods shall be covered as duty assignments it certainly may do so absent an abuse of discretion. In this case, petitioner has presented no evidence to demonstrate that the Board has abused its discretion. There is no authority to support the position taken by petitioner in this case.

The Petition of Appeal is **DISMISSED.**

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 14, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

NOV 16, 1990
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 21 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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CARMINE FORTE AND THE RED BANK REGIONAL EDUCATION ASSOCIATION,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
RED BANK REGIONAL DISTRICT BOARD OF EDUCATION, MONMOUTH 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 and independent review of the instant matter, the Commissioner must remand the case for further elaboration and clarification of the record. Before it can be determined whether petitioner may claim the two "duty" positions which he seeks in order to secure full-time status in the district, it is necessary to educe further testimony and findings of fact to demonstrate that the two "duty" periods assigned to Messrs. Dadenas and Kunze, are actually non-instructional time for the instructors when students are attending either lunch or study hall.

The confusion in the record stems from the Board's brief at page 8 wherein it is stated:

> ***teaching staff members in the Red Bank Regional High School are required to teach five periods, have a duty period, a prep period and a lunch period for a total of eight periods.***
> (emphasis supplied)

At page 5 of the initial decision, however, the ALJ states:

> ***it is inferred from the foregoing stipulations that full-time employment for a teacher consists of being assigned to six teaching periods, a preparation period, and lunch. Full-time attendance for pupils assigned in-school suspension consists of eight periods, including lunch and study period. Pupils assigned In-School Suspension remain in the same classroom all day. (emphasis supplied)

Moreover, as noted at page 6 of the Initial Decision, petitioner himself frames the issues to be adjudged as follows:

> Whether a Board of Education may implement a full-day program, but elect to staff such a program with an instructor who teaches six periods and two instructors who watch or supervise the class for two periods, but give no instruction.*** (emphasis supplied)

Exhibit J-5 merely indicates that Messrs. Kunze and Dadenas relieve Mr. Orr for his lunch and prep. One of Mr. Orr's periods, however, is unaccounted for by the joint exhibits. The purpose of seeking clarification of the record is to provide assurance that two periods other than lunch in Mr. Orr's schedule are not instructional periods for him to which petitioner may then lay claim.

Accordingly, for the reasons stated herein, the initial decision is rejected and remanded for further fact finding consistent with the decision herein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

DECEMBER 31, 1990

DATE OF MAILING - JANUARY 3, 1991

LEE AMOS,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, December 29, 1989

For the Petitioner-Appellant, Robert M. Schwartz, Esq.

For the Respondent-Respondent, Love & Randall (Melvin Randall, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. To the extent, however, that the Commissioner's decision can be perceived as imposing culpability in part on the Petitioner for precluding complete development of the factual record, we note that the Petitioner acted properly to preclude the Board from introducing certain evidence at the plenary hearing not provided by the Board during discovery.

July 5, 1990

ELLA SEALES BARCO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ET AL., ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 10, 1989

For the Petitioner-Appellant, Oxfeld, Cohen, Blunda, Friedman, Levine & Brooks (Arnold S. Cohen, Esq., of Counsel)

For the Respondent-Respondent, Marvin L. Comick, Esq.

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

February 7, 1990

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE CONSTITUENT DISTRICT OF BRIDGE-WATER TOWNSHIP OF THE BRIDGE-WATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY, AND THE ELECTION INQUIRY IN THE BRIDGEWATER-RARITAN SCHOOL DISTRICT.	:	STATE BOARD OF EDUCATION DECISION

Decisions by the Commissioner of Education, June 1, 1989 and November 1, 1989

Decision on motion by the State Board of Education, February 7, 1990

For the Petitioners-Appellants, Enid Bloch, Ph.D., pro se, and Jean Crabtree, pro se

For the Respondent-Respondent, Soriano & Gross (Daniel C. Soriano, Jr., Esq., of Counsel)

By letter to the Commissioner dated April 10, 1989, Petitioners Enid Bloch and Jean Crabtree, defeated candidates in the April 4, 1989 annual school election held in the Bridgewater-Raritan school district, requested both a recount of the votes in that election and an inquiry into alleged irregularities in the conduct of that election. Petitioners claimed, inter alia, that there had been illegal electioneering at the polls on behalf of the write-in candidates, two of whom were elected, and challenged the validity and security of the sheets containing the write-in votes.

The recount was determined by the Commissioner not to be a contested matter and was conducted on April 24, 26 and 27, 1989 by Frank Arch, representing the Commissioner from the Office of the Somerset County Superintendent of Schools. The Board of Education of the Bridgewater-Raritan Regional School District ("Board") was not a party thereto.

In his final report to the Commissioner on May 24, 1989, Mr. Arch pointed out a number of discrepancies he had discovered during the recount, including seven portions of write-in sheets that could not be identified by polling place or machine number and the fact that the write-in sheets had not all been placed in sealed packets by election officials at the conclusion of the election.

For purposes of his report, Mr. Arch decided to count the seven unidentified sheets. However, he made no express findings regarding their validity or Petitioners' claims concerning the lack of security for the sheets and possible tampering therewith.

On June 1, 1989, in reliance upon Mr. Arch's report, the Commissioner, while deducting a number of voided votes from the write-in candidates for defects in some individual votes, e.g., one write-in sticker on top of another, upheld the election of candidates Albert N. Tornatore, H.A. Arthur Wiegand and Raymond Kovonuk.[1] The Commissioner, however, admonished school election officials for failure to follow mandated procedures.

Hearings on Petitioners' inquiry request were held on May 15 and 16, 1989 before an Administrative Law Judge ("ALJ"). During those hearings, in which the Board participated as a party, the ALJ precluded the Petitioners from fully litigating their claims regarding the validity and security of the write-in sheets. Petitioners were also denied access to the write-in sheets during the inquiry proceedings as the Commissioner retained them for use in his recount decision.[2]

On September 20, 1989, the ALJ, asserting that certain facts relevant to the conduct of the election, particularly with regard to the write-in sheets and votes, were res judicata for purposes of the inquiry in that the Commissioner had "already determined those facts based on evidence produced at the recount," initial decision, at 3, concluded that the irregularities shown by Petitioners in the conduct of the election were insufficient to set it aside. The ALJ made no findings or conclusions regarding the

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[1] We note that as a result of the recount, the results, as determined by the Commissioner, were as follows (the top three vote-getters, indicated by asterisks, were elected to three year terms):

Registered Candidates	AT POLLS	ABSENTEE	TOTAL
*Albert N. Tornatore	1028	12	1040
Enid Bloch	894	8	902
Jean D. Crabtree	866	9	875
Bruck E. Kalter	815	3	818
Write-In Candidates			
*H.A. Arthur Wiegand	946	7	953
*Raymond Kovonuk	904	7	911
Sharad Tilak	879	5	884

[2] We note that the hearings on the Petitioners' inquiry request were held prior to the submission of Mr. Arch's final recount report to the Commissioner or the Commissioner's decision on the recount.

security or validity of the write-in sheets. He found, however, that two votes received from unregistered voters should be deducted from each write-in candidate.

On November 1, 1989, the Commissioner adopted the ALJ's decision on the election inquiry and denied the Petitioners' request to reopen the hearing or remand to the ALJ for further proceedings regarding the validity or security of the write-in sheets. The Commissioner contended that his representative, Frank Arch, had specifically addressed questions concerning the number of write-in sheets and other discrepancies, like torn sheets, in his report, and that the recount decision had found that the seven unidentified sheets were appropriately included in the vote tally. The Commissioner agreed with the ALJ that the recount decision represented a final decision regarding the findings of fact on the write-in votes determined therein, noting that such issues that have been fully and fairly adjudicated in a preceding action may not be raised again by the same parties in a later proceeding.

The Petitioners have filed the instant appeals from the Commissioner's decisions in both the recount and inquiry, arguing, inter alia, that the Commissioner improperly applied the doctrine of res judicata, and that they were improperly denied the opportunity at the inquiry hearing to demonstrate election law violations concerning the write-in sheets, including lack of security therefor and possible tampering. The Board counters that application of res judicata was proper in this case and that the Petitioners had the opportunity to challenge the write-in sheets during the recount.

On February 7, 1990, we granted Petitioners' motion to consolidate their recount and inquiry appeals.

After a careful review of the record, we reverse the Commissioner's determination that Petitioners were properly precluded from challenging the validity and security of the write-in sheets at the inquiry hearing, and, accordingly, remand to the Commissioner for transmittal to the Office of Administrative Law for the limited purpose of further developing the record on Petitioners' allegations concerning the validity and security of the write-in sheets and for further findings and conclusions thereon.

We conclude that the application of res judicata was improper under the circumstances. "Res judicata as a principle of law bars a party from relitigating a second time what was previously fairly litigated and determined finally. The general requirements for the invocation of this principle are a final judgment by a court or tribunal of competent jurisdiction, identity of issues, parties and cause of action and thing sued for." City of Hackensack v. Winner, 162 N.J. Super., 1, 27-28 (App. Div. 1978), mod., 82 N.J. 1 (1980).

There is no indication that Petitioners' claims concerning the security and validity of the write-in sheets were litigated or determined in the recount. We note initially that the recount was not conducted as a contested case, the Board was not a party there-

to, there were no formal hearings, and factfinding was conducted not by an administrative law judge, but by a representative of the Commissioner from the Office of the Somerset County Superintendent of Schools. Moreover, Petitioners were not given the opportunity to file exceptions to Mr. Arch's report.[3]

Furthermore, while Mr. Arch made findings with regard to the validity of individual contested votes and found that some write-in sheets were unidentified, unsealed and/or torn, he made no specific findings or conclusions on Petitioners' claims regarding the validity or security of the write-in sheets. Although he decided, for purposes of his report, to count the seven unidentified sheets as part of the election results, there is no indication that he made any actual findings regarding their validity or security. Rather, that decision appears to have been based upon an assumption that all unidentified sheets were valid and proper. The only explanation offered -- "[t]his decision was reinforced when polling district three's (Adamsville School) sealed enveloped was opened and it was void of a write-in tear-off sheet" -- cannot fully explain the number of unidentified sheets, nor does it address the Petitioners' specific claims with regard to the lack of security for the sheets and the attendant potential for tampering therewith. Moreover, it appears from Mr. Arch's testimony presented during the inquiry hearing that he saw it as the Commissioner's responsibility to determine the larger issues of the sheets' security and validity. See tr. 5/ /89, at 41[4] (he had no way of knowing whether the write-in sheets had been tampered with); id. at 23 (he did not know the total number of write-in sheets or the number that could be identified by polling place or machine); id. at 43-44 (it would be the Commissioner's decision in the recount whether to throw out the votes on the unidentified and unsealed sheets[5]). The Commissioner subsequently adopted Mr. Arch's report in his recount decision without further findings or conclusions on those issues.

Thus, we conclude that the Petitioners' claims regarding the security and validity of the write-in sheets were neither fairly litigated nor finally determined by the Commissioner in the recount, and that Petitioners should not have been precluded from litigating such issues in the inquiry proceedings.[6] In the confusion

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[3] We note that the Commissioner's recount decision was issued on June 1, 1989, just eight days after Mr. Arch faxed his final recount report to the Commissioner.

[4] We note that inasmuch as Petitioners have only provided us with portions of the transcripts, we are unable to determine whether this testimony was presented on May 15 or May 16, 1989.

[5] See supra n. 2.

[6] We note that Petitioners, in their April 10, 1989 letter to the Commissioner requesting both a recount and an inquiry, included allegations concerning the validity and security of the write-in sheets in their inquiry request.

surrounding this election, it is undisputed that seven write-in sheets could not be identified by polling place or machine number and that a number of sheets were unsealed and found loose in the Board of Education office the day after the election. Given the extremely close nature of the results in this election and the high number of write-in votes cast, it is clear that the outcome could be affected by a determination of Petitioners' allegations regarding those sheets.

Accordingly, inasmuch as we find that Petitioners did not have the opportunity to fully and fairly litigate their allegations concerning the validity and security of the write-in sheets, including those sheets which could not be identified, and inasmuch as the record before us does not provide us with the basis for a fair determination thereon, we remand these consolidated matters to the Commissioner for transmittal to the Office of Administrative Law for the limited purpose of further developing the record on Petitioners' allegations concerning the validity and security of the write-in sheets and for further findings and conclusions thereon.[7] In order to avoid further delays,[8] we direct that the proceedings on remand be conducted in an expedited fashion.

We retain jurisdiction.

Attorney exceptions are noted.
July 5, 1990

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[7] We note, in response to the Petitioners' exceptions, that Petitioners have provided no basis for a remand for further development of the record regarding the several voters who were unaccounted for or the one unregistered voter Petitioners did not subpoena as a witness at the plenary hearing. Petitioners concede in their appeal brief that inasmuch as they had not subpoenaed one of four unregistered voters, "his vote is not here an issue." Moreover, Petitioners acknowledge that there is no way to show for whom the several unaccounted for extra voters cast votes. We note further that we have retained jurisdiction, and, as the ultimate administrative decision maker in school matters, can make our own independent findings based upon the record before us. See Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982).

[8] We note that those Board members elected in the April 1989 election are currently in the second year of their three year terms.

EDU #1124-89
C # 251-89
SB # 67-89

WILLIAM L. CADE, JR.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, September 18, 1989

For the Petitioner-Appellant, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Carroll & Weiss (Russell Weiss, Jr., Esq., of Counsel)

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

January 3, 1990

GERALD CAPUTO,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 8, 1988

Decision on motion by the Commissioner of Education, September 27, 1988

Decision on motion by the State Board of Education, December 1, 1988

Decision on motion by the Appellate Division, January 26, 1989

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

For the Respondent-Appellant, Lowenstein, Sandler, Kohl, Fischer and Boylan (Kevin Kovacs, Esq., of Counsel)

This is an appeal by the Board of Education of the City of Union City (hereinafter "Board") from a decision rendered by the Commissioner, which found that the Board's refusal to rehire Petitioner Gerald Caputo, a tenured industrial arts teacher, as head football coach for Emerson High School for the 1987-88 school year was in violation of his constitutional rights. The Commissioner directed that the Board restore Petitioner to that position and pay him the coaching stipend he otherwise would have received.

The matter arose when, at its June 1987 meeting, the Board voted 6-3 to accept the recommendation of its School Government Committee and Superintendent, thereby acting to appoint Leonard Introna as head football coach rather than Petitioner, who had served in that capacity in 1983, 1984, 1985 and 1986. In his petition to the Commissioner, Mr. Caputo claimed that he was not appointed as head coach for the 1987-88 school year because of his political efforts during the April 1987 school board election and that the Board's decision therefore was both arbitrary and capricious and in violation of his constitutional rights. Petitioner sought reinstatement as head coach and payment of the

$2,800 stipend he would have received had he been reappointed as head coach for the 1987-88 season.

Following denial of the Board's motion for summary judgment, hearing was conducted before an Administrative Law Judge (ALJ). At hearing, three witnesses in addition to Petitioner testified on his behalf, and two witnesses testified on behalf of the Board. The testimony of the witnesses detailed the rise of the Alliance Civic Association (Alliance), which was formed to wrest power from the Musto organization, to a majority position on the Board, as well as Petitioner's participation in the 1987 school board election with C.A.R.E., a group in opposition to Alliance. Based on the testimony and noting the administrative decision in Helga Milan-Vera et al. v. Bd. of Ed. of Union City, decided by the Commissioner, June 15, 1987, in which the Commissioner had expressed concern with the intrusion of partisan politics in the context of the 1987 school election in Union City, the ALJ concluded that the Board's vote and decision not to hire Mr. Caputo for the 1987 season was the result of "the unlawful motive of purging [Petitioner] solely because he exercised his constitutional rights of speech and assembly." Initial Decision, at 14.

The ALJ, however, concluded that, given the circumstances, to force Petitioner back in as coach would probably be impractical and disruptive to the students. He therefore recommended that the Board be required to pay Petitioner the coaching stipend he would have received for the 1987 season and that the Board be required to consider Petitioner for the position at the next opportunity. In this respect, the ALJ recommended that such consideration be given openly, with polling of the Board members if so requested.

The Commissioner's review of this matter was without the benefit of transcripts of the hearing. Nor did the Commissioner consider the Board's reply and cross-exceptions, which he characterized as primary exceptions and found to be untimely filed, or Petitioner's reply thereto.

Based on his review, the Commissioner adopted the ALJ's findings and conclusions on the merits for the reasons expressed in the Initial Decision. The Commissioner, however, modified the relief to be awarded Petitioner. In contrast to the ALJ, the Commissioner required that the Board determine whether it would be disruptive to restore Petitioner as coach and, based on this determination, to either restore him immediately or compensate him monetarily for both the 1987-88 and 1988-89 seasons. In the event that Petitioner was not restored to the position for the 1988-89 season, he was to be appointed head coach for the 1989-90 season. The Commissioner required that thereafter, any determination by the Board relative to Petitioner's employment as head coach be made for such reasons that would withstand careful scrutiny. Commissioner's decision, at 21. This appeal followed.

In this appeal, the Board contends, as it did in its cross-exceptions below,[1] that there is insufficient evidence in the record to substantiate the ALJ's conclusion, which was adopted by the Commissioner, that the Board's decision not to hire Petitioner as head football coach for the 1987 season resulted from the unlawful motive of purging Petitioner solely because he exercised his constitutional rights of speech and assembly. The Board argues that it was Petitioner's burden to overcome the presumption of validity which attached to the Board's decision and that more is required in this regard than showing involvement in a political campaign. The Board further contends that the ALJ and Commissioner improperly disregarded its rationale for the appointment decision at issue, and that it should prevail because its rationale was legitimate and Petitioner has failed to rebut it.

We have carefully reviewed the record in this case, including the transcripts. Based on that review, we find that the Petitioner has failed to establish that the Board in fact determined not to reappoint him because of his political activity during the April 1987 school board election. Therefore, as follows, we reverse the decision of the Commissioner.

Initially, we emphasize that there is no right to employment as a coach and that tenure does not attach to coaching positions. E.g. Koslick v. Board of Education of the Township of Edison, decided by the State Board, April, 1987, aff'd, Docket #A-4358-86T1 (App. Div. 1987); Furlong V. Kearny Board of Education, 1980 S.L.D. 1420. Consequently, an individual seeking to challenge an employment decision by a district board not to hire him as a coach is entitled to an evidentiary hearing only where violation of rights conferred by statute or constitution is alleged. c.f. Andrew Guerriero v. Board of Education of the Borough of Glen Rock, Docket #A-3316-85T6 (App. Div. 1986). Such is the case here.

Nonetheless, merely asserting that a constitutional right has been violated does not entitle Petitioner to prevail. Rather, he is required to show not only that he had engaged in constitutionally protected activity, but also that his political affiliation or activity was a material factor in the Board's decision not to reappoint him. Winston v. Board of Education of South Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd, 64 N.J. 582 (1974).

In that the Board's appeal challenges the factual determinations upon which the ALJ's and Commissioner's ultimate

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[1] Although we are not convinced that the Commissioner's characterization of the Board's cross-exceptions was proper, we need not pass upon his apparent interpretation of N.J.A.C. 1:1-18.4(a) in that we have considered both the Board's cross-exceptions, which were largely incorporated in its appeal brief to the State Board, and Petitioner's reply thereto.

conclusion rests, and in view of the State Board of Education's responsibility as the ultimate administrative decision maker in this case, Dore v. Bedminister Township Board of Education, 195 N.J. Super. 447, 452-53 (1982), we have reviewed the entire record in this matter with utmost care in order to ascertain whether the proofs substantiate by a preponderance of credible evidence the conclusion reached below. In this respect, we recognize that we are not required to adopt the ALJ's assessments of the substance of the witnesses' testimony, nor his evaluation of objective factors bearing on credibility. In the Matter of the Tenure Hearing of John Eberly, decided by the State Board of Education, July 6, 1988; In the Matter of the Tenure Hearing of Barry F. Deetz, 1974 S.L.D. 1923, aff'd, Docket #A-1264-84T5 (App. Div. 1985), certif. denied, 101 N.J. 32 (1986). We, however, have accorded due consideration to the fact that the ALJ had the opportunity to observe the parties and their witnesses. Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 42, 50-54 (App. Div. 1962).

Notwithstanding such consideration, we find that the evidence relied upon by the ALJ is inadequate to support the conclusion that Petitioner's political affiliation or activity was a motivating factor in the Board's decision. Furthermore, our review shows that the ALJ was overly selective in his consideration of the evidence and failed to adequately consider and weigh the evidence countering Petitioner's claim, particularly with respect to the rationale offered by the Board to support its decision.

The evidence in this case is circumstantial. The ALJ's conclusion that the Board's action was in retaliation for Petitioner's political activity is largely based upon his findings concerning the political circumstances in the district generally, taken together with his interpretation of the circumstances surrounding Petitioner's service as head coach from the time of his initial appointment. While we reject the view that a constitutional violation such as asserted here can never be proven by circumstantial evidence, close examination of the record in this case shows that Petitioner did not establish a factual basis sufficient to support the inferences upon which the ALJ's conclusion rests.

The ALJ's inferences concerning the political circumstances were drawn primarily from the testimony of Petitioner and Ronald Dario. Although Petitioner testified at length concerning the relationship between the Alliance and the coaching position he held, his testimony in this respect was based on what he had heard from others. Tr. 4/11/88, at 73-74 and 81-82. As a former leader of Alliance, Ronald Dario had a more direct basis for his testimony. However, his testimony too was generalized, and, in assessing the weight to be accorded that testimony, we cannot ignore that he is a political opponent of the Alliance.

While it is tempting to infer from the general political circumstances as presented in the testimony that the action at issue

here was the product of improper political motivation, there is not sufficient evidence in this record to support the inference that the political context in and of itself was such that the Board's decision in this particular instance was indeed in retaliation for Petitioner's activity opposing Alliance. Further, although we do not find it improper that the ALJ and Commissioner noted the concerns expressed in Helga Milan-Vera v. Bd. of Ed. of Union City, supra, with respect to the intrusion of partisan politics in the 1987 school election, that decision does not provide a proper basis for drawing the factual conclusion in this case that Alliance operated a patronage system of such nature as to dictate that the head football coach could not be a member of an opposition party.

Nor does consideration of the sequence of events relating to Petitioner's service as head coach provide a sufficient basis for inferring that the Board's vote was politically motivated. Although Petitioner interprets those events in such manner, consideration of all the testimony, including that relating to the Board's rationale, in the absence of adequate rebuttal, fails to provide adequate support for that interpretation.

Petitioner's interpretation of the circumstances surrounding his tenure as head coach is supported largely by his own testimony. While we find Petitioner's testimony credible in the sense that he offered what he believed was a true interpretation of events, that belief is not sufficient without corroboration to establish that the motives of others were in fact as Petitioner believed.

As indicated previously, the testimony in support of Petitioner is generalized and impressionistic, and we find that it fails to provide the corroboration necessary to substantiate Petitioner's interpretation. For example, Ronald Dario testified that he had assumed that the Board wanted Petitioner removed in 1986. Mr. Dario, however, made that assumption on the basis of the fact that Petitioner was not politically active, along with his "gut feeling they were looking to replace him with someone else." Tr. 4/11/88, at 49. Similarly, while Petitioner testified that then Board member Bonacci had refused to go along with what Petitioner characterized as an unsuccessful attempt to "fire" him in 1985 because the attempt was political, Tr. 4/11/88, at 75-76, there is no corroboration for this in the record.[2] It is reflective of the impressionistic nature of the testimony on behalf of Petitioner that when specifically questioned, then Board member Ralph Lanni testified that no one had ever said in private or public session or otherwise that Petitioner was being purged for his political beliefs. Tr. 4/11/88, at 29.

Likewise, Petitioner's testimony that his transfer to another school in 1985 was politically motivated is not adequately

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[2] We note that while Petitioner's attorney spoke to Mr. Bonacci, he was not offered as a witness. Tr. 4/14/88, at 3.

supported by the record. While, as found by the ALJ, Petitioner was in fact transferred, Petitioner's interpretation is countered by the fact that, as testified by Principal Morini, Petitioner's transfer occurred as part of a consolidation affecting more than seventy teachers and involving some two dozen transfers, Tr. 5/2/88, at 4, and that, notwithstanding any complaints concerning Petitioner, Tr. 5/2/88, at 7-8, he was the least senior industrial arts teacher in terms of years of service at Emerson High School. Id. at 6-7.[3] On balance, on the basis of the record made in this case, we find that the fact that Petitioner was transferred to another school in 1985 does not support any inferences concerning the relationship between Petitioner's political activity and the coaching appointment at issue.

Similarly, the ALJ articulated his finding with respect to the fact that the Board tabled consideration of candidates for head football coach in March 1987 so as to support an inference that the action was aimed at Petitioner and motivated by his lack of support for Alliance. Initial Decision, at 12. The record, however, shows that Mr. Fuentes, who was then Board President, moved to table consideration of all candidates for extracurricular positions at the March meeting and not just that of Petitioner for head football coach. Tr. 5/2/88, at 43-44. Nor is there anything in the record to rebut Mr. Fuentes' testimony that his refusal to permit individual Board members to be polled concerning their vote was not

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[3] While Petitioner asserts in his exceptions to our Legal Committee's report that he was most senior industrial arts teacher at his high school, Petitioner apparently is referring to seniority as calculated pursuant to N.J.A.C. 6:3-1.10. We note, however, that decisions relating to transfer of staff between schools are within the discretion of the board and are not subject to challenge based on seniority as established pursuant to N.J.A.C. 6:3-1.10.

We further note that while Petitioner claims in his exceptions that the least "senior" industrial arts teacher, specifically one Mr. Cordano, was not transferred, Mr. Marini testified at hearing that Petitioner was one of two industrial arts teachers at Emerson High School and that Mr. Monty, who was not transferred, was the one with the most experience at the school. Tr. 5/22/88, at 7. Although Petitioner did not support his exceptions with any citation to the record, our own review of the record indicated that Petitioner did testify that there were three industrial arts teachers of which one Mr. Cordano was the least senior, Tr. 4/11/88, at 62 and Tr. 5/1/88, at 76. Our review, however, failed to reveal any support for Petitioner's testimony on this point. Nor did Petitioner's counsel challenge Mr. Marini's testimony in this respect during cross-examination.

unusual, but that it was his consistent practice to require all questions from the public to be addressed to him. 5/2/88, at 56-57.

The basis for inferring that the Board's action was to purge Petitioner is further weakened by the fact that Petitioner was reappointed as assistant track coach for 1987-88. Tr. 4/14/88, at 30.[4] Likewise, the fact that Mr. Introna was not politically active undermines Petitioner's contention that his appointment as head coach was in jeopardy prior to 1987 because he was not politically active.

Even so, it is possible to interpret the circumstances to support Petitioner's claim, as did the ALJ. Petitioner's burden in establishing a constitutional violation, however, is greater than showing that such an interpretation is possible. In failing to produce affirmative proof such as to provide an adequate factual basis to support his claim, Petitioner failed to meet that burden.

Moreover, Petitioner did not prove that the Board's decision was politically motivated rather than, as claimed by the Board, based on the desire to rotate coaches. Tr. 5/2/88, at 45-46. We find that the Board's claim is supported in the record by the fact that the head football coach at the district's other high school was also replaced by his assistant coach in the same year. Tr. 5/2/88, at 46.[5] In that Petitioner did not rebut this claim, he failed to meet his ultimate burden of proof.

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[4] Petitioner excepts to this statement, asserting that Petitioner was the only applicant and that the Board posted the position twice "apparently in order to get applicants other than Petitioner." Petitioner's exceptions to the Legal Committee's report, at 2. We again note that Petitioner failed to support his assertions with citation to the transcript. See supra note 3. Although our own review indicates that Petitioner was the only applicant, Tr. 4/14/88, at 38, we find nothing in the record to support the proposition that, in posting the position twice, the Board was attempting to avoid appointing Petitioner.

[5] Given that the testimony indicates that the desire to rotate coaches was part of the Alliance's program and given that the majority of the members of the Board were not affiliated with Alliance until 1985, Tr. 11/14/88, at 5 and Tr. 5/2/88 at 33-34, the fact that the previous football coach at Emerson High School had been there thirty-five years when he retired in 1983 does not rebut the Board's claim that it desired to rotate coaches.

Nor is the fact that the incumbent head football coach at Union Hill High School was appointed Athletic Director when the assistant football coach was made head football coach in 1987 alter the fact that the Board appointed assistant football coaches as head coaches at both high schools in 1987. Again, we note that while we have carefully reviewed the testimony, Petitioner did not provide us with any citation to the record in support of this exception or to otherwise show that the Board's claim of the the desire to rotate coaches generally was pretextual. See supra notes 3 and 4.

In sum, while the record below establishes that Petitioner was active in the 1987 school board election, supporting a group opposing Alliance, that a majority of Board members were affiliated with Alliance, and that these individuals did vote to appoint Mr. Introna as head coach, it does not provide an adequate factual basis to support the conclusion that the failure to appoint Petitioner was motivated by Petitioner's political activity or beliefs. We therefore reverse the decision of the Commissioner.

Alice Holzapfel opposed.
Attorney exceptions are noted.
July 5, 1990

BARBARA CARNEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, September 18, 1989

For the Petitioner-Appellant, Dennis M. DiVenuta
(Anna M. Liuzzo, Esq., of Counsel)

For the Respondent-Respondent, McCarter & English
(Patti E. Russell, Esq., of Counsel)

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

February 7, 1990

SB #68-89

IN THE MATTER OF THE CERTIFICATE :
OF APPROVAL GRANTED TO STENOTECH : STATE BOARD OF EDUCATION
TO CONDUCT A PRIVATE SCHOOL IN : DECISION
THE STATE OF NEW JERSEY. :

Decided by the Commissioner of Education, September 25, 1989

For the Appellant, Chase & Chase (Bruce Evan Chase, Esq., of Counsel)

For the Respondent, Starrett & Klinghoffer (Harry L. Starrett, Esq., of Counsel)

Appellants in this matter are American Business Academy, Inc., a private vocational school, and its president, S. Theodore Takvorian. By this appeal, Appellants are challenging the grant of a certificate of approval pursuant to N.J.A.C. 6:46-4.1 et seq. by the Department of Education to StenoTech, Inc., also a private vocational school, and its president, Jean M. Malone.

Appellants claim that the Commissioner has failed to comply with N.J.A.C. 6:46-4.16(c),[1] which provides that:

> [a]ny person who operates a private vocational school without ... approval shall be referred by the Commissioner to the Office of the Attorney General with a request that the Attorney General obtain a Court Order to enjoin that person from continuing to operate...

Appellants also claim that the grant of approval was arbitrary, capricious and unreasonable in that they had provided the Department of Education with substantial evidence that Respondent Malone had solicited a teacher and students to leave American Business Academy, that Respondent Malone had conducted a private school without a certificate of approval, and that Respondent Malone had made derogatory statements concerning American Business Academy.

[1] We note that in their brief, Appellants incorrectly cite this provision as N.J.A.C. 6:46-4.17(a).

Respondents counter that the Commissioner did comply with N.J.A.C. 6:4-4.16(c) since, as confirmed by investigation by Department of Education staff, Respondents were no longer conducting any instructional activity at that point so as to necessitate referral to the Attorney General's Office. Respondents claim that Appellants' objective in initiating complaints to the Department of Education was to prevent the certification of a competitor. They further argue that the complaints were fully investigated and were evaluated by the Commissioner, and that the grant of approval was proper.

Appellants have moved to supplement the record with documents pertaining to Appellants' complaints and the approval process, and Respondents have moved for dismissal, arguing that Appellants lack standing.

We agree that Appellants have not shown any real or direct interest in these proceedings other than as a competitor of StenoTech. New Jersey State Chamber of Commerce et al. v. New Jersey Election Law Enforcement Commission, 82 N.J. 57 (1980); Crescent Park Tenants Association v. Realty Equities Corp. of New York, 58 N.J. 98 (1971). However, in view of public interest with respect to approvals by the Commissioner of Education of private vocational schools, we decline to dismiss on that basis. c.f. N.J. Chamb. Commerce v. N.J. Elec. Law Enforce. Com., supra; Elizabeth Federal Savings & Loan Assn. v. Howell, 24 N.J. 488 (1957).

Initially, we find that we need not rule on Respondents' motion to supplement the record in order to properly review the merits of this matter. With two exceptions,[2] the documents with which Respondent seeks to supplement are already included in the record that has been certified to us, and we find that the record as certified provides a sufficient basis for arriving at a decision in this matter.

Upon review of that record, we conclude that Appellants' claims are entirely without merit. While Appellants are correct that N.J.A.C. 6:46-4.16(c)[3] mandates referral to the Attorney General's Office where a private vocational school is operating without approval, such referral is for the purpose of enjoining continued operation, and we agree with Respondents that referral is not required where, as here, investigation by the Department of Education confirms that a "school"[4] is no longer operating.

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[2] The two documents in question are correspondence from Assistant Commissioner Lloyd Newbaker and Congressman Torricelli regarding the Department's investigation of Appellants' complaints.

[3] See supra note 2.

[4] While it is not necessary to resolve the question in order to decide this matter, we note that Respondents deny that the instructional activity in question constituted operation of a school.

Further the record here shows clearly that Appellants' complaints were fully investigated by Department staff, and were considered and evaluated as part of the approval process. See N.J.A.C. 6:46-4.16(a) (violations of the regulations may be just cause for the Commissioner to withhold approval). Nor have Appellants shown that Respondents failed to meet the regulatory criteria for approval. We find that the grant of approval was not arbitrary, capricious or unreasonable, but rather represented a proper exercise of the Commissioner's authority under N.J.S.A. 18A:69-1 et seq. and N.J.A.C. 6:46-4.1 et seq.

Therefore, for the reasons stated, the State Board of Education dismisses this appeal.

January 3, 1990

EDU #7364-88
C # 227-89
SB # 58-89

LAWRENCE CHAMMINGS,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,

RESPONDENT-RESPONDENT,

AND

EDWIN JOHNSTON, JR.,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF ROCKAWAY, MORRIS COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 22, 1989

For the Petitioner-Appellant Lawrence Chammings, Robert M. Schwartz, Esq.

For the Petitioner-Appellant Edwin Johnston, Jr., Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Green & Dzwileski (Paul H. Green, Esq., of Counsel)

For the Intervenor, Wiley, Malehorn & Sirota (Robert Goldsmith, Esq., of Counsel)

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

January 3, 1990

H.A. DEHART AND SON,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-APPELLANT,	:	
AND	:	
JERSEY BUS SALES, INC.,	:	
RESPONDENT.	:	

Decided by the Commissioner of Education, August 31, 1989

For the Petitioner-Cross/Appellant, Albertson, Ward & McCaffrey (Thomas H. Ward, Esq., of Counsel)

For the Respondent-Appellant, Capehart & Scatchard (Robert Hagerty, Esq., of Counsel)

For the Respondent, Gelzer, Kelaher, Shea, Novy & Carr (Milton H. Gelzer, Esq., of Counsel)

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

Robert A. Woodruff abstained, having recused himself from the deliberations in this matter.

May 2, 1990

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF DELAWARE, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EAST AMWELL, MAYOR AND COMMON COUNCIL OF THE BOROUGH OF FLEMINGTON, TOWNSHIP COMMITTEE OF THE TOWNSHIP OF RARITAN AND TOWNSHIP COMMITTEE OF READINGTON,	:	STATE BOARD OF EDUCATION
PETITIONERS-APPELLANTS,	:	DECISION
V.	:	
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL HIGH SCHOOL DISTRICT, HUNTERDON COUNTY,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, October 18, 1989

For the Petitioners-Appellants, Vogel, Chait, Schwartz & Collins (Arnold H. Chait, Esq., of Counsel)

For the Respondent-Respondent, Broscious, Cooke & Glynn (James W. Broscious, Esq., of Counsel)

This case involves a challenge by the governing bodies of the five municipalities constituent of the Hunterdon Central Regional High School District to the efforts of the Board of Education of the Hunterdon Central Regional High School District to address the district's facilities needs through a lease purchase arrangement pursuant to N.J.S.A. 18A:20-4.2(f). By decision of October 18, 1989, the Commissioner rejected the governing bodies' application for interim relief and dismissed the underlying petition for failure to state a cause of action upon which the Commissioner could grant relief at that time.

The governing bodies have appealed to the State Board, contending that they have stated a cause of action entitling them to plenary hearing and, therefore, have been denied due process. They also contend that the procedural rulings that have been made with respect to N.J.S.A. 18A:20-4.2(f) foreclose any opportunity for the objecting party to obtain plenary hearing to produce an affirmative record for appellate review.

We find these claims to be without merit and, substantially for the reasons expressed by the Commissioner, affirm his determination that the petitioning governing bodies failed to state a cause of action upon which the Commissioner could grant relief at that

time. Review of the specific claims made in the twelve count petition shows that, although asserting that the Board's action in seeking approval was arbitrary, capricious and unreasonable, the governing bodies offered no facts to support that conclusion. The remainder of the claims relate to the propriety of approval of the Board's application and present no factual issues of such nature as to require plenary hearing.

To the extent that the governing bodies herein may have been entitled to the opportunity to be heard, they were in fact provided the opportunity to file written objections as part of the approval process before the Department of Education[1]. In that the approval process had not been completed when the Commissioner rendered his decision, we fully concur with him that the petition was, in any event, premature.

Maud Dahme abstained.
March 7, 1990

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1 We note that N.J.S.A. 18A:20-4.2(f) requires that lease purchase agreements in excess of five years be approved by both the Commissioner of Education and the Local Finance Board in the Department of Community Affairs.

DERON SCHOOL OF NEW JERSEY, INC. AND RONALD L. ALTER AND DIANE C. ALTER,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION AND SAUL COOPERMAN, COMMISSIONER OF EDUCATION,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, October 14, 1989

Decision on motion by the Appellate Division, February 17, 1988

Decision on motion by the Appellate Division, April 4, 1988

Remanded by the New Jersey Supreme Court, June 9, 1988

Decision on remand by the Commissioner of Education, October 20, 1989

For the Petitioners-Appellants, Apostolou & Middleton (Timothy B. Middleton, Esq., of Counsel)

For the Respondents-Respondents, David Earle Powers, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

The decision of the Commissioner of Education is affirmed substantially for the reasons expressed therein. In affirming that decision, we note that, as argued by Respondent, by inclusion of principal and interest on investment loans as allowable costs, the regulatory scheme guarantees that owners of for profit schools for the handicapped will receive a full return on their investment. Furthermore, because the 2.5% surcharge is calculated on allowable costs, the regulatory scheme guarantees "profit" on the funds invested by the owners, as well as on operating costs. Viewing the regulatory scheme as it operates, and has applied to Appellants, it has ensured a reasonable return on investment even excluding salary paid to Appellants Ronald L. and Diane C. Alter.

S. David Brandt and John T. Klagholz opposed.
Regan Kenyon abstained.

April 4, 1990

Pending N.J. Superior Court

DAVID DOWDING,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONROE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 7, 1989

For the Petitioner-Respondent, Klausner & Hunter (Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Epstein & Gross (Lester Aron, Esq., of Counsel)

For the amicus curiae, New Jersey Association of School Administrators (Margaret C. Murphy, Esq., of Counsel)

David Dowding (hereinafter "Petitioner"), a tenured teaching staff member assigned to teach math for half of the school day and supervise in-school suspension for the remainder of the day, sought declaratory judgment that an in-school suspension assignment was a teaching assignment rather than merely a duty assignment and required approval as an unrecognized title from the county superintendent.

On March 7, 1989, the Commissioner, asserting that case law has determined that in-school suspension is an instructional assignment requiring an instructional certificate and not a mere duty that might be subsumed as part of the collateral duties assumed by teaching staff members, concluded that there was no need to submit this particular assignment to the County Superintendent for determination of the appropriate certification since "[s]uch submission would only result in a finding that an instructional certificate is required." The Commissioner, however, dismissed the petition, finding that Petitioner had raised a "tempest in a teapot" inasmuch as there had never been any claim made against his tenure or seniority rights.

The Board filed the instant appeal from the Commissioner's decision, alleging that the Commissioner erred in determining that in-school suspension constituted a teaching assignment.

On July 6, 1989, we granted leave to the New Jersey Association of School Administrators (hereinafter "Amicus") to appear as amicus curiae in this matter. Amicus maintains that

in-school suspension may or may not be an instructional assignment, depending on how the district has structured the program.

On August 17, 1989, following our determination that it was necessary to expand the record in this matter, the parties were directed to submit stipulations of fact as to the structure and substance of the district's in-school suspension program and the exact duties performed by the Petitioner in his assignment to the program. Such stipulations were submitted by the parties on September 22, 1989.

After a thorough review of the record, we affirm the Commissioner's ultimate determination that the instant assignment is an instructional assignment requiring an instructional certificate, but for the reasons expressed herein.

We reject the notion that in-school suspension is necessarily a teaching staff assignment within the position of "teacher" requiring possession of a valid certificate in order to be qualified to serve in the assignment. See N.J.S.A. 18A:26-2; 18A:28-5. The cases cited by the Commissioner do not justify a blanket determination that all in-school suspension assignments are instructional. Nor do we find such a blanket determination proper. Whether or not an in-school suspension assignment is a teaching staff assignment requiring an instructional certificate turns upon the specific duties to be performed in that particular assignment, requiring assessment of whether the employment is of such character as to require that the individual assigned thereto hold appropriate certification in order to perform such functions. See N.J.S.A. 18A:1-1; N.J.A.C. 6:11-3.4.

When the nature of an assignment is such that possession of appropriate certification is required, and the position title to be utilized by the district board is not recognized in the administrative code, it is the county superintendent of schools who is charged with responsibility in the first instance for approving such title and determining the appropriate certification based upon the specific duties required to be performed. N.J.A.C. 6:11-3.6(b). The State Board has the ultimate administrative authority for determining appropriate certification. See South River Education Association v. Board of Education of the Borough of South River, decided by the State Board of Education, November 4, 1987, aff'd, Docket #A-1695-87T8 (App. Div. 1990); Pezzullo v. Board of Education of the Township of Willingboro, decided by the State Board of Education, March 1, 1989, appeal dismissed, Docket #A-4006-88T1 (App. Div. 1989).

In Vanderhoof v. Board of Education of the Scotch Plains-Fanwood Regional School District, decided by the Commissioner of Education, April 15, 1987, aff'd, State Board of Education, June 1, 1988, aff'd, Docket #A-5608-87T1 (App. Div. 1989), one of the cases cited by the Commissioner, a tenured teacher's challenge to her reassignment from a music teacher to an in-school suspension teacher was dismissed as a proper reassignment within the tenurable position of "teacher." The Commissioner, affirmed by the State Board and Appellate Division, upheld the County Superintendent's

determination following review of the district board's job description, that, based upon the duties performed, the in-school suspension program in that particular case required instructional certification.

The fact that instructional certification has also been required in several other in-school suspension programs does not obviate the requirement for a case-by-case determination, dependent upon the particular duties required to be performed, of whether a particular in-school suspension program constitutes a teaching staff assignment requiring appropriate certification in order to perform the required functions.

Under our authority as the ultimate adminstrative decision-maker in matters arising under the education laws, Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982), and mindful that the State Board has the ultimate authority to determine whether a teacher is qualified for a position when construing state education law within our purview, South River, supra, we have reviewed the stipulation of facts submitted herein and are satisfied that in-school suspension, as utilized by the Board in the assignment before us is a teaching staff position title requiring possession of an instructional certificate. The stipulated duties include assisting students in completing their assigned work and providing reading assignments to students who have no assigned work. Inasmuch as such functions are instructional in nature, we conclude that this particular assignment constitutes an instructional assignment which can be performed only by teaching staff members possessing instructional certificates.

Finally, observing that the Superintendent of Schools herein avers that he was told by the County Superintendent that it was not necessary to apply for approval of in-school suspension as an unrecognized title in that it was not a distinct teaching position, we find it necessary to reiterate that when the character of an assignment is such that possession of appropriate certification is required, and the position title to be used is not recognized in the administrative code, the district board "shall submit a written request to the county superintendent for permission to use the proposed title" and 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." N.J.A.C. 6:11-3.6(b) (emphasis added). The county superintendent is further required to review annually all previously approved unrecognized position titles. Id.

We therefore concur with the Commissioner's ultimate determination that the in-school suspension program herein is an instructional assignment requiring an instructional certificate, but for the reasons stated herein and not those expressed by the Commissioner.

December 5, 1990

BARBARA ELLICOTT,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, August 17, 1989

For the Petitioner-Appellant, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

Barbara Ellicott (hereinafter "Petitioner"), a tenured teaching staff member holding an educational services certificate with endorsements as both a learning disabilities teacher-consultant ("LDTC") and speech-language specialist, alleged that the Board of Education of the Township of Frankford (hereinafter "Board") had violated her tenure and seniority rights by appointing a non-tenured individual to a newly-created full-time LDTC position.

Petitioner was employed by the Board from March 1 through June 30, 1981 as a speech correctionist and LDTC for four days a week. During that particular period, she served as a substitute for a teacher on maternity leave. In 1981-82, she also served for four days a week as a speech correctionist and LDTC. Petitioner did not serve as an LDTC subsequent to 1981-82, but was employed as a speech correctionist for three days a week in 1982-1983, four days a week in 1983-84, 1984-85 and 1985-86 and was reduced to two days a week in 1986-87, 1987-88 and 1988-89. In June 1988, Petitioner asserted her entitlement to a full-time LDTC position the Board was seeking to fill for 1988-89, but the Board employed a non-tenured individual.

On June 29, 1989, an Administrative Law Judge ("ALJ") determined that Petitioner had acquired tenure as a result of her employment by the Board since 1981. He concluded that since the LDTC assignment was within the scope of Petitioner's certificate and Petitioner held the requisite endorsement for LDTC, she was tenured in the "position" of LDTC. However, the ALJ recommended granting the Board's motion for summary decision, finding that Petitioner had not been subject to a reduction in force ("RIF") concomitant with

the creation of the controverted assignment, thereby rendering moot the issue of the violation of Petitioner's seniority rights.[1]

On August 17, 1989, the Commissioner adopted the ALJ's decision on different grounds and dismissed the petition, concluding that each endorsement under an educational services certificate represented a "separately tenurable position." While acknowledging that teaching staff members serving under instructional certificates achieved tenure in the position of "teacher," regardless of the specific endorsements under which they had actually served, the Commissioner observed that the activities conducted by a teacher were "generic in nature," while persons serving under educational services certificates carried out a multitude of activities and frequently performed entirely different activities representing distinct and separate disciplines depending on the endorsement. Accordingly, he concluded that LDTC was a separately tenurable position from speech correctionist. Finding that Petitioner had accumulated only one year's service creditable towards tenure under her LDTC endorsement,[2] the Commissioner concluded that she had failed to satisfy the probationary period set forth in N.J.S.A. 18A:28-5 or 28-6 and was not tenured as an LDTC. Thus, he determined that she had no entitlement by virtue of tenure or seniority to the controverted LDTC assignment.

Petitioner has filed the instant appeal from the Commissioner's decision, arguing that she was tenured as both a speech correctionist and LDTC, contending that the Commissioner created an artificial dichotomy between individuals serving under instructional and educational services certificates. The Board counters that the Commissioner properly determined that the endorsements under an educational services certificate are separately tenurable positions and that the Petitioner had not served as an LDTC for the requisite period of time under N.J.S.A. 18A:28-5 for the acquisition of tenure as such.

After a thorough review of the record, we reverse the Commissioner. After careful review of the current statutory scheme, we find that it includes no authority for limiting the scope of the position in which tenure is achieved by virtue of service under an educational services certificate on the basis of the endorsements or individual assignments thereunder, with the exception of school nurse. The issue herein, we stress, is not whether educational policy dictates that speech correctionist and learning disabilities teacher-consultant should be regarded as separately tenurable positions, but whether the education laws permit them to be so regarded.

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[1] We note that the ALJ did not specifically address Petitioner's tenure rights to the LDTC assignment.

[2] We note that the Commissioner concluded that since Petitioner's service as a speech correctionist and LDTC for the period from March 1 through June 30, 1981 was as a substitute for a teacher on maternity leave, such time could not be counted towards Petitioner's tenure status.

Tenure is created by a statute, N.J.S.A. 18A:28-1 et seq., which should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). Under the statutory scheme, tenure is achieved in a particular "position." The "position" in which tenure is achieved is initially limited by the certificate that the teaching staff member must hold in order to fulfill the statutory prerequisite of qualification for employment. Capodilupo v. West Orange Bd. of Ed., decided by the State Board of Education, September 3, 1986, slip op. at 7, aff'd, 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). Further definition of the "position" in which tenure is achieved is provided by N.J.S.A. 18A:28-5, which, by specifying that service as a teacher, principal, assistant principal, vice principal, superintendent, assistant superintendent and school nurse shall be under tenure if other statutory prerequisites are met, defines, for individuals serving in these capacities, the scope of the "position" in which tenure is achieved and to which tenure protection attaches.[3] Id.

It is now well established that a tenured teaching staff member subject to a reduction in force pursuant to N.J.S.A. 18A:28-9 has entitlement by virtue of tenure to an assignment within the scope of his or her certificate as against non-tenured individuals. Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo, supra. Because the assignments that a staff member is qualified to fill are limited by the scope of his or her endorsements, the scope of the position in which such individual may be entitled to tenure protection is likewise limited by the scope of his or her endorsements. Id.

In Grosso v. Board of Education of the Borough of New Providence, decided by the State Board of Education, March 7, 1990, appeal pending (App. Div.), we rejected the claim of the petitioner therein that tenure was acquired within a specific endorsement on an instructional certificate. We concluded that under the statutory scheme, particularly N.J.S.A. 18A:28-5, "teacher" was a separately tenurable position, and that teaching staff members serving under

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[3] N.J.S.A. 18A:28-5 provides, in pertinent part:

> The services of all teaching staff members including all teachers, principals, assistant principals, vice principals, superintendents, assistant supervisors, 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....

instructional certificates achieved tenure in the position of teacher and were entitled to tenure protection in all assignments for which the endorsements upon their instructional certificates qualified them, not just those under which they had actually served for the requisite period for the acquisition of tenure pursuant to N.J.S.A. 18A:28-5 or 28-6.[4] We stated in Grosso that:

> In affirming the State Board's decision upholding tenure rights in Capodilupo, the Appellate Division reiterated the State Board's reasoning that the petitioner therein had tenure "in all positions for which his instructional certificate qualified him," Capodilupo, supra, at 514, including elementary physical education, the assignment claimed, even though he did not have seniority in that category and in which, as the Court noted, he had acquired no demonstrable experience. The Court was satisfied that "the State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification." Id. at 515. And in Bednar, the Court emphasized that "Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher." Bednar, supra, at 242, citing Capodilupo, supra.

Grosso, supra, slip op. at 6.

Similarly, principal, assistant principal, vice principal, superintendent and assistant superintendent, although all within the purview of the administrative and supervisory certificate, are separately tenurable positions by virtue of the express language of N.J.S.A. 18A:28-5.[5] Capodilupo, supra. See, e.g., Schienholz v. Board of Education of the Township of Ewing, decided by the State Board of Education, February 7, 1990, appeal pending (App. Div.). In Schienholz, we reiterated that tenure was achieved in the position of "principal," rather than in the specific assignments of elementary or high school principal, stressing that "principal" was a separately tenurable position under N.J.S.A. 18A:28-5. Since petitioners therein were authorized by virtue of their principal endorsements to serve at all grade levels, they were entitled to tenure protection in all assignments within that tenurable position for which that certification qualified them.

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[4] We note that in the recent Appellate Division decision in Grossman v. Board of Education of the Borough of Ramsey, Docket #A-3270-88T1 (App. Div. 1990), slip op. at 9, the Court held that "as a tenured teacher, [petitioner] is entitled to preference over [a non-tenured individual] to teach a course which she is certified to teach, even though she never taught it and has no seniority in that category."

With the exception of school nurse, assignments within the purview of the educational services certificate are not enumerated in N.J.S.A. 18A:28-5 as separately tenurable positions. Under regulations promulgated by the State Board, moreover, teaching staff members holding an educational services certificate are authorized and qualified for service in any assignment under that certificate for which they possess the appropriate endorsement. N.J.A.C. 6:11-12.1 et seq. Consequently, we conclude that, with the exception of school nurses, who are separately tenured by statute, staff members serving under educational services certificates achieve tenure in "educational services" and are entitled to tenure protection in all assignments within that tenurable position for which the endorsements on their certificates qualify them.[6]

Thus, in the instant case, we find that Petitioner, who was employed as a teaching staff member in the district under her educational services certificate since 1981, served thereunder for the requisite period of time pursuant to N.J.S.A. 18A:28-5 and thereby achieved tenure in educational services.[7] Furthermore, under our regulations, Petitioner was authorized and qualified for assignment as an LDTC by virtue of her LDTC endorsement. N.J.A.C. 6:11-12.15. Indeed, she actually served under that endorsement for more than a year. Accordingly, she had entitlement by virtue of tenure following a reduction in force to employment as an LDTC as against non-tenured individuals.

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[5] We note that such status as separately tenurable positions is not based upon the various endorsements on the administrative certificate. An endorsement as principal, for example, authorizes service in both the separately tenurable positions of principal and vice principal. N.J.A.C. 6:11-10.4(b). Thus, while the Commissioner stresses, as an analogy to the instant case, the irrationality of a tenured vice principal displacing a non-tenured principal following a RIF, under regulations promulgated by the State Board, an individual serving as a vice principal is required to possess an endorsement as principal, and would, therefore, be authorized and qualified for service as a principal. Id. However, by virtue of the fact that principal and vice principal are, pursuant to N.J.S.A. 18A:28-5, separately tenurable positions, a tenured vice principal who has no tenure as a principal would have no statutory entitlement by virtue of tenure to assignment as a principal following a RIF.

[6] We emphasize that, by virtue of the fact that the scope of the position to which tenure protection attaches is limited by the scope of the staff member's certification, individuals tenured in educational services would have no entitlement by virtue of tenure to assignments under that certificate for which they do not possess the appropriate endorsement.

[7] We note that inasmuch as we have concluded that tenure is achieved in "educational services," and it is undisputed that Petitioner served as a teaching staff member under her educational services certificate since 1981, it is unnecessary for us to determine whether, in this particular case, her service for the period from March 1 through June 30, 1981 may be credited towards her acquisition of tenure.

We further conclude that Petitioner was entitled to assert her tenure rights to the instant LDTC assignment. In 1986-87, subsequent to achievement of tenure in educational services, Petitioner was subject to a RIF when her speech correctionist assignment within her tenured position was reduced from four to two days a week. Reduction in hours of employment is considered a reduction in force. Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354, 357 (App. Div. 1982). Her tenure rights to the instant assignment are unaltered by the fact that the RIF did not occur concomitant with the creation of that assignment. See Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 5, 1989. The statutory scheme makes no distinction between retention and reemployment rights for purposes of tenure protection. And, as pointed out by the Commissioner, a part-time teaching staff member subject to a RIF is not precluded from claiming entitlement by virtue of tenure or seniority to a full-time assignment. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983).

We therefore conclude that Petitioner is tenured in educational services and is entitled to tenure protection following a reduction in force in all assignments for which she is qualified by virtue of the endorsements on her educational services certificate. We further conclude that Petitioner's tenure rights were violated when the Board, subsequent to a RIF, employed a non-tenured individual in the controverted LDTC assignment, which assignment is within the scope of Petitioner's certification.

Accordingly, we reverse the Commissioner and direct that Petitioner be assigned to the full-time LDTC assignment and be awarded back pay and emoluments from the beginning of the 1988-89 academic year, less mitigation.

Attorney exceptions are noted.
November 19, 1990

Pending N.J. Superior Court

BOARD OF EDUCATION OF THE BOROUGH OF ENGLEWOOD CLIFFS, BERGEN COUNTY,

PETITIONER/CROSS RESPONDENT-APPELLANT,

V.

BOARD OF EDUCATION OF THE CITY OF ENGLEWOOD, BERGEN COUNTY,

RESPONDENT/CROSS PETITIONER-CROSS APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF TENAFLY, BERGEN COUNTY,

CROSS RESPONDENT-APPELLANT,

AND

A.S., by her guardian ad litem, R.S.,

INTERVENOR.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 11, 1988

Decision on motion by the Commissioner of Education, September 1, 1988

Decision on motion by the State Board of Education, November 1, 1988

Decision on motion by the State Board of Education, December 1, 1988

Decision on motion by the Commissioner of Education, February 22, 1989

Decision on motion by the State Board of Education, May 3, 1989

Decision on motion by the Commissioner of Education, September 6, 1989

Decision on motion by the State Board of Education, March 7, 1990

For the Petitioner/Cross Respondent-Appellant, Hellring, Lindeman, Goldstein, Siegal, Stern & Greenberg (Joel D. Siegal, Esq., of Counsel)

For the Respondent/Cross Petitioner-Cross Appellant, Clapp and Eisenberg (Arnold K. Mytelka, Esq., and Agnes I. Rymer, Esq., of Counsel) and Paul L. Tractenberg, Esq.

For the Cross Respondent-Appellant, Riker, Danzig, Hyland, and Perretti (James J. Rothschild, Esq. and Glenn D. Curving, Esq., of Counsel)

For the Intervenor, Smith, Don, Alampi & Scalo (Philip Scalo, Esq., of Counsel)

I

This case was initiated by the Board of Education of the Borough of Englewood Cliffs (hereinafter "Cliffs Board"), which, pursuant to N.J.S.A. 18A:38-13, petitioned the Commissioner on December 23, 1985, seeking permission to terminate its sending-receiving relationship with the Board of Education of the City of Englewood (hereinafter "Englewood Board") and to enter into a new sending-receiving relationship with the Board of Education of the Borough of Tenafly (hereinafter "Tenafly Board").[1] In its petition, the Cliffs Board asserted that deficiencies in the management of Dwight Morrow High School (DMHS), the receiving school, and the quality of the educational environment provided to its students at that school had led it to conclude that continuation of its relationship with the Englewood Board was contrary to the interests of its students. It further asserted that because of community dissatisfaction resulting from the many educational problems at Dwight Morrow High School, the great majority of its high school students were paying tuition to attend Tenafly High School (THS) or a private or parochial school, and that termination of its relationship with the Englewood Board would not have a significant effect on the racial balance of any of the districts involved.

In its answer, the Englewood Board alleged that termination of the relationship would violate the New Jersey State Constitution, as well as State statutes and public policy. It also cross-petitioned the Commissioner, requesting that he permanently enjoin and restrain the Tenafly Board from accepting for enrollment at Tenafly High School students from the City of Englewood and

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[1] We note that in amending N.J.S.A. 18A:38-13, the Legislature eliminated the requirement that the termination of a sending-receiving relationship could be granted only upon a showing of "good and sufficient reason." The Legislature, however, further altered the statute so as to require the Commissioner to grant termination if he finds, after consideration of all circumstances, including the effect of severance on the racial composition of the pupil populations of the districts, that "no substantial negative impact will result therefrom." We further note that although this action was filed prior to the November 24, 1986 effective date of the amendment to the statute, hearings began subsequent to that date, and the parties were agreeable to litigating under the amended statute.

Englewood Cliffs. In this respect, the Englewood Board asserted that in accepting these students on a tuition basis, the Tenafly Board had disregarded the sending-receiving relationship between the Cliffs Board and the Englewood Board, and that the Tenafly Board's practice of accepting students from these two districts had and would continue to have an adverse impact on the racial composition of Dwight Morrow High School, increasing the probability that the school would become totally segregated.

The Englewood Board further sought the creation of a regional school district to be comprised of Englewood, Englewood Cliffs and Tenafly, urging that the creation of such a district was necessary to vindicate constitutional rights and State policies regarding the achievement of racial balance. It asserted that this remedy was appropriate in that 1) the communities were adjoining, 2) despite the sending-receiving relationship between the Englewood and Cliffs Boards, Englewood Cliffs students were attending Tenafly High School on a tuition basis, 3) the large majority of Englewood Cliffs and Tenafly students were white while the majority of Englewood students were members of minority groups, and 4) all three districts had experienced declining enrollment of high school age students, adversely affecting their ability to provide educational programs and opportunities.

In response to the Englewood Board's cross-petition, the Tenafly Board admitted that some Englewood Cliffs students were attending Tenafly High School. While not denying that acceptance of these students had adversely affected the racial composition of Dwight Morrow High School, the Tenafly Board asserted that the Englewood Board's cross-petition failed to state a claim upon which relief could be granted, and that, in accepting tuition students, the Tenafly Board had in all respects complied with N.J.S.A. 18A:38-3. It further alleged that the Englewood Board had initiated the action for regionalization solely because of the Cliffs Board's intention to withdraw from its relationship with the Englewood Board, and sought dismissal of this action on the grounds that it had been brought in bad faith for the sole purpose of delaying withdrawal and intimidating the parties.

The matter was transmitted in its entirety to the Office of Administrative Law (OAL) for hearing. Those hearings were conducted over a period of 99 days, prior to which the parties engaged in extensive discovery. The record generated by the hearings is massive, including over 600 exhibits and nearly 20,000 pages of transcripts. It was on this record that the Administrative Law Judge (ALJ) entered his findings and recommendations with respect to the central issues presented by the parties.

In his initial decision, the ALJ recommended that both the Cliffs Board's petition for termination of its sending-receiving relationship with Englewood and its alternative request for establishment of a dual sending-receiving relationship with Englewood and Tenafly be denied and that the Tenafly Board be directed to cease admitting students who were residents of Englewood Cliffs and Englewood to Tenafly High School except for those enrolled in the Tenafly school system as of the date of the initial decision. He also recommended denial of Englewood's cross-petition for the establishment of a regional high school district. These

recommendations were based on his findings and analysis as set forth in his initial decision.

In evaluating the Cliffs Board's petition to terminate its sending-receiving relationship with Englewood, the ALJ found that while the Cliffs Board was acting in good faith for what it perceived to be the best educational interests of its students, DMHS was in fact providing a good solid education which more than adequately prepared students attending that school for college and later life. While his findings in this regard were not limited to Englewood's certification status, the ALJ noted that DMHS had passed Level I monitoring and, therefore, was fully certified as satisfying State standards for the provision of a thorough and efficient education.

In arriving at his conclusions regarding the quality of education provided by the districts involved in this case, the ALJ found that: 1) both DMHS and Tenafly High School offered well-rounded college preparatory programs, but DMHS had a much greater emphasis on improving basic skills, maintaining discipline and increasing attendance, areas taken more for granted at THS; 2) the record failed to provide support for the fear expressed by Englewood Cliffs parents that their children would be at risk of physical harm at DMHS; 3) while teachers at THS had a slight edge over their counterparts at DMHS both in years of experience and attainment of advanced degrees, the teaching staff at THS was sorely deficient in the area of racial composition -- with the exception of one Hispanic and one Asian teacher, its staff was all white in 1986-87, while DMHS's teaching staff was 61% white, 32% black and 6% Hispanic or Asian; 4) both schools provided a wide range of courses for students of different ability levels and interests, including advanced placement, honors and enrichment courses, but class sizes tended to be smaller at DMHS; 5) both districts had experienced problems with administrative turnover and teacher morale; 6) both schools offered a wide array of co-curricular activities, but the degree of participation by Englewood Cliffs students in such activities at DMHS exceeded that of Englewood Cliffs students at THS; 7) DMHS sat on a beautifully landscaped and wooded campus, but was older, drabber and more in need of repairs than THS; 8) DMHS students, in the aggregate, scored consistently lower than students at THS and other Bergen County high schools on standardized tests, but DMHS's scores on the HSPT had improved substantially in 1986-87 and college-bound students did very well at DMHS; 9) the ability of Englewood Cliffs students to pursue higher education did not appear to have been hampered in any way by attendance at DMHS; 10) DMHS had a broader and more comprehensive curriculum than THS, particularly for students interested in vocational careers or requiring special education services. The ALJ further noted that the Englewood Board had mounted an effective campaign to deal with its recurring past problems.

The ALJ then turned, as required by N.J.S.A. 18A:38-13, to analysis of whether termination of the relationship between Englewood Cliffs and Englewood would result in substantial negative impact on the racial composition, educational quality, financial condition or facilities at DMHS. Although concluding that termination would have no substantial financial impact nor any

substantial impact with respect to facilities, the ALJ found that termination would have a significant impact on the racial balance at Dwight Morrow and would have a substantial impact on the quality of education at that school.

In assessing the impact of termination on the racial composition of the pupil population attending Dwight Morrow, the ALJ concluded that because the school was so precariously short of white and Asian students, the loss of even a small number of Englewood Cliffs students would have a significant impact on racial balance at the school, noting that the loss of the 15 white Englewood Cliffs students would a make a difference of 1.6% in the overall proportion of white students at DMHS, and these 15 white students constituted 16% of the 94 white students enrolled at the school.

Regarding the future impact of severance, the ALJ relied upon the testimony of Dr. Mario Tomei, who was qualified as an expert in the field of impact on racial and ethnic student composition, and who, testifying for the Cliffs Board, provided a conservative estimate of future losses.

Using the cohort survival ratio procedure with three years of data,[2] Dr. Tomei projected that without severance, there would be 21 Englewood Cliffs students attending DMHS in 1990-91, of which 15 would be white, out of a total student body of 662 in a 9-12 school and 808 in an 8-12 school.[3] In a 9-12 school, Dr. Tomei expected a total of 58 whites in 1990-91 without severance, representing 8.76% of the student population, and 43 whites with severance, representing 6.71%. This would constitute a 2.1% drop in the white population at the school with severance, the Englewood Cliffs students comprising 28% of the white student body. In an 8-12 school, Dr. Tomei projected a total of 61 whites without severance, representing 7.55% of the student body, and 46 whites with severance, representing 5.84%. This would constitute a 1.7% drop in the white population at the school with severance, the Englewood Cliffs students comprising 25% of the white student body. He did not project a secondary loss of Englewood students in the event that severance was granted.

The ALJ concluded that even accepting the projections of Dr. Tomei, which were more conservative than the projections of the Englewood Board's experts, the impact on racial composition must be regarded as substantial in a school with such a low white and Asian population. While noting that some amount of secondary loss of Englewood students would occur if severance were granted, the ALJ concluded that the record did not provide a credible basis for quantifying that amount.

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[2] The cohort survival ratio procedure is a methodology based upon the proportion of students attending one grade who were enrolled in the same school in the previous grade.

[3] We note that there were plans for Englewood to use part of the facilities at DMHS for its resident eighth grade students.

In evaluating the impact of termination on the quality of education, the ALJ recognized that both Englewood and Tenafly had been experiencing declining student enrollment at the high school level. While finding that the departure of the 21 Englewood Cliffs students then attending DMHS, in and of itself, would not seriously impair the educational program at DMHS, the ALJ found that severance would result in a "symbolic loss," representing a substantial negative impact on the quality of education at Dwight Morrow.

In this respect, the ALJ relied upon a "report" by Dr. Michelle Fine, a social psychologist engaged by the Englewood Board, which he found substantiated the "symbolic loss" that DMHS would suffer if severance were approved. On this basis, the ALJ concluded that those students left behind at the school would perceive the result as an implicit message that DMHS was acceptable for blacks and Hispanics, but not good enough for whites and Asians. Feelings of isolation and inferiority engendered by such perceptions, the ALJ noted, would lower the self-confidence of minority youngsters and be detrimental to their trust in the basic fairness of the educational system. The ALJ further found that the Englewood Cliffs contingent at DMHS represented a proportionally large number of upper income and high-achieving students who helped to motivate and set an example for the economically deprived and low-achieving students at the school. Loss of these particular students, he concluded, would have a much greater negative impact on educational quality than their numbers alone would suggest.

The ALJ then turned to assessment of Tenafly's tuition policy. Relying on a report by Dr. Robert D. Fleischer showing that of 234 school districts, 85% had no tuition students in 1985-86 while THS had 74 enrolled, more than three times as many as the next highest, and on an informal survey of 20 Bergen County districts by the Tenafly Board, the ALJ found that the Tenafly Board had a novel tuition policy enacted to alleviate the adverse effects of its own declining enrollment. He found that, as applied, the policy had many characteristics of a private school placement, and while not racially exclusive on its face, whites and Asians, as a group, were better able to afford the entry fee. He further found that, in practice, the policy had attracted disproportionately high numbers of students from Englewood Cliffs and Englewood. The practical effect of the policy had been to drain upper income whites and Asian college bound students from DMHS, subverting that school's efforts to promote racial balance and luring many of its academically talented students.

In arriving at this finding, the ALJ found it immaterial how many tuition students from Englewood Cliffs might decide to go to private or parochial schools were the Tenafly option foreclosed, emphasizing that THS is not a private school and that while State officials do not have the authority to prevent an individual from attending a non-public school, they do have the constitutional and statutory responsibility for supervising the public education system. Concluding that fact-finding should deliberately avoid any inquiry into what choices parents might conceivably exercise if the State's policy with respect to segregation is enforced, the ALJ found that the key fact here was the number of Englewood Cliffs and Englewood students enrolled at Tenafly High School who by all rights

belonged at DMHS if they chose to attend public school. The ALJ concluded that by the enrollment of 76 Englewood Cliffs students and 16 Englewood students, Tenafly's tuition policy seriously undermined the continuing ability of Englewood to provide equal educational opportunity to all its students.

The ALJ then assessed Englewood's petition for regionalization, recognizing that Englewood had not mapped out in exact detail any plan for regionalization, but rather had provided potential configurations in the event that the Commissioner ordered further study of regionalization. Finding that Tenafly, Englewood and Englewood Cliffs were autonomous and distinct communities, the ALJ found that the disadvantages of forced regionalization outweighed the advantages. The primary disadvantages, aside from turmoil, specified by the ALJ included diverting the energies of administrators and teachers from educating children and diverting money from improving educational opportunities in the existing districts. The ALJ also found that the Englewood Board had not put on a convincing case that regionalization was the best solution in this instance given that desegregation literature cautions that forced merger carries the greatest risk of white flight.

Applying the law to his findings, the ALJ found that the losses shown with respect to demoralization and student perception were demonstrable, detectable, verifiable, and definite and tangible. Thus, he determined that, without more, these losses justified denial of the Cliffs Board's petition for termination. He concluded that an examination of all the equitable circumstances must include a thorough examination of Tenafly's tuition policy and its detrimental impact on DMHS. He further concluded that such inquiry must be premised on the State's policy against discrimination and segregation in the public schools, as articulated in Booker et al. v. Board of Education of the City of Plainfield, 45 N.J. 161 (1965) (hereinafter "Booker") and Jenkins et al. v. Tp. of Morris School Dist. and Bd. of Ed., 58 N.J. 483 (1971) (hereinafter "Jenkins"). The ALJ found that Tenafly's intentions did not negate the State's involvement in the violation of a constitutional duty and, observing that Tenafly was hardly in the position of an innocent bystander, concluded that Tenafly's policy was not only repugnant, but was plainly against the law.

In arriving at this conclusion, the ALJ relied on Asbury Park Bd. of Educ. v. Shore Reg. High School Dist. Bd. of Educ., 1971 S.L.D. 221, aff'd by the State Board, 1971 S.L.D. 228 (hereinafter "Shore Regional"), which involved a tuition policy similar to the one involved in the matter before him. He rejected Tenafly's argument that the Commissioner lacked the legal authority to prohibit a district board from setting its own admission conditions for nonresident students because N.J.S.A. 18A:38-3 affords district boards the discretion to accept nonresident students. Rather, he found that the Commissioner and State Board had the power and the duty to take decisive action when, as in the case before him, local board action clearly conflicts with overriding State policy and threatens to cause substantial harm to another district.

Cautioning that State officials should resist the temptation to count heads of those Englewood Cliffs students who

would not return to DMHS if the Tenafly option were foreclosed in that such figures were irrelevant to the legal issues in the case, the ALJ concluded that restatement of the ruling in Shore Regional should be sufficient to deter other public school districts from breaking the law.

The ALJ found that application of Jenkins so as to direct regionalization in this case would require extension of Jenkins since the communities involved here were not a single community as they were in Jenkins. He, however, concluded that this case did not appear to be an appropriate factual setting in which to so act, given his finding that the potential risks of regionalization were greater than the potential benefits.

Finally, the ALJ rejected the establishment of a dual sending-receiving relationship as a way of maximizing parental choice, emphasizing that while "freedom of choice" was then under study by State education officials, in this instance such relief would afford choice only to the parents of Englewood Cliffs children.

The Commissioner fully agreed with the ALJ's recommendation to deny severance of the sending-receiving relationship between Englewood and Englewood Cliffs. In adopting this recommendation, the Commissioner rejected the argument that the State's policy against racial segregation was not implicated in this matter and, stressing that it was his responsibility to combat "flight" from a racially imbalanced school, further emphasized that New Jersey's strong policy against "segregation/imbalance" extended to de facto segregation.

The Commissioner found it obvious in this case that DMHS had a "serious racial imbalance problem" in that barely 12% of its student population was white in 1987-88. He concluded that any district board action jeopardizing such a "precarious" racial balance must be scrupulously examined.

In this framework, the Commissioner concurred with the ALJ's finding that severance of the sending-receiving relationship between Englewood and Englewood Cliffs would have a significant negative impact on racial balance in that, notwithstanding the small number of students involved, the percentage loss of white students would be 16% in 1989-90 and 25% in 1990-91. In this respect, the Commissioner distinguished Morris School District v. Harding, 1974 S.L.D. 457, aff'd by the State Board, 1974 S.L.D. 487, aff'd, Docket #A-905-74 (App. Div. 1975), where a 1% increase in black enrollment to 16% was expected to occur as a result of severance, emphasizing that "minority" enrollment in this case was already 88% and, in further contrast to Morris, there was no anticipated growth in the number of white students.

Adopting the ALJ's findings with respect to enrollment projections, the Commissioner was "compelled to put to rest once and for all the belief that because painfully few white students remain in a school because of a pattern of withdrawal there can be no significant impact on racial composition." Commissioner's decision, at 103. Thus, the Commissioner determined to consider not only the few remaining students from a sending district who were attending

public school in the designated receiving district, "but the pool of eligible students as well who have withdrawn for whatever reason be it to private school, parochial school or, in this particular case, to a public high school in another community as well." Id.

Finding that the dramatic decline in this case in the enrollment of Englewood Cliffs students was attributable to "white flight," the Commissioner concluded that to grant severance "as a matter of public policy would place an imprimatur of acceptance by the State to this flight." Commissioner's decision, at 104.

In assessing the impact of severance on educational quality, the Commissioner found it unnecessary to look beyond Brown v. Board of Education of Topeka, 374 U.S. 483, 74 S. Ct. 686, 94 L. Ed. 873 (1954) (hereinafter "Brown"), in order to support the ALJ's reliance on evidence dealing with "symbolic loss," i.e., the psychosocial dimension of education. Relying on Booker, which established that the educational effects of de facto segregation were negative, the Commissioner fully supported the ALJ's conclusion that severance would have a significant negative impact on the quality of education at DMHS.

In this respect, the Commissioner found Dr. Fine's "study" supportive of negative symbolic loss. However, while recognizing that the impact of a student's feelings does not necessarily lead to the conclusion that he or she would leave, and while finding that some secondary loss would undoubtedly result, the Commissioner agreed with the ALJ that such "secondary loss" could not be quantified and was too speculative for purposes of this inquiry. Thus, the Commissioner adopted verbatim the ALJ's conclusions that severance would have a substantial negative impact on the quality of education.

Turning to the question of the propriety of Tenafly's tuition policy, the Commissioner found that, although the policy itself was not against the law, the effect of the policy on the racial balance at DMHS was contrary to public policy. He concluded that while the Tenafly Board's policy was not discriminatory on its face, and while it had not been adopted for improper motives, the policy was repugnant in that it exacerbated racial imbalance by skimming off and luring students eligible to attend DMHS.

Observing that 92 students were involved here, in contrast to Shore Regional which involved 8 students, the Commissioner further concluded, as had the ALJ, that the principles of that case were directly applicable in judging the propriety of Tenafly's tuition policy.

Thus, relying on the decisions of the Commissioner and State Board of Education in Shore Regional, and finding that the right of a district board to enact a tuition policy under N.J.S.A. 18A:38-3 or of parents to send their children to school under such a policy was in no way diminished, the Commissioner emphasized that where there is a conflict between rights under N.J.S.A. 18A:38-3 and the constitutionally- and statutorily-based policies on racial integration, it is the Commissioner's obligation to combat racial imbalance. The Commissioner therefore found that any rights of the

Tenafly Board or of Englewood Cliffs and Englewood parents under N.J.S.A. 18A:38-3 must be subordinate to the compelling State interest to combat racial imbalance.

The Commissioner therefore adopted the findings and conclusions of the ALJ with the modification that any student from Englewood Cliffs or Englewood enrolled in and attending eighth grade in Tenafly on April 18, 1988, the date of the initial decision, would be permitted to attend THS in September 1988, through graduation.

Like the ALJ, the Commissioner rejected the alternative of establishing a dual sending-receiving relationship, finding that to grant such relief would serve to legitimize the flight of 76 Cliffs students to THS, which had contributed to the serious racial imbalance at DMHS. In this respect, the Commissioner emphasized that even if legitimate educational reasons are advanced for either severing an existing sending-receiving relationship or establishing a dual relationship, neither form of relief would be granted where, as he had found in this case, substantial negative impact on racial composition and educational quality outweighed the educational benefits sought.

Finally, the Commissioner concluded that a compulsory regionalization study should not be ordered. While adopting the ALJ's factual and legal findings in this respect, the Commissioner concluded that under Jenkins, forced regionalization will be ordered only when the factual circumstances demonstrate that: 1) a "single community" exists between or among the districts in question, 2) regionalization is "entirely reasonable, feasible, and workable," and 3) regionalization can be accomplished "without any practical upheavals." Finding that Englewood had failed in these proofs, and concluding that responsibility for any "incompleteness" in the record rested solely with Englewood, the Commissioner dismissed Englewood's motion for regionalization and found that there was no compelling basis for ordering a regionalization study.

In sum, like the ALJ and on the basis of his findings that significant negative impact on racial composition and educational quality would result from severance, the Commissioner denied the Cliffs Board's petition to terminate its sending-receiving relationship with Englewood, as well as its request to establish a dual sending-receiving relationship with Tenafly. He ordered that the Tenafly Board cease and desist from admitting to its high school on a tuition or other basis any students who were residents of either Englewood or Englewood Cliffs except for those enrolled in and attending THS or eighth grade in the Tenafly School District as of April 18, 1988, the date of the initial decision. Finally, he denied the Englewood Board's cross-petition for regionalization for failure to demonstrate circumstances comparable to those in Jenkins.

II

The Cliffs Board appealed to the State Board from the Commissioner's determination denying its petition to terminate its sending-receiving relationship with the Englewood Board and enjoining Englewood Cliffs students from attending THS. The Tenafly

Board filed an appeal from the Commissioner's decision enjoining it from accepting to THS any students who were residents of Englewood or Englewood Cliffs, and the Englewood Board filed a cross-appeal from the Commissioner's decision denying its cross-petition for forced regionalization. Thus, all three of the Commissioner's central determinations have been challenged by these appeals.

In support of its appeal, the Cliffs Board argues that the Commissioner, in applying N.J.S.A. 18A:38-13, equated any racial impact with substantial impact, asserting that the impact of severance on the racial composition of DMHS would be de minimis in light of the number of Englewood Cliffs students attending DMHS, and that even the attendance at DMHS by every Englewood Cliffs high school student would not solve the problem of deterioration in the racial balance at that school. The Cliffs Board further maintains that the "symbolic losses" found by the Commissioner were based on speculation in the absence of the sort of data traditionally considered to be "definite and tangible," and that the Commissioner failed to weigh his finding of substantial negative impact against the benefits of severance to the sending district and its pupils, alleging that the record establishes that the parents' preference for THS is grounded in hard educational facts.

The Cliffs Board also argues that the Commissioner's order enjoining Tenafly from accepting into THS students from Englewood and Englewood Cliffs was improper, asserting that the only rationale for this decision was the effect he perceived Tenafly's tuition policy to have on the racial balance at DMHS, and that there was no basis in federal or State law for such an injunction. It maintains that consideration of the constitutional rights of Englewood Cliffs parents to educate their children as they desire mandates reversal.

The Englewood Board asserts that the Commissioner correctly denied severance of the sending-receiving relationship, contending that in the context of a school with only about 12% white students and 4% Asian students, the loss of 16% of the school's white population would have been "substantial and devastating," and urges affirmance of the Commissioner's decision prohibiting Englewood and Englewood Cliffs students from attending THS. It also urges us to reverse the Commissioner's decision to deny regionalization of the districts.

In support of its cross-appeal seeking regionalization, the Englewood Board argues that regionalization is feasible, would achieve racial balance, that, while these communities are not a "single community" as the Court found in Jenkins, there are significant ties among them, and that the Court in Jenkins did not confine regionalization to the unique facts of the Morristown/Morris Township relationship.

The Tenafly Board, in support if its appeal, argues that the Commissioner was without authority to prohibit it from accepting students from Englewood and Englewood Cliffs, contending that N.J.S.A. 18A:38-3 gives it the right to accept nonresident tuition students. It maintains that neither the statute, the Commissioner's authority to supervise the public schools nor public policy provided the Commissioner with the authority to ignore the express grant of

authority given to local boards by N.J.S.A. 18A:38-3 absent an improper or illegal purpose. The Tenafly Board further contends that the Commissioner's reliance upon Booker and Jenkins is misplaced, arguing that neither decision gives the Commissioner the authority to prohibit the lawful exercise of a statutory right by an innocent third party merely because that action may have an adverse impact on a neighboring district.

On November 1, 1988, we granted the motion of A.S. (hereinafter "Intervenor"), a student from Englewood Cliffs attending seventh grade in the Tenafly district on April 18, 1988, the date of the ALJ's decision, to intervene in these proceedings. Such intervention was limited to presenting her position that the eighth grade cutoff established by the Commissioner was arbitrary and without a basis in law.

The Intervenor argues that if eighth graders are permitted to continue on to THS, then not permitting seventh graders to also do so can only be explained as arbitrary. She asserts that from an educational point of view, her situation is no different from that of an Englewood Cliffs student who has completed the first year at THS, and she urges us to restore the recommended decision of the ALJ.

III

As set forth above, disposition of this matter in its entirety requires that the State Board of Education pass upon the Commissioner's determinations of the three central claims made by the parties. While we must consider each claim under the particular legal standards applicable thereto, the claims are interrelated in that resolution of each turns upon assessment of the racial composition of the pupil populations of the districts involved and the changes which occurred therein during the period relevant to this litigation.

Thus, underlying this entire case is the question of whether the State's constitutionally-derived policy with respect to segregation and imbalance as it applies to New Jersey's public schools is contravened by the grant or denial of the specific relief sought by the parties. Further, although not expressly considered by the Commissioner, in view of our supervisory responsibilities, we cannot ignore the question of whether our State's policy is properly effectuated by our ultimate disposition of this case.

Therefore, as we have reviewed the specific claims in this matter, we have been particularly attentive to the judicial decisions which have considered the legal effect of segregation and racial imbalance in the public school system. In so doing, we have recognized that the courts have not yet been presented with the circumstances now confronting us and, consequently, have not addressed many of the questions raised by this case.

The United States Supreme Court's decision in Brown settled that state action in establishing and maintaining a system of racially segregated schools through official state policy violated the United States Constitution. In Booker and Jenkins, the New Jersey Supreme Court firmly established that our State's

constitution and policies derived thereunder prohibited with equal vigor segregation-in-fact resulting from longstanding housing and economic discrimination and rigid application of neighborhood school districting, i.e., de facto segregation, rather than from official policy.

In Booker, the New Jersey Supreme Court confronted a situation involving apportionment of black students among the elementary schools within a single school district. In resolving that case, the Court settled that the Commissioner had an affirmative obligation to take remedial action where he is presented with an excessively high concentration of black students in a particular school within a given school district in contrast to the percentage of blacks in the schools of the same level in that district such that the school in question is known as a black school.

In Jenkins, the Court reaffirmed the principles enunciated in Booker and applied them in the context of a sending-receiving relationship between two districts. The Court held that the Commissioner not only had the authority to deny severance of the sending-receiving relationship existing at the high school level, but also had the power to take suitable steps to effectuate a K-12 merger between the two districts. The Court found that it was unnecessary under the compelling circumstances of that case, which included the unique fact that the two districts involved constituted a single community, to pursue the issue of merger in its broader aspects. The Court, however, reiterated that the Commissioner had both the responsibility and power for correcting de facto segregation which is frustrating our State constitutional goals, and emphasized that our State's policy against racial discrimination and segregation in the public schools matches in vigor its policy in favor of a thorough and efficient education.

By its decisions in Booker and Jenkins, the New Jersey Supreme Court broadly delineated the State's constitutionally-derived policy and the Commissioner's responsibilities thereunder where de facto segregation by race is presented by apportionment of students among the schools of a single district or among those of two districts constituting what is in fact a single community. The Court has not been presented with, and so has not considered, as we must in the case now before us, questions relating to the meaning and application of the State's policy in a situation where the fundamental judgment to be made relates to the balance among both racial and national origin groupings in the student population of the single high school in a given district.

Thus, while we fully agree with the Commissioner that the State's policy against segregation is implicated in this matter, we find that the novelty and complexity of the situation with which we have been presented requires extreme care in applying that policy to the specific facts of this case as they have been established in the record. Further, we believe that not only must the individual claims be assessed in the context of the State's policy, but that the adequacy of any remedy ultimately afforded must be measured under that policy. It is to these tasks that we now turn.

The events leading up to this action began in 1965, when the Cliffs Board, lacking high school facilities of its own, entered into the instant sending-receiving agreement with the Englewood Board. Under the contractual agreement, the Englewood Board agreed to construct additional high school facilities at Dwight Morrow High School in reliance upon receiving students from Englewood Cliffs beginning in September 1967. Prior to entering its relationship with the Englewood Board, Englewood Cliffs had been sending its high school students to Fort Lee under an agreement dated November 2, 1962.

Throughout the 1970's, the percentage of graduating eighth graders in the Englewood Cliffs district moving on to DMHS remained steady in the 60% range, peaking at 69% (34/49) in 1980-81, when a total of 159 Englewood Cliffs students attended DMHS. P-109, in evidence.[4] Nonetheless, Englewood Cliffs petitioned the Commissioner in 1977 pursuant to N.J.S.A. 18A:38-13 as then in effect,[5] seeking to terminate the relationship. In 1981, the Cliffs Board withdrew its petition, having concluded that it was not capable of being supported in fact.

Between 1981-82 and 1987-88, the number and percentage of Englewood Cliffs eighth grade graduates enrolling at DMHS declined sharply. P-109, in evidence. By 1987-88, the most recent year in the record, a total of 21 Englewood Cliffs students attended DMHS --

Grade 9:	2 White, 1 Hispanic
Grade 10:	1 White, 1 Asian
Grade 11:	2 Asian, 1 Hispanic
Grade 12:	12 White, 1 Asian

R-234, in evidence.

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[4] The Cliffs Board states as fact in its brief that enrollment of Englewood Cliffs students at DMHS has been declining continuously since the early 1970's, and cites enrollment in 1971-72, 1979-80, 1982-83 and 1987-88 to support this factual contention. Cliffs Board's brief in support of appeal, at 3. We note that while the percentages offered are accurate for those years, the only years from 1970-71 through 1980-81 during which the percentage of Englewood Cliffs students attending Dwight Morrow fell below 60% were 1977-78 and 1979-80. P-109, in evidence. As set forth above, the "continuous" decline in enrollment began in 1981-82.

[5] See supra note 1.

15 whites, 4 Asians and 2 Hispanics.[6] The racial breakdown by grade of those students was stipulated by the Englewood Board as follows:

During that same period, the composition of the student population of DMHS in terms of the racial and national origin groupings represented therein shifted. In 1982-83, the student population of the school was 55.5% black, 31.5% white, 10.3% Hispanic and 2.7% Asian in a total pupil population of 1,128. By 1987-88, the proportion of students who were black and Hispanic had increased to the point where the composition of DMHS's 799 students[7] was 66.2% black, 17.8% Hispanic, 3.9% Asian and 11.8% white.

The shift in the composition of the student population is even more apparent if figures for the most recent incoming classes on record are analyzed alone. While the twelfth grade class at DMHS in 1987-88 was nearly 21% white and 75% black/Hispanic, the ninth and tenth grade classes were each nearly 87% black/Hispanic and 10% and 7.7% white, respectively. R-231, in evidence. 16% of the 94 white students attending DMHS that year were from Englewood Cliffs.

In 1982-83, in the face of declining enrollments, the Tenafly Board, acting under authority of N.J.S.A. 18A:38-3, instituted a program for the admission of nonresident students to its public schools, including THS, on a tuition basis under criteria established by the Board. Although the Cliffs Board had a sending-receiving relationship with Englewood, the Englewood Cliffs administration took a favorable view towards the program. Prior to its institution, as part of the feasibility report to the Tenafly Board concerning the program, Tenafly's Superintendent reported that "[i]n an informal discussion with Dr. Harold France, Superintendent of Schools in Englewood Cliffs, Dr. France noted that it would be most interesting if and when the Tenafly Board of Education decided to admit non-resident tuition students." R-22, in evidence. Once the program was adopted by the Tenafly Board, Englewood Cliffs provided written instructions upon request to the parents of its students on how to apply to Tenafly High School for admission on a tuition basis. R-93, in evidence. It did not provide such instructions with respect to any other school. Tr. 1/12/87, at 209.

Further, while the Cliffs Board had placed special emphasis since 1974-75 on seeking to enhance the likelihood that its students would continue their education at Dwight Morrow, such special

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[6] We note a minor discrepancy in the number and percentage of Englewood Cliffs eighth grade graduates enrolling in DMHS in 1987-88. While the parties and the decisions below refer to 4.4% (2/45), apparently based upon figures contained in the Englewood Board's 1988-89 application for state school aid, our review of the record indicates that the Englewood Board modified those figures by stipulating that there were 3, rather than 2, Englewood Cliffs students attending ninth grade at DMHS that year, R-234, in evidence, in which case the correct statistic would be 6.6% (3/45).

[7] We note that all three districts experienced declining enrollments during the period involved herein.

efforts continued only until 1981-82. Tr. 1/7/87, at 173. During 1980-81, several "cottage parties" were held at which board members from Englewood Cliffs and Englewood were available to answer questions about Dwight Morrow. In addition, department chairs from Dwight Morrow presented information concerning Englewood's program at meetings of the Cliffs Board. These attempts, however, ceased after only one year. Tr. 1/7/87, at 167-68.

Since the inception of Tenafly's tuition program, the number of Englewood Cliffs students attending THS has increased dramatically. At the same time, the number of Englewood Cliffs students attending DMHS has dropped on a yearly basis:

CHART I

	Englewood Cliffs Students Attending Dwight Morrow High School	Englewood Cliffs Students Attending Tenafly High School
1982-83	119	11
1983-84	92	21
1984-85	73	33
1985-86	60	48
1986-87	35	62
1987-88	21	76

P-109; R-232; CR-25; CR-107; R/CR-20, in evidence.

By 1985-86, the year in which this action was initiated, there were 74 nonresident private tuition students attending THS. This was nearly three times the number enrolled in any other high school district in the state, of which only 43 had nonresident tuition students in attendance. Of those, only 16 had more than five nonresident tuition students. R-1, in evidence.

By 1987-88, the number of tuition students at THS had increased to 107, of which 76 were from Englewood Cliffs and 16 from Englewood. CR-107, in evidence. Through 1985-86, nonresident tuition students at THS were overwhelmingly white and Asian:

CHART II
NONRESIDENT TUITION STUDENTS ATTENDING TENAFLY HIGH SCHOOL

	Englewood Cliffs Residents[8]				Englewood Residents				Residents of Other Districts			
	W	B	H	A	W	B	H	A	W	B	H	A
1982-1983	9	0	0	2	5	0	0	0	4	0	0	0
1983-1984	18	0	0	3	14	3	1	1	7	0	0	1
1984-1985	28	0	1	4	21	3	2	1	19	0	0	2
1985-1986	38	0	2	8	15	2	0	0	8	0	0	4

CR-25, in evidence.

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[8] We note that while CR-25, in evidence, indicates that only one Asian student from Englewood Cliffs attended THS in 1984-85, it is evident from a full analysis of the exhibit that that figure was in error and that, in fact, there were 4 Asians from Englewood Cliffs in attendence that year.

The 891 students attending THS in 1987-88 included only 5 (0.6%) blacks and 8 (0.9%) Hispanics. The remaining 98.5% were white (80.7%) and Asian (17.8%). At DMHS, however, the proportion of blacks had grown to 66.2% and Hispanics to 17.8%.

CHART III
COMPOSITION OF STUDENT POPULATIONS BY RACE AND NATIONAL ORIGIN

	Englewood Cliffs K-8 1987-88	Englewood DMHS 1982-83	Englewood DMHS 1987-88	Tenafly THS 1987-88
White	247 (50.8%)	355 (31.5%)	94 (11.8%)	719 (80.7%)
Black	7 (1.5%)	626 (55.5%)	529 (66.2%)	5 (0.6%)
Hispanic	27 (5.5%)	116 (10.3%)	142 (17.8%)	8 (0.9%)
Asian	205 (42.2%)	31 (2.7%)	31 (3.9%)	159 (17.8%)
Other	0	0	3	0
	486	1,128	799	891

P-166; P-264; R-231; CR-114, in evidence.

While Englewood is a heterogeneous community, Englewood Cliffs and Tenafly, as reflected in their student populations, are overwhelmingly white with growing Asian populations:[9]

CHART IV
COMPOSITION OF COMMUNITIES BY RACE AND NATIONAL ORIGIN
1980 Census

	Englewood Cliffs Gen. Pop.	Englewood Cliffs School Age Pop.	Englewood Gen. Pop.	Englewood School Age Pop.	Tenafly Gen. Pop.	Tenafly School Age Pop.
White	85.0%	84%	44.6%	37%	91.3%	88%
Black	0.8%	Less Than 1%	40.6%	48%	0.6%	Less Than 1%
Hispanic	3.9%	4%	8.8%	11%	3.0%	4%
Asian	9.3%	12%	2.8%	3%	4.5%	7%
	Pop.:	5,698	Pop.:	23,701	Pop.:	13,552

Initial decision, at 7-8; P/CR-1, in evidence.

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[9] We note that although grouped with whites in the proceedings below, Asians are not considered a racial grouping for purposes of desegregation, but rather are considered a distinct national origin group. NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF EQUAL EDUCATIONAL OPPORTUNITY, GUIDELINES FOR THE DESEGREGATION OF PUBLIC SCHOOLS IN NEW JERSEY (1989). Moreover, there is no question that individuals of Asian descent are not considered members of the white majority for purposes of establishing violation of the equal protection guarantee of the United States Constitution. E.g., Korematsu v. United States, 323 U.S. 214 (1944); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

It is in the context of the racial/national origin groupings represented in the three communities and their student populations as delineated above, as well as in the context of the shift in the balance among these groupings at Dwight Morrow High School, that we must consider the three central claims in this case.

B.

The threshold question in this case is whether the State Board of Education should direct termination of the sending-receiving relationship between Englewood and Englewood Cliffs so as to permit Englewood Cliffs to establish a sending-receiving relationship with Tenafly. That question must be resolved under N.J.S.A. 18A:38-13, which provides that, in acting upon applications for a change of designation of a high school or withdrawal from a sending-receiving relationship, the Commissioner:

> shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected 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.

As set forth above, both the ALJ and the Commissioner determined that a change in designation could not be permitted in this case. This determination was based on the finding that termination of the relationship between Englewood and Englewood Cliffs would have a substantial negative impact on the racial composition of the student population at Dwight Morrow and, related thereto, a substantial negative impact on the quality of education provided by that school.

We agree with the ALJ and Commissioner that Englewood Cliffs should not be permitted to terminate its relationship with Englewood. However, although we have arrived at the same conclusion, we have approached this matter from a different perspective.

Initially, we emphasize that the student populations of the districts involved here are comprised not only of two racial groupings, black and white, but include two national origin groupings as well -- Hispanic and Asian.[10] Had Englewood Cliffs been permitted to change its designated receiving district in 1987-88, the 21 Englewood Cliffs students who had been attending Dwight Morrow would instead have been assigned to attend Tenafly High School. As previously noted, of those 21 students, 15 were white, 4 were Asian and 2 were Hispanic. Departure of these students would have altered the composition of the student population of Dwight Morrow from 11.8% (94/799) white, 66.2%

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10 See supra note 9.

(529/799) black, 17.8% (142/799) Hispanic, and 3.9% (31/799) Asian to 10.2% (79/778) white, 68% (529/778) black, 18% (140/778) Hispanic, and 3.5% (27/778) Asian.

Statistically, while representing a loss of 16% of the white student body, the effect of this loss on the student population of Dwight Morrow would have been to decrease the proportion of white students by 1.6%.

Viewed in isolation at that particular point in time, this change might not in itself constitute a substantial negative impact on the racial composition of the student population attending Dwight Morrow. Nor, as set forth in the decisions below, would the loss of the 21 Englewood Cliffs students have affected the structure or substance of the educational program provided by Dwight Morrow.

Thus, were the circumstances of this case so limited, we might have reached a conclusion different than the Commissioner's. However, N.J.S.A. 18A:38-13 requires that any determination with respect to a requested change in designation must be based upon consideration of "all the circumstances" (emphasis added), and, consequently, the language of the statute precludes us from taking such a narrow view.

As reflected by the claims of the parties, the circumstances here are unique in that by 1987-88, the majority of Englewood Cliffs high school age students attending public school were not attending Dwight Morrow, their designated receiving school, but rather were attending Tenafly High School on a tuition basis. Given that circumstance and the legal import of the sending-receiving relationship between Englewood and Englewood Cliffs, we conclude that assessment of the impact of termination must include consideration of the effect of Tenafly's acceptance of tuition students from Englewood Cliffs on the composition of Dwight Morrow's student population. To do otherwise would avoid assessment of the true impact of the change sought by Englewood Cliffs and would give legal sanction to the de facto change in designation that has occurred in this case.

While the impact of the formal change alone might not be considered significant at this point, the impact of the change that has actually occurred cannot be judged insignificant. Had Englewood Cliffs sought the formal change it now seeks in 1982-83, at which point only 11 of its students were attending THS, termination of its relationship with Englewood would have involved the withdrawal from Dwight Morrow of 119 students, rather than the 21 attending Dwight Morrow in 1987-88. A change in designation under those circumstances would have directly resulted in a decrease in the proportion of whites in the student population by approximately 6.5%,[11] as contrasted with the 1.6% decrease that, based upon

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[11] We note that, inasmuch as the record does not indicate the specific racial breakdown of Englewood Cliffs students attending DMHS in 1982-83, we have applied the 1980 census figures for the school age population of Englewood Cliffs in calculating the approximate decrease in the proportion of white students at DMHS had the Cliffs Board been granted a change in designation in 1982-83.

conservative assessment, would have directly resulted from termination in 1987-88.

There is no question that we would have found the impact of withdrawal in 1982-83 to be substantial and, absent a compelling reason for permitting withdrawal,[12] would have denied the Cliffs Board's petition at that point. We will not now allow our vision to be so limited as to permit Englewood Cliffs, whose conduct can at best be seen as acquiescence to the departure of a significant portion of its students from its designated receiver, to now claim on the basis of that departure that a formal change in designation would have no significant impact.[13]

In this respect, we emphasize that, as described by the ALJ, not only is the School District of the City of Englewood fully certified by the State as providing a thorough and efficient education, but DMHS is in fact providing a good solid education which more than adequately prepares its students for college and later life. Given, as established below, the quality of the education provided by DMHS, we find that any educational benefits of permitting the change sought here are far outweighed by the negative educational implications of allowing it.

As set forth above, in the landmark case of Brown, supra, the U.S. Supreme Court settled that state action in establishing and

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12 See supra note 1.

13 We reject Englewood Cliffs's assertion that our analysis rests on "some alternate state of facts that may have existed at an earlier time." Exceptions on behalf of Cliffs Board, at 4. To the contrary, the fact that a substantial number of its students were attending Tenafly High School is a significant circumstance which existed at the time of the application and which did not alter prior to the time that the Commissioner rendered his decision. Furthermore, contrary to Englewood Cliffs' contentions, it is not the policy of the State Board of Education to ignore circumstances which have contributed materially to a given situation. In this respect we note that In the Matter of the Application of the Board of Education of the Borough of Milltown to Terminate its Sending-Receiving Relationship with the Board of Education of the City of New Brunswick, 1976 S.L.D. 854, appeal dismissed by the Appellate Division, December 6, 1976 (previous history omitted), cited by Englewood Cliffs in its exceptions to our Legal Committee's Report, does not support its proposition. Central to that matter was the ineffectiveness of measures which had been directed in an earlier decision concerning the sending-receiving relationship between the parties. Board of Education of the City of New Brunswick v. Board of Education of the Township of North Brunswick and Board of Education of the Borough of Milltown, 1974 S.L.D. 962, aff'd by the State Board, 1975 S.L.D. 1110. After that decision was rendered, the circumstances altered and the parties agreed to severance. Consequently, the hearing examiner's report and the State Board's decision adopting that report focused on the circumstances in the relationship of the communities as they had altered since the time of the earlier decision.

maintaining a system of racially segregated public schools through official state policy violated the United States Constitution. In reaching its decision, the Court rejected the proposition that a public school system could provide equal educational opportunity where children were segregated by law solely on the basis of race. Finding that education is perhaps the most important function entrusted to state and local governments, the Court predicated its holding on its recognition that even if the education provided by segregated schools was the same in all other respects, segregated schools generated feelings of inferiority in the minority children forced to attend them. The Court concluded that segregated schools were, therefore, inherently unequal.

Again, Booker and Jenkins firmly established that our State's constitution and policies derived thereunder prohibit with equal vigor de facto segregation. Furthermore, those cases settled that, whether or not the federal Constitution compelled action to eliminate or reduce de facto segregation, it did not preclude such action by State school authorities in furtherance of State law and State educational policies.

By its decisions, the New Jersey Supreme Court recognized that sound educational policy embraces the fundamental educational principles upon which the Brown decision rests. As expressed by the New Jersey Supreme Court:

> In a society such as ours, it is not enough that the 3 R's are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by.

Jenkins, supra, at 499, quoting Booker, supra, at 170-71.

Thus, the Court recognized that de facto segregation has an undesirable effect upon attitudes related to successful learning and denies equal educational opportunity to minority students. E.g., Booker, supra, at 178. Further, as reflected in our State's

constitution, these principles apply not only to racial segregation, but to segregation based on religion, color, ancestory and national origin as well. New Jersey Constitution, Article I, para. 5. Thus, where policies, practices or conditions exist such that students within a district are separated on the basis of religion, race, color, ancestory or national origin, the New Jersey Department of Education requires that the district act affirmatively to correct the situation. N.J.A.C. 6:4-1 et seq.; N.J.A.C. 6:8-4.3(9). See, e.g., In the Matter of the Board of Education of the Township of Hillside, decided by the Commissioner, June 10, 1980, aff'd by the State Board, November 5, 1980, aff'd, Docket #1689-80-T4 (App. Div. 1982); Walker v. Board of Education of the City of Englewood, decided by the Commissioner, May 19, 1955.

We recognize that there is no fixed balance between racial and national origin groupings that, from an educational perspective, can be considered ideal for all communities. Booker, supra, at 178-80. However, were we to sanction termination of the sending-receiving relationship between Englewood and Englewood Cliffs, we would be condoning a concentration of blacks and Hispanics that is sharply out of balance with the composition of the society in which those students must function. See Booker, supra. Further, the concentration of minority students would be at such level as to allow Dwight Morrow to be characterized as a minority school with the attendant "sense of stigma and resulting feeling of inferiority" cited by the Court in Booker and upon which the Brown decision rests.

Thus, as a matter of educational policy, we could not condone the level of concentration of minority students attending Dwight Morrow by sanctioning the change in designation sought here. In this respect, we emphasize that:

> Educational considerations are primary in eliminating school segregation. The elimination of racial imbalance is not to be sought as an end in itself but because such imbalance stands as a deterrent and handicap to the improvement of education for all.

New Jersey State Board of Education, A Statement of Educational Policy, November 5, 1969.

Such educational considerations do not include the beliefs and social values of the individuals attending a particular school. Rather, as set forth above, resolution of the legal and policy questions with which we have been presented rests on fundamental educational principles applicable in all educational settings as those principles have been expressed in the decisions of the United States and New Jersey Supreme Courts. Therefore, in resolving these questions, we have neither relied upon nor considered the proofs developed from interviews with students attending DMHS and THS concerning their beliefs and social values, which were submitted into evidence to show that "symbolic loss" would occur in this case. Cf. In the Matter of the Board of Education of the Township of Hillside, supra, Commissioner's decision, at 22, State Board's decision, at 28a-29a, Appellate

Division's decision, at 2-3. In this respect, we specifically find that whatever evidentiary value Dr. Fine's "report" might have does not justify intruding upon the privacy of students by interviewing them for purposes of this litigation concerning their beliefs and feelings on matters of race relations. See Board of Education of the Borough of Merchantville v. Board of Education of the Borough of Pennsauken v. Board of Education of the Board of Haddonfield, Decision on Motion by the State Board of Education, October 6, 1989 (John T. Klagholz, dissenting).

In sum, given the balance between racial and national origin groupings that would exist were we to permit termination of the sending-receiving relationship between Englewood and Englewood Cliffs and the negative educational implications thereof, we deny Englewood Cliffs' petition. Such a limited ruling, however, would do nothing to correct the imbalance that has developed at Dwight Morrow over the last five years. We believe that we would be denying both our authority and responsibility for proper implementation of our State's educational policies were we to sanction this imbalance by failing to take such steps as are necessary to correct it.

We recognize that neither the State Board of Education nor the Commissioner has an obligation to act affirmatively by consolidation of districts or otherwise to alter the composition of the pupil population of a given district solely because of a fortuitous concentration of minority students in that district. In this instance, however, Englewood Cliffs has brought the question before us, and, hence, it is our responsibility to resolve it. Cf. Booker, supra, at 178.

The record herein is clear that a significant number of high school age students from Englewood Cliffs were not attending Dwight Morrow, their designated high school, when the Commissioner rendered his decision in this matter, yet had remained in the public school system. It is equally clear that a significant portion of these students were attending Tenafly High School as tuition students and that the number of such students has increased steadily since Tenafly initiated the program. This increase has been mirrored in the continual decline in the number of Englewood Cliffs students attending Dwight Morrow.

It is impossible to ignore the fact that the overwhelming majority of those Englewood Cliffs students were white, and that their numbers were significant enough to account for the shift in the balance between the various racial and ethnic groupings that occurred at DMHS during the six year period following the initiation of Tenafly's tuition program. We also recognize that, although not as significant as the number of white students from Englewood Cliffs who attended THS during the period relevant to this litigation, a smaller number of white students from Englewood also withdrew from the Englewood school community during this period while remaining in the public school system by attending THS as tuition students.

In short, the record shows clearly the trend toward withdrawal from the Englewood school community by members of the white majority from both Englewood and Englewood Cliffs during the

relevant period. As a result, the proportion of Dwight Morrow's student population that was black or Hispanic rose from 65.8% in 1982-83 to 84% by 1987-88. Under these circumstances, we cannot give State sanction to the continued admittance of increasingly large numbers of white students from Englewood and Englewood Cliffs by a neighboring district to its public high school where that school's pupil population is already 80.7% white and but 1.5% black or Hispanic.

Given the circumstances with which we have been presented, we have the responsibility to exercise fully our jurisdictional authority with respect to the public school system so as to remedy this situation. We conclude that the first step in achieving the kind of balance which would effectuate our State's policy is for the State Board of Education to direct such measures as will ensure that high school age students from Englewood and Englewood Cliffs will attend Dwight Morrow, their assigned school, if they attend public school. We therefore conclude that it is necessary to limit the discretion of other public school districts, including Tenafly, to accept high school students who are residents of Englewood or Englewood Cliffs on a tuition basis or otherwise.

In arriving at this conclusion, we reject the view that our authority to direct such relief under the circumstances presented here is limited by the discretion afforded local districts by N.J.S.A. 18A:38-3 or by the right of parents to seek admission to school districts other than their districts of residence pursuant to that statute.

N.J.S.A. 18A:38-3 provides that:

> Any person not resident in a school district, if eligible for residence, may be admitted to the schools of the district with the consent of the board of education upon such terms, and with or without payment of tuition, as the board may prescribe.

Although enacted to ensure that the children of migrant laborers and other children temporarily residing in New Jersey would be entitled to an education while in our state, Statement accompanying S. 216, L. 1947, c. 138, the statute does not preclude a district board from adopting admission policies aimed at alleviating declining enrollment, as did Tenafly, or from admitting nonresident students under such policies.

However, the discretion afforded by N.J.S.A. 18A:38-3 does not create an absolute right for district boards to admit non-resident students on a tuition basis or otherwise. Nor can we identify any other source in law which would confer such right where admittance of students by a given district pursuant to the statute has contributed significantly to deterioration in the balance among racial and national origin groupings represented in the pupil population of another district.

> As the State Board of Education has long recognized: N.J.S.A. 18A:38-3 imposes no mandatory course of action on any local board. It allows discre-

> tionary action by such a board in certain situations if a board is so inclined to act. We see no conflict between the principles of Booker and Jenkins as here involved and the provisions of the cited statute and even if there were, the educational goal and objectives underlying Booker and Jenkins would have to be given primacy.

Shore Regional, supra, at 229.

We repeat that, as established by Booker and Jenkins, our State's policy against discrimination and segregation in the public schools is of such vigor and import as to match its policy in favor of a thorough and efficient education. Accordingly, where a question involving the exercise of discretion by a district board is brought before this agency, the Commissioner and the State Board of Education have both the power and responsibility to limit the exercise of that discretion, and, where reasonable and feasible, to direct such remedy as necessary to effectuate our State's policy. Jenkins, supra, at 505; Booker, supra, at 178.

Furthermore, there is no question that the Commissioner and the State Board have the responsibility to counter trends towards withdrawal from the school community by members of the white majority. Booker, supra, at 180. Consequently, we must have the accompanying power to limit the exercise of discretion by district boards to the extent necessary to counter such withdrawal.

> As expressed by the Commissioner:
> Public high schools in this State are created primarily for the purpose of serving the resident pupil population and those students from bona fide sending districts approved by the Commissioner and the State Board of Education. Certainly, the intent of N.J.S.A. 18A:38-3, supra, is not to provide an avenue permitting individual parents or local boards of education to circumvent the law requiring the integration of the public schools.

Shore Regional, supra, at 227.

We recognize that, as established below, Tenafly did not act with discriminatory intent in adopting its tuition policy or in admitting nonresident students under that policy. We find nothing, however, under State or federal law that would limit the exercise of authority by this agency to situations where a district board has acted with discriminatory intent. Cf. Booker, supra, at 170; Shore Regional, supra, at 229. To the contrary, we believe that both the Commissioner and the State Board have an affirmative obligation to take such steps as are necessary to correct an imbalance brought before us where, as here, our failure to act would make us a passive participant to the perpetuation of that imbalance. Cf. Richmond v. Croson, 488 U.S. ____, 109 S. Ct. 706, 102 L. Ed. 854 (1989).

Similarly, N.J.S.A. 18A:38-3 does not confer on parents the right to select from among the public school districts other than their district of residence the one in which their children will

attend school. Nor do the United States or New Jersey Constitutions guarantee such a right. While the equal protection guarantees of the United States and New Jersey Constitutions guarantee equal educational opportunity, and while our State Constitution guarantees a thorough and efficient education, there is no constitutionally protected right to attend the public school of one's choice. Again, we emphasize that, as the State Board recognized in Shore Regional, where there is a conflict between the provisions of N.J.S.A. 18A:38-3 and the constitutionally-derived policy expressed in Booker and Jenkins, the State's policy must be given primacy.

As previously stated, we find that in order to properly effectuate our State's policy in this instance, we must limit the discretion of all district boards, including Tenafly, to admit to their public high schools any students resident of Englewood or Englewood Cliffs. This measure would counter the withdrawal of white high school students from those districts by eliminating the option that while withdrawing from their designated school, students could remain within the public school system.[14]

However, we do not believe that the trend toward withdrawal from the Englewood public school community by the white majority can be reversed by this directive alone. As has long been recognized, such trends can be effectively countered only if parents, students and citizens come to understand the democratic and educational benefits of maintaining heterogeneous student populations. Such understanding, however, does not develop in a vacuum. Rather, school districts must play a leadership role in promoting a positive view of the benefits of such an educational environment so that all members of the school community may work cooperatively toward that objective.

In this instance, given the legal relationship between Englewood and Englewood Cliffs, the Cliffs Board had the obligation to fulfill that leadership role and to encourage its students to attend their designated receiving school, rather than facilitating their withdrawal from the Englewood school community. Its failure to act consistently with its legal relationship with Englewood exacerbated the trend toward withdrawal that developed.

We find it incumbent upon the Cliffs Board to effectuate its sending-receiving relationship with Englewood by taking all steps necessary and feasible to reverse that trend. We therefore direct that the Cliffs Board develop a plan detailing a course of action for preparing its students for entry to Dwight Morrow and for encouraging such attendance. Such course of action shall be aimed at maximizing the proportion of its student body enrolling at Dwight Morrow by minimizing the anxieties of students and parents related thereto so that they may fully realize and appreciate the

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[14] While no other public school district has sought to participate in this matter, we recognize that some students from Englewood and Englewood Cliffs may be attending public high school in districts other than Tenafly.

educational benefits of doing so. We direct the Cliffs Board to develop such a plan cooperatively with the Englewood Board and, as directed by the order appended to this decision, to submit its plan to the Commissioner upon adoption for his review and approval.

We recognize that, as described in the ALJ's initial decision, the Englewood Board has already implemented reforms aimed at both improving the education provided at Dwight Morrow and building greater support for that school in the community. Such efforts must not only continue, but must intensify if the trend that has developed here is to be reversed. Furthermore, the Englewood Board must work in close cooperation with the Cliffs Board both with respect to issues related to Dwight Morrow's future direction and in ensuring that the school's educational goals and mission are clearly and positively presented to Englewood Cliffs students and parents.

C.

Although presented to us as a sending-receiving case, this matter has raised questions of fundamental State policy and this agency's responsibilities thereunder. It has been twenty years since our State Supreme Court has had the occasion to confront such questions in the context of public education. Furthermore, as previously discussed, articulation of our State's constitutionally-derived policy has occurred almost exclusively in a single district setting. While much progress has been made in effectuating our State's policy in that particular setting, that policy has not found judicial, legislative or administrative expression in a multi-district context. By our decision, we would provide that expression.

As set forth above, we have concluded that we have both the responsibility and the authority to direct such measures as are necessary to correct the situation that has been brought before us. Such measures, of course, must be reasonable, feasible and workable. Jenkins, supra.

By precluding high school students from Englewood and Englewood Cliffs from withdrawing from their assigned high school while remaining within the public school system, we would forestall further deterioration in the balance among racial and national origin groupings represented in the public school population assigned to Dwight Morrow. By directing the Cliffs Board to fulfill its leadership responsibilities arising from both its legal relationship with Englewood and our State's educational policies, we would create the context necessary to reverse the trend that has developed in this case.

These directives flow from our recognition that we cannot stand idly by while another urban/suburban split with the attendant educational implications indicated herein is perpetuated. We also recognize that, ultimately, additional measures may be necessary to correct this situation. However, we cannot and should not direct measures that are more intrusive than necessary to effectuate our State's policy.

Therefore, while we must fulfill our responsibility to assess the sufficiency of the relief afforded by virtue of our decision, we must consider with equal care whether it is necessary to direct additional remedial measures at this time.

We have carefully reviewed the Commissioner's determination rejecting the Englewood Board's motion for compulsory regionalization or, towards that end, a regionalization study. While we concur that it is neither necessary nor advisable for this agency to actively pursue compulsory regionalization at this point, we do so for reasons different than those expressed by the Commissioner.

We firmly reject the view taken by the Commissioner that regionalization may be directed only in cases where the districts involved constitute, as in Jenkins, a "single community." While this circumstance was pivotal to the Court's holding in that case and eliminated the necessity of pursuing the issue of merger in its "broader aspects," Jenkins, supra, at 505, the Court acknowledged that the community involved was "probably a unique one in our State." Id. at 485. To read Jenkins as requiring that the districts involved constitute a single community before this agency has the power to direct a cross-district remedy such as regionalization is to be overly restrictive, and would be tantamount to a disavowal of our power.

We do not doubt the breadth of our powers under the State Constitution and implementing legislation. See Jenkins, supra, at 494. Nor do we question our responsibility to effectuate our State's policy against segregation with the same vigor as we implement its policy in favor of a thorough and efficient education. Id. at 495.

We would not hesitate to exercise our powers fully and to cross district lines, by directing regionalization or otherwise, where it has been demonstrated that such a remedy was necessary to vindicate our State's policy against segregation, and where to do so was "reasonable, feasible and workable." Id. at 505. We conclude, however, that the circumstances as they have been presented to us do not call for such a remedy, at least not at this juncture.[15]

As set forth above, we have directed that certain measures be taken both to ensure that all high school students from Englewood and Englewood Cliffs will attend their assigned school if they attend public school and to maximize the proportion of students choosing to attend public school rather than parochial or private school. In this respect, we recognize that the balance among the racial and national origin groups at Dwight Morrow has been affected to some degree by the number of students who have chosen to attend parochial or private schools upon entering high school, or, as claimed by the Cliffs Board, in the lower grades. However, we do not possess the authority to compel students to attend public school

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15 We note that our conclusion that it is not necessary for this agency to pursue compulsory regionalization at this time in no way infringes upon the ability of the districts involved in this litigation to pursue voluntary regionalization pursuant to N.J.S.A. 18A:13-1 et seq.

rather than private or parochial school. Pierce v. Society of Sisters, 268 U.S. 510 (1924).

Moreover, although an increase in the number of those high school students choosing to attend public school undoubtedly would have a positive effect on the composition of the pupil population at Dwight Morrow, there is nothing in the record to indicate that the proportion of the high school age population of Englewood attending private or parochial school increased during the period relevant to this litigation. Moreover, the proportion of public school students from Englewood Cliffs who have chosen to continue their education in the public school system upon completion of eighth grade has remained steady during the period relevant to this litigation. In short, as previously discussed, it is the fact that high school age students from Englewood Cliffs and Englewood withdrew from Dwight Morrow while remaining in the public school system by attending Tenafly High School that accounts for the deterioration in the balance between racial and national origin groupings at Dwight Morrow since 1982-83.

Consequently, we have focused the exercise of our authority toward ensuring that high school age students from Englewood and Englewood Cliffs will attend their designated school if they remain in the public school system. We recognize that it is impossible to predict with certainty the degree to which these measures will succeed in reversing the trend that has developed here. However, we can assess whether the remedy that would be afforded by virtue of our decision will be sufficient if successfully implemented.

Had a return of Englewood and Englewood Cliffs students attending Tenafly High School been successfully effectuated in 1987-88, the pupil population of Dwight Morrow would have been comprised of approximately 16% white, 62% black, 16% Hispanic and 6% Asian. R-4a, in evidence. While not equally balanced, such a student population is both multi-racial and multi-cultural. Given that there is no fixed balance between racial and national origin groupings that can be considered ideal for all communities, such balance, if achieved, might well afford all students who attend Dwight Morrow the educational advantages of a heterogeneous student population. See Booker, supra, at 178-80. In that it has not been shown that more intrusive measures than those we have directed are necessary at this juncture in order to vindicate our State's constutionally derived policy, we conclude that it would be premature for this agency to pursue compulsory regionalization at this point.

However, notwithstanding this conclusion, we recognize that it is our responsibility to ensure that the situation is in fact corrected. We therefore direct, as specified in the order appended hereto, that the Commissioner monitor the composition of the pupil population at Dwight Morrow so as to assess the effectiveness of the measures we have directed and to formally report to us on a yearly basis for the next five years as to the progress being made.

In this respect, we have concluded that it is essential that our directives apply uniformly to all high school students from Englewood and Englewood Cliffs so that our objective in directing the measures herein may be achieved. Accordingly, we have rejected the Intervenor's arguments that, as the ALJ recommended, all students from Englewood and Englewood Cliffs enrolled in the school

district of Tenafly at the time of the initial decision, regardless of grade level, should be permitted to attend Tenafly High School. Although we recognize that our decision may require some students in the lower grade levels who are enrolled in the Tenafly district to alter their plans with respect to their high school education, such impact is not significant enough to warrant undermining our decision by exempting all such students from its terms.

We find that the eighth grade cut-off established by the Commissioner drew the line at the point where the measures we have directed will be most effective while having the least educational impact on the students affected by the preclusion. By exempting students attending Tenafly High School at the time of the initial decision, an exemption to which Englewood consented, the Commissioner prevented disruption in the high school education of those students. Exemption of students enrolled in and attending eighth grade in the Tenafly district at the time of the initial decision was appropriate in that those students would otherwise have been forced to make alternative arrangements for their high school education in less than two months, given that the Commissioner did not render his decision until July 11, 1988.

In that we have limited the discretion of other public school districts to accept high school students who are residents of Englewood or Englewood Cliffs on a tuition basis or otherwise, we exempt from our decision, for the same reasons, those students from Englewood and Englewood Cliffs who are enrolled in and attending public high schools in districts other than Tenafly on the date of this decision, and allow them to continue on to graduation at their current high school.

Such considerations, however, are not present in Intervenor's case. As a seventh grader at the time of the ALJ's initial decision, she had more than a year after the Commissioner's decision to make plans for her high school education.

Finally, we reserve judgment on Tenafly's appeal of the Commissioner's decision of September 6, 1989, in which he determined that, by virtue of his substantive decision, Tenafly was foreclosed from admitting to Tenafly High School, pursuant to its employment practices, a child of an Englewood resident employed by the school district of Tenafly. In that resolution of the questions involved in that appeal relate solely to a limited class of students and is controlled by this decision, we now direct that a briefing schedule be established so as to permit us to consider Tenafly's appeal.

Regan Kenyon opposed.
S. David Brandt opposed on the grounds that the administrative order is too limited.

Attorney exceptions are noted.[16]
April 4, 1990

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16 We note that following issuance of our Legal Committee's Report, the Tenafly Board declined to participate further in this appeal and therefore did not file exceptions to our Legal Committee's Report.

Pending N.J. Superior Court

JOSEPH GROSSO,	:	
PETITIONER-APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,	:	STATE BOARD OF EDUCATION
	:	DECISION
RESPONDENT-RESPONDENT,	:	
V.	:	
MARGARET LESLIE, ET AL.,	:	
INTERVENORS-RESPONDENTS.	:	
	:	

Decided by the Commissioner of Education, May 22, 1989

For the Petitioner-Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Respondent, Pachman & Glickman (Martin R. Pachman, Esq., of Counsel)

For the Intervenors-Respondents, Bucceri & Pincus (Gregory T. Syrek, Esq., of Counsel)

In April 1988, Joseph Grosso (hereinafter "Petitioner"), a tenured teaching staff member, was serving as a high school business teacher when his position was abolished by the Board of Education of the Borough of New Providence (hereinafter "Board") pursuant to a reduction in force ("RIF"). Petitioner, who possessed an elementary endorsement on his instructional certificate, thereafter alleged, inter alia, violation of his tenure rights when the Board appointed non-tenured individuals as elementary teachers for the 1988-89 school year.[1] Petitioner's experience at the elementary level consisted of teaching computer science (keyboard training) for two periods per day to 12 third-grade students at a time during the three years prior to the RIF. He had taught business education at the high school level since 1985-86, having previously served as a business supervisor, a business department head and a business education coordinator.[2]

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[1] We note that the only claim before us on this appeal involves Petitioner's tenure rights to an elementary teaching assignment.

[2] We note that there is no dispute that Petitioner served in a teaching position for the requisite period of time pursuant to N.J.S.A. 18A:28-6 for the acquisition of tenure.

Petitioner alleged that by virtue of his tenure status, he was entitled to any teaching assignment covered by the endorsements on his instructional certificate as against non-tenured individuals. The Board argued that the position in which tenure was achieved was defined by the certification under which a teaching staff member actually served for the requisite time pursuant to N.J.S.A. 18A:28-5. It was the Board's contention that Petitioner had never served as an elementary teacher, and therefore he had no tenure rights to such an assignment. The Intervenors were non-tenured individuals employed as elementary teachers by the Board for 1988-89.

On April 5, 1989, an Administrative Law Judge ("ALJ") agreed that Petitioner was entitled to an elementary teaching assignment. Citing Capodilupo v. West Orange Township Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. denied, 109 N.J. 514 (1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. denied, 110 N.J. 512 (1988), the ALJ stressed that "the Appellate Division has left no doubt that tenured persons qualified for a position by certification, whether they have served in the precise category or not, must prevail over nontenured persons for appointment to that position." Initial Decision, at 11. The ALJ concluded:

> Petitioner acquired tenure as a teacher pursuant to N.J.S.A. [18A:28-6.] Having acquired tenure as a teacher, he could be reassigned within the scope of his instructional certificate to any assignment covered by the endorsements on his instructional certificate. When his position as "teacher" was abolished, he became entitled to any teaching assignment covered by the endorsements on his certificate to which respondent Board had assigned nontenured teachers. Notwithstanding that the respondent Board believes it had educational reasons for not appointing petitioner to one of the elementary school positions, lack of service as an elementary school teacher cannot thwart petitioner's tenured rights over nontenured individuals.

Id. at 12.

Accordingly, the ALJ recommended that Petitioner be assigned as an elementary teacher and be awarded back pay and other benefits.

On May 22, 1989, the Commissioner, asserting that Capodilupo and Bednar supported his conclusion that "one obtains tenure within an endorsement on [an] instructional certificate and, thus, that the scope of tenure is determined by the endorsement under which one has served," Commissioner's decision, at 22, rejected the initial decision and found that Petitioner had no tenure claim to any elementary position in the district, notwithstanding his elementary education certification. Finding that Petitioner's service teaching computer keyboard to third

graders was under his business certification and that he had therefore never served under his elementary endorsement, the Commissioner stated that to conclude that a tenured teacher was entitled as against non-tenured individuals to any teaching assignment covered by any endorsement held, without considering whether that individual had served under the endorsement applicable to the assignment, was "tantamount to abrogating the seniority regulations altogether." Id. at 23. Accordingly, the Commissioner dismissed the petition.

Petitioner has filed the instant appeal from the Commissioner's decision, arguing that his assignment to teach computer keyboard was under his elementary endorsement and he, therefore, had acquired tenure and seniority rights as an elementary teacher;[3] and that even if he had not served under his elementary endorsement, under Capodilupo and Bednar, his tenure protection extended to all endorsements on his instructional certificate, not just those under which he had actually served.

After a thorough review of the record, we find that Petitioner's tenure rights were violated when the Board abolished his teaching position and appointed non-tenured individuals as elementary teachers. We, therefore, reverse the Commissioner.

Given the statutory scheme, we have no choice but to conclude that tenure is achieved in and tenure protection attaches to all endorsements upon a teacher's instructional certificate, not just those under which the individual has actually served for the requisite period of time pursuant to N.J.S.A. 18A:28-5 or 18A:28-6. Tenure attaches to a position, and "teacher" is a separately tenurable position under N.J.S.A. 18A:28-5. See Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner, 1982 S.L.D. 1328, aff'd by the State Board of Education, 1983 S.L.D. 1554. Petitioner was authorized to serve under all the endorsements on his instructional certificate, including his elementary education endorsement. N.J.A.C. 6:11-6.1 et seq. We stress that, as correctly pointed out by the ALJ, Petitioner could have been transferred by the Board to any other assignment within the scope of his endorsements within that tenurable position. Thus, he could properly have been transferred without his consent to an elementary teaching assignment, even if he had never previously served under his elementary education endorsement. See Howley, supra.

We find no basis in Capodilupo or Bednar for concluding that tenure is obtained "within an endorsement on an instructional certificate." To the contrary, we find that those Appellate Division decisions are clear expressions of Petitioner's assertion that the scope of his tenure protection extends to all endorsements on his instructional certificate. The scope of the position in which a teacher may be entitled to tenure protection is merely

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[3] We note that the Petitioner, in his petition of appeal in this matter, alleged only violation of his tenure rights and not of his seniority rights in the Board's failure to assign him as an elementary teacher.

limited by the scope of his or her endorsements. This limitation is predicated on the fact that the assignments that a staff member is qualified to fill are similarly limited. Capodilupo, supra.

In affirming the State Board's decision upholding tenure rights in Capodilupo, the Appellate Division reiterated the State Board's reasoning that the petitioner therein had tenure "in all positions for which his instructional certificate qualified him," Capodilupo, supra, at 514, including elementary physical education, the assignment claimed, even though he did not have seniority in that category and in which, as the Court noted, he had acquired no demonstrable experience. The Court was satisfied that "the State Board was within its delegated authority when it ruled that a tenured teacher seeking reinstatement within the endorsements on his or her certificate is entitled to preference in a RIF as against a non-tenured applicant with the same certification." Id. at 515. And in Bednar, the Court emphasized that "Chapter 28 surely does not contemplate use of the concept of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher." Bednar, supra, at 242, citing Capodilupo, supra.

Thus, we agree with the ALJ that Petitioner achieved tenure as a "teacher" by virtue of his service teaching business education for the requisite period of time under N.J.S.A. 18A:28-6, and that the scope of his tenure protection extends to all of the endorsements on his instructional certificate. Since Petitioner was authorized and qualified to serve as an elementary teacher by virtue of his elementary education certification, N.J.A.C. 6:11-6.2(a)(6), we conclude that he had entitlement as a result of his tenure status to employment as an elementary teacher as against non-tenured individuals, regardless of whether he had previously served under that endorsement. See Bednar, supra; Capodilupo, supra.

Such a result does not abrogate the seniority regulations. As noted in Bednar, supra, at 243, "N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative." The instant matter, however, like Bednar, involves the effectuation of tenure rights as against non-tenured individuals. Seniority is not determinative, nor are seniority rights at issue, and, in any event, "the rights conferred by the tenure statute may not be dissolved by implementing regulations." Id.

As for the Board's "educationally based reasons" argument, "in light of the Appellate Division decision in Bednar, supra, [we] reject the continuing viability of such a standard in assessing the rights of tenured individuals in a RIF." Mirandi v. Board of Education of the Township of West Orange, decided by the State Board of Education, April 5, 1989, slip op. at 9.

We therefore conclude that Petitioner's tenure rights were violated when the Board abolished his teaching position pursuant to N.J.S.A. 18A:28-10 and employed non-tenured individuals as elementary teachers, which assignments were within the scope of the

endorsements on Petitioner's instructional certificate.[4] Accordingly, we reverse the Commissioner and direct that Petitioner be assigned to a position as an elementary school teacher in the district and be awarded back pay and emoluments from the beginning of the 1988-89 school year, less mitigation.

In light of our determination and since Petitioner did not allege violation of his seniority rights in the Board's failure to assign him as an elementary teacher,[5] we need not determine the endorsement under which Petitioner served in teaching computer keyboard to third graders.

Attorney exceptions are noted.
March 7, 1990

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[4] As indicated by our decision, we decline, as requested by Intervenors in their exceptions, to address generally, in the absence of specific facts and allegations, tenure rights to assignments not before us.

[5] See supra n.3.

DIANE HANSEN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MAYWOOD SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, July 19, 1989

For the Petitioner-Appellant, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Gladstone & Hart
(Gregory C. Hart, Esq., of Counsel)

Diane Hansen (hereinafter "Petitioner") was first employed by the Board of Education of the Maywood School District (hereinafter "Board") in September 1982 as a switchboard operator. In 1986-87, the central switchboard was removed and Petitioner's responsibilities consisted, to a large extent, of secretarial and clerical duties. In 1987-88, the position of switchboard operator was abolished and Petitioner was assigned as secretary to the principal. As a result, her annual salary increased from $5,918.12 to $10,000. In April 1988, Petitioner was advised that her secretarial position was being eliminated in 1988-89 pursuant to a reduction in force ("RIF"). Petitioner thereafter alleged that she was tenured as a secretary and that the Board had violated her tenure rights by retaining a non-tenured individual as a confidential secretary.

On June 1, 1989, an Administrative Law Judge ("ALJ") dismissed her petition, concluding that under Given v. Bd. of Ed. of Windsor Regional School District, decided by the Commissioner, 1978 S.L.D. 43, aff'd by the State Board of Education, 1978 S.L.D. 46, aff'd by the Appellate Division, 1979 S.L.D. 832, Petitioner had not served as a secretary for the required probationary period in conformity with N.J.S.A. 18A:17-2(b) in order to have achieved tenure in that position. While giving Petitioner credit as a secretary for 1986-87 as a result of her actual duties that year, the ALJ rejected Petitioner's claim that she should also, based upon her duties, be given credit towards tenure as a secretary for 1982-83 through 1985-86. The ALJ found, based upon Petitioner's own testimony, that no more than one-quarter of her time during those years was spent on duties other than operating the switchboard. The ALJ thus determined that Petitioner was tenured only as a switchboard operator and not as a secretary, and that she therefore had no tenure entitlement to the confidential secretary assignment.

On July 19, 1989, the Commissioner adopted the initial decision with clarification. The Commissioner, observing that N.J.S.A. 18A:17-2 created no separate tenure categories between secretaries and clerks and made no mention of switchboard operators, determined that Petitioner, by virtue of her service in the district since 1982 "in some combination of capacities covered by N.J.S.A. 18A:17-2," was a "tenured employee." Commissioner's decision, at 17. However, the Commissioner concluded that the confidential secretary position was a hierarchically higher position than her previous secretarial assignment and therefore required a probationary period of service. Accordingly, the Commissioner dismissed her petition. In so doing, the Commissioner also noted that Petitioner could lay claim to any equal in rank or lesser secretarial/clerical position which may have existed in the district at the time of her termination, by virtue of her tenure under N.J.S.A. 18A:17-2.

The Petitioner filed the instant appeal from the Commissioner's decision, alleging that the confidential secretary position was not of a higher rank than her former secretarial position and, alternatively, that the Commissioner's decision was not clear on her entitlement by virtue of her tenure status to other assignments in the district. The Board countered that Petitioner had failed to acquire tenure in a secretarial position, or, in the alternative, that she had no entitlement to the "higher position of confidential secretary." The Petitioner challenged the Board's right to argue that she was not tenured as a secretarial/clerical employee, contending that since the Board had not cross-appealed that determination by the Commissioner, it was not properly before the State Board.

After a thorough review of the record, we agree with the Commissioner that Petitioner had no entitlement to the confidential secretary position. However, since we find that the Commissioner erred in his analysis, we affirm for the reasons expressed herein.

We stress initially that the State Board is the ultimate administrative decision maker for controversies arising under the school laws. It may review issues of law as well as make its own independent findings of fact. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 452 (App. Div. 1982). Moreover, "[t]he State Board's primary responsibility in its role as final arbiter in school law controversies is to assure that its decision is supported by a preponderance of the credible evidence and is consistent with public policy and the pertinent principles of law." Matter of Tenure Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989). Thus, in order to reach a proper determination of the instant appeal consistent with pertinent principles of law, we find it necessary to correct the analysis underlying the Commissioner's decision of the tenure status conferred on clerical and secretarial employees by N.J.S.A. 18A:17-2.

Petitioner herein was reassigned in 1987-88 from her position as a switchboard operator to a secretarial position with new duties and a substantial increase in pay. Under the statutory scheme, however, the mere fact that she served in both capacities in the district does not provide her with tenure protection in the

secretarial position absent a finding that her service therein complied with the probationary period required by N.J.S.A. 18A:17-2. See Given, supra.

In Given, a tenured clerk was appointed to a secretarial position with an increase in salary. She held that position from August 27, 1974 until June 8, 1976 when she was reassigned to a clerical position. The State Board and Appellate Division affirmed the Commissioner's determination that that reassignment was proper in that, while the petitioner was tenured in a clerical position, upon promotion to the secretarial position she was required to satisfy the precise conditions of N.J.S.A. 18A:17-2(b) in order to achieve a tenure status in that new position.

Thus, although Petitioner in the instant matter achieved tenure pursuant to N.J.S.A. 18A:17-2 by virtue of her service as a switchboard operator, her subsequent secretarial assignment constituted a promotion for which an additional probationary period was required prior to acquisition of tenure therein. Accordingly, we reject the Commissioner's determination that, pursuant to N.J.S.A. 18A:17-2, the scope of Petitioner's tenure extended to include her secretarial assignment by virtue of having served "in some combination of capacities" covered by that statute since 1982.[1]

Although Petitioner argues that she had been functioning in a capacity which was secretarial in nature from the commencement of her service as a switchboard operator in 1982-83, after reviewing the record herein, we agree with the ALJ that the only academic year in which Petitioner served as "switchboard operator" but should be given credit towards tenure as a secretary based upon actual duties performed was 1986-87 when the central switchboard was removed. Thus, inasmuch as we find that Petitioner served in a secretarial capacity for only two academic years, we conclude that she did not serve for the requisite period under N.J.S.A. 18A:17-2 and Given for the acquisition of tenure therein.

Consequently, since Petitioner did not acquire tenure in a secretarial position, she has no entitlement by virtue of tenure to the controverted confidential secretary assignment. In light of our determination that Petitioner did not acquire tenure in a secretarial position, we need not consider whether the confidential secretary assignment would constitute a promotion requiring a further probationary period. Moreover, in view of our decision and considering the fact that the Commissioner's statement regarding Petitioner's entitlement by virtue of her tenure status to other assignments in the district was purely dictum since Petitioner is not asserting a claim to any other assignments at this time, we

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[1] We note that the Commissioner did not disturb the ALJ's finding that Petitioner had served in a secretarial capacity for only two academic years, and the Commissioner's determination was not based upon a finding that Petitioner's actual duties had, in fact, been secretarial in nature for the requisite probationary period under N.J.S.A. 18A:17-2.

decline to address generally, in the absence of a specific assignment claimed, her future rights to reemployment.

We, therefore, affirm, for the reasons expressed herein, the Commissioner's ultimate determination that Petitioner has no entitlement to the confidential secretary position. The Board's motion to supplement its answer brief is denied as not necessary to a fair determination of this matter.

Attorney exceptions are noted.
March 7, 1990

ROBERT HERBERT,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	
	:	

Decided by the Commissioner of Education, July 25, 1989

For the Petitioner-Respondent, Zazzali, Zazzali, Fagella & Nowak (Kenneth I. Nowak, Esq., of Counsel)

For the Respondent-Appellant, Kalac, Newman & Lavendar (Howard M. Newman, Esq., of Counsel)

Robert Herbert (hereinafter "Petitioner"), a tenured teaching staff member, alleged that the Board of Education of the Township of Middletown (hereinafter "Board") violated his tenure and seniority rights by appointing a non-tenured individual to the position of supervisor of special services in August 1988. Petitioner possessed an instructional certificate, along with an administrative and supervisory certificate with endorsements as principal and supervisor. He served as a supervisor in the district from July 1970 through June 1981, except for the 1978-79 school year when he served as a teacher. In 1982, following a reduction in force, he was employed once again as a teacher, and in 1985 he served as a supervisor for one additional year. He was then placed on a preferred eligibility list for supervisor positions pursuant to N.J.S.A. 18A:28-12. The individual subsequently employed as supervisor of special services possessed certification as a supervisor but had no tenure as such.

On June 12, 1989, an Administrative Law Judge ("ALJ") determined, based upon Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987), Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988) and Mirandi v. West Orange Bd. of Ed., decided by the State Board of Education, April 7, 1989, that the Board had violated Petitioner's tenure rights as a supervisor by employing a non-tenured individual in a position within the scope of Petitioner's supervisory certification. On July 25, 1989, the Commissioner adopted the ALJ's findings and conclusions, directed Petitioner's reinstatement to the position of supervisor of special services retroactive to August 1, 1988, and awarded him all back pay and other emoluments due and owing.

The Board has filed the instant appeal from the Commissioner's decision, alleging that notwithstanding the current status of the law, there was a sound educational basis for its appointment since the area of special education is unique and requires particular expertise and training; that the Board had fashioned a separate category, supervisor of special services, in its job description; and that the controverted assignment was not a traditional supervisor's position in that only 20% of the work was spent on supervising special education teachers.

After a thorough review of the record, we affirm the decision of the Commissioner, but modify the analysis as follows.

It is now well established that a tenured teaching staff member whose position is abolished in a reduction in force has entitlement by virtue of tenure to an assignment within the scope of his or her certification as against non-tenured individuals. Bednar, supra; Capodilupo, supra. Notwithstanding the fact that Bednar and Capodilupo involved teachers rather than supervisors, the holdings therein with respect to the tenure rights of individuals dismissed as the result of reductions in force cannot be limited to teachers. See Schienholz v. Board of Education of the Township of Ewing, decided by the State Board of Education, February 7, 1990, slip op. at 7, appeal pending (App. Div.). Moreover, in light of the Appellate Division decision in Bednar, we have rejected the continuing viability of the "educationally based reasons" standard in assessing the rights of tenured individuals in a RIF. Mirandi, supra, slip op. at 9.

Tenure should be liberally construed to further its beneficial purpose of affording job security to teaching staff members who meet its designated time of service. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). While the Board maintains that this is a unique situation, under the statutory scheme, we have no choice but to conclude that Petitioner was tenured in the position of supervisor and, accordingly, had entitlement as against a non-tenured individual by virtue of tenure to any assignment within the scope of his certification.

We reject the Board's contention that Petitioner should not be permitted to serve in this assignment since he is not qualified to teach in the special education field. The Board does not allege that the duties and responsibilities of the controverted assignment are such that an instructional certification in special education is required by law therefor.[1] Rather, the Board maintains that this

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[1] We note that there is no indication in the record whether this position title was submitted to the county superintendent of schools for approval and determination of the appropriate certification as required by N.J.A.C. 6:11-3.6.

is a unique position requiring expertise in the special education field.[2]

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 assignment, the desire to employ or retain individuals with such additional qualifications cannot defeat the tenure and seniority rights conferred by statute on teaching staff members. See South River Education Association, supra. To hold otherwise would vitiate legislatively-created rights by permitting the creation of positions distinct for tenure and seniority purposes based on distinctions in subject area beyond those made by the certification regulations. See id.

Here, Petitioner, by virtue of his possession of an administrative and supervisory certificate with endorsement as a supervisor, was authorized and qualified by the regulations promulgated by the State Board for assignment in any supervisory capacity within the purview of his certifications. See N.J.A.C. 6:11-10.4. Those regulations do not authorize a separate endorsement for qualification as a supervisor in the special education field or in any other specific area of supervision. Moreover, the regulations, while requiring candidates for a supervisor endorsement to possess a standard teaching certificate and have three years of successful teaching experience, do not require such certification and experience to be in any specific subject area. N.J.A.C. 6:11-10.9.

Nor does our review of the record, including the job description, provide any indication that the duties attending the controverted assignment were of such character as to require possession of an instructional certification in special education in addition to certification as a supervisor. All enumerated responsibilities, with the exception of the catchall "other duties as assigned by the Director of Pupil Personnel Services and by the Superintendent of Schools," involve assisting the director of pupil personnel "in the development of policy, practices and procedures"

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[2] We note that the job description adopted by the Board does not require education in special education or a minimum of three years experience in that field, as the Board claims. Rather, it calls for a "minimum of three years of successful professional experience, preferably in the field of Special Education" and a "Master's Degree, preferably in the field of Special Education." R-1, in evidence. (Emphasis added.) We note further, in response to the Board's exceptions, that, for the reasons expressed in our decision, even if the Board had included such a requirement in its job description, it would not alter the result herein so as to defeat Petitioner's statutory tenure rights. See South River Education Association v. Board of Education of the Borough of South River, decided by the State Board of Education, November 4, 1987, aff'd, Docket #A-1695-87T8 (App. Div. 1990).

pertaining to classified and other students.[3] Such functions are clearly administrative in nature, rather than instructional, and within the broad responsibilities of a supervisor, "who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel." N.J.A.C. 6:11-10.4. Moreover, the Board, in developing the job description, did not deem it necessary to require possession of an instructional certification in special education.[4]

As for the Board's argument that it had fashioned a separate seniority category for this assignment, we stress that it is Petitioner's tenure rights as a supervisor, and not his seniority rights, which we find to have been violated.

Thus, inasmuch as we find that Petitioner is tenured as a supervisor and possesses the appropriate certification qualifying him for assignment as supervisor of special services, we concur with the Commissioner that he had entitlement as against non-tenured individuals to that assignment.

We therefore affirm the ultimate determination of the Commissioner reinstating Petitioner to the position of supervisor of special services retroactive to August 1, 1988, with back pay and other emoluments.

Attorney exceptions are noted.
August 1, 1990

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[3] Contrary to the Board's assertion in its appeal brief, we note that the ALJ in this matter did not make any findings with regard to the percentage of the incumbent's duties spent in supervision of special education teachers. The ALJ was merely restating the Board's argument in this regard.

[4] We note that the job description requires only "Supervisory or Administrative Certification."

Pending N.J. Superior Court

ROBERT HERMANN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUNTERDON CENTRAL REGIONAL SCHOOL DISTRICT, HUNTERDON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, December 26, 1989

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, James P. Granello, Esq.

Upon our review of the record in this matter we fully agree that, as found by the Administrative Law Judge and the Commissioner, Petitioner did not file his Petition of Appeal to the Commissioner within the 90 day time limitation established by N.J.A.C. 6:24-1.2(b). In that we also concur that Petitioner failed to show any basis warranting relaxation of the rule, we affirm the decision of the Commissioner dismissing the Petition of Appeal.

May 2, 1990

EDWARD J. LOWICKI AND BRUCE THOMAS, ET AL.,	:	
PETITIONERS-CROSS/APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, March 16, 1981

Decided by the State Board of Education, May 5, 1982

Decision on motion by the Commissioner of Education, March 13, 1986

Partial Decision by the Commissioner of Education, September 16, 1986

Partial Decision by the Commissioner of Education, June 6, 1988

Decision on motion by the Commissioner of Education, August 11, 1988

Decision on motion by the State Board of Education, October 5, 1988

For the Respondent-Appellant, Murray, Murray & Corrigan (Robert E. Murray, Esq., of Counsel)

For the Petitioners-Cross/Appellants, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Jeffrey Barton Cahn, Esq., of Counsel)

For the Petitioner-Respondent, Feintuch & Porwich, (Philip A. Feintuch, Esq., of Counsel)

These consolidated cases, filed in 1979, arose from the Commissioner's decision in Yanowitz, et al. v. Board of Education of the City of Jersey City, decided by the Commissioner, 1973 S.L.D. 57, appeal dismissed by the State Board of Education, 1973 S.L.D. 79, in which six teachers employed by the Board of Education of the City of Jersey City ("Board") claimed that they had been improperly paid for prior years of service as a result of improper placement upon the Board's salary guide. Together with the Jersey City Education Association ("JCEA"), an unincorporated teachers organization, they requested proper placement, back pay lost each year by virtue of the Board's improper action, and similar relief for all similarly-situated teachers in the district.

The Commissioner in Yanowitz found that the Board's policy of employing certified teachers to perform full-time teaching duties while designating them as "teachers-in-training" or "contract teachers" for several years before "appointing" them violated the petitioners' rights and deprived them of their appropriate place on the salary guide. He ordered the Board to pay "each of the petitioners herein" the difference between each actual annual salary received and the amount that each would have received by virtue of receiving proper credit for each year of full-time teaching experience in the district, less any amounts received for prior years of experience with the district.[1]

On May 1, 1979, Petitioners Lowicki and Thomas filed a petition on behalf of themselves and all other Jersey City teachers similarly situated to enforce their rights under the Yanowitz decision and for other related relief. On July 2, 1979, a petition was filed by the JCEA seeking relief similar to that sought by the Lowicki-Thomas petition, except for punitive damages, costs, and reasonable attorney fees. In January 1980, those petitions were consolidated by an Administrative Law Judge ("ALJ"), who designated the case as a "class action."

In an initial decision dated January 26, 1981, the ALJ enumerated four criteria agreed to by the parties for recovery by Jersey City teachers of the benefits awarded in Yanowitz: They served in a full-time continuous teaching capacity; were entitled to contribute to the Teachers' Pension and Annuity Fund ("TPAF");[2] were employed during a period while there existed in full force and effect any appropriate teaching certificate; and were discriminated against in terms of pay advancement until their "regular appointment."

The ALJ found that the nature of the proceedings as to the JCEA teaching member Petitioners was one of enforcement since the JCEA was a named petitioner in Yanowitz. As to those Petitioners, the ALJ found no merit or relevance to the Board's defenses of laches, waiver and statute of limitations.

As to those Petitioners herein who were not members of the JCEA at the time the Yanowitz litigation was commenced, the ALJ concluded that this was not an enforcement proceeding, but an action seeking proper placement on the salary guide. He noted that the Commissioner in Yanowitz did not mention this group in his order or certify the JCEA as being eligible to bring the action on behalf of other persons similarly situated. The ALJ found that despite the fact that these individuals had not participated in Yanowitz, they

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1 We note that the relief directed by the Commissioner in Yanowitz made no reference to similarly-situated teachers.

2 We note, as set forth by the ALJ in the initial decision, that some question had existed concerning whether Yanowitz required actual contribution to the TPAF as an immutable condition precedent to relief thereunder since each of the individual petitioners in that case started contributing when their initial employment began. As pointed out by the ALJ, the Commissioner had not been confronted with the issue of non-contribution in Yanowitz.

met the enumerated criteria for recovery. He concluded that laches and waiver were also inapplicable to those Petitioners, but that the Board's statute of limitations defense was applicable to those Petitioners who were not members of the "New Jersey Education Association" ("NJEA") when the Yanowitz litigation was commenced and who, pursuant to N.J.S.A. 2A:14-1, had failed to institute an action within six years next after the cause of action had accrued.

The ALJ recommended that the Board immediately comply in all respects with the Commissioner's orders in Yanowitz applicable to all Petitioners herein not barred by the statute of limitations, and that all Petitioners in the instant action who were members of the NJEA at the time that Yanowitz commenced were entitled to the benefits ordered by the Commissioner in that decision. Determination of Petitioners' claims for interest, fees and costs was deferred.

On March 16, 1981, the Commissioner adopted the initial decision, adding that he found no significance to the ALJ's use of "NJEA" interchangeably with "JCEA." That decision was affirmed by the State Board on May 5, 1982, and an appeal to the Appellate Division was dismissed.

Over the next few years, a complex effort was undertaken by the parties to identify "class" members and determine their entitlement status, if any. As set forth in more detail by the ALJ in his partial initial decision in this matter: A Second Order of Enforcement was signed in March 1983, in which an accounting firm was appointed to serve as independent auditor; a Third Order of Enforcement in October 1984 noted that the independent auditor was continuing to work with the parties and their representatives to identify individuals entitled to benefits and the amounts due, resolve outstanding issues pertaining to the methodology of computation and determine whether portions of payments due were affected by Social Security or Teachers' Pension and Annuity Fund obligations; in 1986, the Commissioner determined that 40 to 50 "pool substitutes" could not be considered "regular teachers" so as to be eligible for enrollment in the TPAF and, therefore, were not eligible to share in the recovery; various other matters were the subject of conferences, motions and/or applications to the court; and orders were entered directing the Board to make payments into a previously established trust fund of amounts anticipated to be necessary for distribution to eligible claimants.

In 1987, applications were made by the Petitioners' counsel and the independent auditor for an allowance of fees from the trust fund. The ALJ granted the applications without opposition, resulting in the distribution of approximately $205,000.

On February 17, 1988, the ALJ signed a Consent Final Judgment and Payment Order as to Enforcement Stage in which judgment by consent was entered on the claims for back salary in favor of the eligible members of the claimant "class" and against the Board in the amount of $1,056,866.90. Sufficient funds were available in the trust fund, and that portion of the Petitioner's claim was deemed satisfied in full. The ALJ adopted the corrected consent list of claimants, which included over 500 names and the amount of damages to each of the approximately 175 individual claimants determined to be entitled to recovery.

On April 5, 1988, the ALJ entered a partial initial decision on Petitioners' remaining claims for interest, costs, counsel fees and regarding the status of several school nurses who, it was alleged during the course of these proceedings, might be entitled to recovery as members of the petitioning "class."

Initially, the ALJ rejected the Board's challenge, raised for the first time in its reply brief of March 23, 1988, to the class action designation of this matter, noting the background and unique circumstances of the case, including the Board's failure to raise an earlier challenge to the class action format.

The ALJ also concluded that an award of post-judgment interest was proper. Citing Bd. of Educ., City of Newark, Essex Cty. v. Levitt, 197 N.J. Super. 239 (App. Div. 1984) and N.J.A.C. 6:24-1.18, which expressly authorize the Commissioner to award post-judgment interest, the ALJ concluded that there had been an adjudication of liability on March 16, 1981 when the Commissioner adopted the ALJ's initial decision of January 26, 1981. The ALJ noted that although the exact amount due to each claimant could not be ascertained until recently, that fact did not provide a basis for interfering with the commencement of the running of interest from 1981, given the particular circumstances. The critical fact, the ALJ asserted, was that "the rightful owners of the funds did not have access to them through no fault of their own." Initial decision, at 10. Accordingly, he recommended the award of post-judgment interest from the 60th day following the Commissioner's March 16, 1981 decision.

The ALJ recommended denial of Petitioners' claim for pre-judgment interest, concluding that "the degree of the Board's conduct does not reach the level which can comfortably be described as 'bad faith' in the context of the interest issue." Id. at 12. The ALJ also recommended denial of the Petitioners' claim for counsel fees and litigation costs, citing the consistent practice of denying such items. Accordingly, he concluded that the award to Petitioners be reduced, pro rata, by the previously ordered disbursement against the trust fund.

The ALJ concluded, in addition, that the statute of limitations did not bar participation in the "class" by the school nurses if otherwise eligible. Noting that recognition of their claim arose when reference was made to the existence of N.J.S.A. 18A:29-4.2, effective July 1, 1972, which requires school nurses to be paid according to the provisions of the teachers' salary guide, the ALJ agreed with the Petitioners that there was no statute of limitations issue since the instant action was commenced during the 1978-79 school year and the benchmark for determining commencement of the statute would be September 1978 when school opened.

On June 6, 1988, the Commissioner adopted the partial initial decision with modification. The Commissioner rejected the ALJ's recommendation to permit the belated inclusion of the school nurses. Citing the State Board's decision of May 5, 1982 in this matter, in which the State Board concluded that the statute of limitations barred those claims which matured more than six years before a petition had been or would be filed on behalf of a petitioner, either individually or in a proper class action, the Commissioner concluded that the class of participants recognized as of May 5, 1982 could not now be expanded.

The Commissioner also cautioned that while he agreed with the ALJ's denial of counsel fees and costs, the prior disbursement of such fees by the ALJ should not have been effectuated without the Commissioner's approval.

The Board filed an appeal from the Commissioner's decision, alleging that the facts and exigencies of this case do not warrant an award of post-judgment interest. The Board asserts that the amount due was unliquidated and required extraordinary, time-consuming measures before it could be determined, stressing that no fault had been assessed against it by the Commissioner as wrongfully causing any delay in the computations.

The Petitioners filed a cross-appeal, arguing that post-judgment interest should be awarded from the time of the Yanowitz decision in 1973 and that the Commissioner erred in denying their request for fees and costs and in excluding the school nurses. They also filed a motion to dismiss the Board's appeal, alleging the Board's reliance upon knowing and intentional material misstatements of fact.

On October 5, 1989, we granted the Board's motion for a stay of the Commissioner's decision pending our determination on the merits of those appeals.

After a thorough review of the record, we deny the Petitioners' motion to dismiss, reverse the Commissioner's decision to award post-judgment interest and affirm on all other points of appeal before us substantially for the reasons expressed by the Commissioner.

Initially, we deny Petitioners' motion to dismiss, finding that the alleged misstatements do not warrant dismissal of the Board's appeal.

Turning to the cross-appeals, we conclude that Petitioners have no legal entitlement to post-judgment interest. In awarding post-judgment interest, the Commissioner adopted the ALJ's recommendation that although the precise amount of the claims could not be ascertained until recently, that fact, under the circumstances, did not interfere with the award of post-judgment interest from 1981. While acknowledging that "the logistics involved in attempting to identify the precise claimants, the amount of their claims and the appropriate deductions, was inherently complex," Commissioner's partial decision, at 22, the Commissioner reiterated the ALJ's conclusion that "the critical fact is that the rightful owners of the funds did not have access to them through no fault of their own." Id. at 23.

An award of post-judgment interest, however, is appropriate only following an adjudication of responsibility for payment and establishment of the precise amount of the claim. Levitt, supra; N.J.A.C. 6:24-1.18(c)(2). In Levitt, supra, at 239, the Court concluded that N.J.S.A. 18A:16-9 vested jurisdiction in the Commissioner to award post-judgment interest as incidental to his power to fix money judgments. The Court was also of the view that "post-judgment interest cannot start to run until the precise amount of money damages is fixed." Id. at 248. In 1986, the State

Board codified Levitt in N.J.A.C. 6:24-1.18, which expressly authorizes the Commissioner to award post-judgment interest. N.J.A.C. 6:24-1.18(c)(2) provides:

> Post-judgment interest shall be awarded when a respondent has been determined through adjudication to be responsible for such payment, the precise amount of such claim has been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy the claim within 60 days of its award. (Emphasis added.)

In the instant matter, neither the identity of the eligible "class" claimants nor the precise amount of the claims were fully established until entry of the final consent judgment in February 1988, when the parties reached full accord regarding the individual claimants entitled to recovery and the proper amounts. That judgment, which included a final audited consent list of over 500 potential beneficiaries, awarded a total of $1,056,866.90 to approximately 175 of those individuals determined to be entitled to recovery.

The fact that the eligible claimants herein may not have been at fault in not having access to the funds following the Commissioner's decision in 1981 does not provide them with the legal entitlement to an award of post-judgment interest. Again, Levitt and N.J.A.C. 6:24-1.18 require both an adjudication of responsibility for payment and establishment of the precise amount of the claim.

The adjudication of the Board's responsibility towards the instant "class," none of whom were named petitioners in Yanowitz and some of whom were not even members of the JCEA, a named petitioner in Yanowitz, did not occur until the Commissioner's March 1981 decision herein. Notwithstanding that adjudication of responsibility against the Board, there is no dispute that the process of identifying eligible claimants and calculating hundreds of claims was complex and time-consuming.[3] Petitioners do not allege nor did the Commissioner find that such complete identification and the precise amounts due the adjudicated "class" could have been established within 60 days of the Commissioner's decision of March 16, 1981 or at any time thereafter prior to entry of the final consent judgment. See, e.g., German v. Board of Education of the Cape May County Vocational-Technical Center, decided by the State Board of Education, October 4, 1989. To the contrary, the Commissioner acknowledged the inherently complex nature of the logistics involved in attempting to identify the precise claimants, the amount of their claims and the appropriate deductions. The ALJ, in his partial initial decision adopted by the

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[3] We note that as late as 1986, the Commissioner filed a partial decision on the entitlement of certain individuals -- "pool substitutes" -- to recovery as part of the "class" herein.

Commissioner, found that "various delays in enforcing the final decision were occasioned by the efforts being made accurately and comprehensively to identify class members and their exact entitlement status, if any. This state of affairs was due, in large part, to the complicated nature of the case and the large number of potential beneficiaries." Partial initial decision, at 3.

Nor do we find any merit to Petitioners' claim for post-judgment interest running from 1973 when Yanowitz was decided. Yanowitz, we stress, involved but six individual petitioners who, together with the JCEA, requested relief for themselves and similarly-situated teachers. The Commissioner's order for relief in that case referred only to "each of the petitioners herein." No mention was made of similarly-situated teachers "presumably because such group was never before [the Commissioner] as a party subject to examination and scrutinization." Initial Decision, at 10. "Nor did the Yanowitz decision certify the JCEA as being eligible to bring the action on behalf of the other persons similarly situated." Id. at 15-16.

The scope of the "class" entitled to claim the benefits awarded in Yanowitz was not initially adjudicated and determined until the Commissioner's 1981 decision in the instant action, which delineated the criteria for eligibility to those benefits. As noted, none of the claimants herein was a named petitioner in Yanowitz. Moreover, that 1981 decision included within that eligible "class" teachers who were not members of the JCEA, a petitioner in Yanowitz. Thus, a determination of the scope of the "class" entitled to recovery by virtue of Yanowitz, which included teachers who were neither parties nor participants in that case, and adjudication of the Board's responsibility for payment to that "class" did not occur until the Commissioner's decision herein in 1981.

We therefore conclude that under the facts of this case, Petitioners have no legal entitlement to an award of post-judgment interest.

Petitioners contend that if they are not entitled to post-judgment interest from 1973, then they should be awarded pre-judgment interest for the period between the Yanowitz decision in 1973 and the Commissioner's 1981 decision in the instant matter.

N.J.A.C. 6:24-1.18 authorizes the Commissioner to award pre-judgment interest "for that period of time prior to the adjudication of the monetary claim" when the Commissioner concludes "that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule."

As noted, the scope of the instant "class" entitled to recovery by virtue of Yanowitz was not initially determined until 1981, and was determined to include teachers who were not parties or participants in that case. Given the complicated nature of this matter and the number of potential eligible claimants, identification of eligible claimants and calculation of the amounts of their entitlements were not completed until 1988. Under the

circumstances, we agree with the Commissioner that the Board cannot be determined to have acted in such a manner so as to entitle the "class" herein to an award of pre-judgment interest.

We also concur with the Commissioner that the award to Petitioners should be reduced, pro rata, by the previously ordered assessment of counsel fees and costs against the trust fund. There is no authority under the education laws for the award of counsel fees or costs in such instances, and such requests have consistently been denied. See Gibson v. Board of Education of the City of Newark, decided by the State Board of Education, May 6, 1986, slip op. at 29-30, aff'd, Dockets #A-5209-83T6 and A-3111-84T5 (App. Div. 1986). This result is not altered by Petitioners' attempt to characterize these items as an element of "damages," rather than a request for reimbursement of counsel fees and other litigation costs.

We also agree with the Commissioner's decision to exclude the school nurses from participation in these proceedings. Petitioners respond to the Commissioner's determination by arguing that the school nurses do not represent an expansion of the "class" recognized by the State Board's May 5, 1982 decision but, rather, were already part of the "class" at that time by virtue of N.J.S.A. 18A:29-4.2, which provides that school nurses are to be paid according to the provisions of the teachers' salary guide. Petitioners contend that as of September 1, 1972, by virtue of the enactment of that statute, school nurses became "statutorily equivalent to teachers as members of the professional staff of the Board," brief in support of cross appeal/answering brief, at 42, and as such, "became entitled to protection from violation of the Yanowitz mandate in the same way as teachers who first suffered Yanowitz discrimination after September 1, 1972." Id.

We find this argument to be entirely without merit. The petitioners in Yanowitz, six teachers and a teachers organization, sought relief for themselves and for all "similarly-situated teachers." Yanowitz, supra, at 57. The Commissioner in Yanowitz was faced with and, thus, addressed only the Board's pattern and practice of referring to the petitioners therein as "teachers-in-training" and "contract teachers" for several years prior to "appointing" them, finding that that practice was meaningless, violated the education laws and deprived petitioners of their appropriate place on the salary guide based on full-time teaching experience.

School nurses, notwithstanding the requirements of N.J.S.A. 18A:29-4.2, are not teachers. They were neither parties nor participants in Yanowitz, their treatment and position were not litigated in Yanowitz, and the fact that the cited statute requires them to be paid in accordance with the salary guide used for teachers does not qualify them for recovery as part of the "class" of teachers similarly situated to those whose rights were adjudicated in that case. Thus, like the Commissioner, we conclude that the school nurses have no entitlement to recovery as part of the "class" herein.

Accordingly, we affirm the Commissioner on the points of appeal currently before us except that, inasmuch as we find that Petitioners have no legal entitlement to post-judgment interest, we deny their request therefor and reverse the Commissioner's decision awarding such interest.

Petitioners' request for oral argument is denied as not necessary for a fair determination of this case.

February 7, 1990

IN THE MATTER OF THE TENURE	:	
HEARING OF GREG W. MOLINARO,	:	STATE BOARD OF EDUCATION
SCHOOL DISTRICT OF PARSIPPANY-	:	DECISION
TROY HILLS, MORRIS COUNTY.	:	
	:	

Decided by the Commissioner of Education, June 26, 1989

For the Petitioner-Appellant, Dillon, Bitar & Luther
(Myles C. Morrison, III, Esq., of Counsel)

For the Respondent-Respondent, Balk, Oxfeld, Mandell & Cohen
(Nancy Iris Oxfeld, Esq., of Counsel)

On October 13, 1988, the Board of Education of the Township of Parsippany-Troy Hills (hereinafter "Board"), determining that probable cause existed to credit a written statement of evidence submitted by Ruth Krawitz, district superintendent, certified tenure charges against Greg W. Molinaro (hereinafter "Respondent"), a tenured teaching staff member for "conduct unbecoming a teacher...inasmuch as he has made and has admitted to making criminally obscene telephone calls."[1] In her sworn statement accompanying the charges, Krawitz averred that based upon information contained in a police report obtained by the Board counsel, it was clear that Respondent had confessed to a telephone call made on August 26, 1987 to one Jeannette Pisarchuk and that, in connection with that call, he had pled guilty to charges of having made a harassing call in violation of N.J.S.A. 2C:33-4. The sworn statement added that while that call in and of itself constituted conduct unbecoming a teaching staff member, "subsequent investigation" revealed that Respondent had made a number of other harassing telephone calls.

On April 26, 1989, Respondent filed a motion for partial summary decision, requesting that all tenure charges against him be dismissed except for that charge arising from his guilty plea to the one harassing telephone call to Mrs. Pisarchuk. It was Respondent's position that, in light of the Board's admission in answers to interrogatories that it had no knowledge of the precise contents of the calls in question, the Board was unable to produce any factual allegations to meet its burden of proving by a preponderance of

[1] We note that the statement of evidence supporting the tenure charges does not refer to the calls as "obscene." Rather, it relates that Respondent had "plead guilty to charges of having made an harassing telephone call" and, in addition, "had made a number of other harassing telephone calls."

credible evidence that Respondent had made any other harassing or obscene calls.

On May 5, 1989, an Administrative Law Judge ("ALJ") granted Respondent's motion and recommended dismissal of the tenure charges against Respondent except for that charge involving the call to Mrs. Pisarchuk. Stressing that district boards must strictly adhere to the requirements of providing sufficient factual basis for supporting a tenure charge, the ALJ found, in light of the Board's admission that it did not know the contents of the calls, that the tenure charge sought to be dismissed was initially defective because it was not supported by sufficient evidence for the Board to determine whether probable cause existed. The ALJ observed that Respondent had not initially challenged the deficiency of the tenure charge for this reason, but instead, provided the Board with opportunities to cure, which it had failed to do. The ALJ found the Board's failure to provide the underlying facts to the charge sufficient to require a grant of Respondent's motion for partial summary decision.

On the remaining charge, based upon Respondent's guilty plea to a violation of N.J.S.A. 2C:33-4, the ALJ concluded that the Board had met its burden of proof, notwithstanding his finding that the telephone call to Mrs. Pisarchuk had not been obscene. The ALJ determined that the appropriate penalty was Respondent's dismissal from his tenured position.

On June 26, 1989, the Commissioner adopted the ALJ's grant of Respondent's motion for partial summary decision, asserting that without knowledge as to the exact nature of the other alleged calls, the Board was without sufficient information to determine whether probable cause existed to certify a charge that Respondent had made obscene calls in addition to the harassing call made to Mrs. Pisarchuk. The Commissioner agreed with the ALJ's recitation of Manalapan-Englishtown Ed. Assn. v. Bd. of Ed., etc., 187 N.J. Super. 426, 432 (1981) for the proposition that the Board was required to provide Respondent with charges sufficiently specific to determine whether there was probable cause to credit the evidence in support of the charges and whether such charges if credited were sufficient to warrant a dismissal or reduction of salary.

The Commissioner also concurred with the ALJ's determination that the call to Mrs. Pisarchuk constituted conduct unbecoming a teaching staff member and that that call, while harassing, was not obscene. However, the Commissioner disagreed with the penalty imposed by the ALJ, noting that Respondent's single instance of misconduct marred an otherwise unblemished record, the call was not made to a school employee and thus in that regard was not disruptive of the educational environment, terroristic threats were not involved, and the offense was a disorderly persons offense for which Respondent admitted his guilt and complied fully with the terms of the sentence. Accordingly, the Commissioner directed that Respondent forfeit any increments for the 1989-90 school year plus three months salary, as well as the 120 days salary withheld at the time of suspension.

The Board has filed an appeal from the Commissioner's decision, arguing that Respondent's motion for partial summary decision was improperly granted inasmuch as the facts contained in the police report and obtained through an interview of the investigating officer constituted a sufficient basis upon which to find that probable cause existed to credit the evidence in support of the charges, that dismissal was the appropriate penalty under the circumstances, and that the Commissioner improperly rejected its cross-exceptions as untimely.

Respondent filed a cross-appeal, alleging that the penalty imposed by the Commissioner was excessive, and that in determining whether to certify the tenure charges, the Board considered not just the tenure charge and the sworn statement of the superintendent of schools, but also the police report and the investigating officer's interview, which information was not submitted to Respondent or filed with the Commissioner.

We note initially that although we find that the Commissioner properly rejected the Board's cross-exceptions as untimely,[2] we have considered those cross-exceptions, which are largely incorporated within the Board's appeal brief to the State Board and appended to its reply brief, in our review of this matter.

After a thorough review of the record, we affirm the Commissioner's ultimate determination in this matter. We concur with the penalty imposed, and although we agree that Respondent was entitled to a grant of his motion for partial summary judgment, we modify the Commissioner's analysis of that motion.

A district board has the burden of proving the truthfulness of tenure charges by a preponderance of the credible evidence. In his motion for partial summary judgment, Respondent argued that in light of the Board's admission that it had no information regarding the precise contents of the alleged harassing calls, the Board was unable to produce any factual allegations to meet its burden.[3] Our review of the record indicates that the Board, while alleging harassing calls in addition to the one to Mrs. Pisarchuk which led to Respondent's guilty plea, could not, at any time prior to the

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2 We note that the Board, as it acknowledges in its cross-exceptions, received the Respondent's exceptions on May 19, 1989. It did not, however, file a reply thereto and cross-exceptions until May 26, more than five days thereafter. See N.J.A.C. 1:1-18.4(d). Under that regulation, the Board's reply to the exceptions would also have been untimely.

3 We note that the Commissioner's decision in granting Respondent's motion was predicated upon his conclusion that, in making its determination to certify the tenure charges to the Commissioner, "the Board was without sufficient information to determine whether probable cause existed to certify a charge that respondent had made an obscene phone call(s) in addition to the harassing call made and admitted to by respondent..." Commissioner's decision, at 16.

date of the scheduled plenary hearing, provide the specific details of those calls or indicate in what manner they had been harassing. Respondent specifically requested such information in interrogatories directed to the Board and in a subsequent follow-up letter. The Board responded that it had no knowledge of the precise contents of those calls, but assured Respondent that such information would be provided if elicited prior to hearing. Plenary hearing in this matter was scheduled before the ALJ on May 1 and 2, 1989. On April 25, when no such information was provided, Respondent filed his motion for partial summary judgment.

Although the Board insists that its witnesses would have provided testimony regarding those calls at the hearing, it still failed, at all times prior thereto, to produce any factual allegations in support of that charge.[4] In fact, as noted, the Board previously conceded in response to Respondent's requests therefor that it did not have that information, and despite its assurances that it would provide such details to Respondent if elicited prior to hearing, the Board failed to do so.

Thus, even considering the Respondent's moving papers and pleadings in a light most favorable to the Board and resolving all doubts against Respondent, we conclude that there is no genuine issue of a material fact so as to warrant denial of Respondent's motion.

Moreover, while not initially addressed by Respondent in his motion, we find that the Board did not have probable cause to credit the evidence in support of that charge at the time it determined to certify these charges to the Commissioner. N.J.S.A. 18A:6-11. The statement of evidence supporting the tenure charges states only that "subsequent investigation" revealed that Respondent had made other harassing calls. It does not even mention the police report with regard to or as the basis for that charge, or otherwise provide any factual foundation for that charge or the "subsequent investigation."[5]

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[4] We note that oral argument on Respondent's motion for partial summary judgment was held on May 1, 1989, just prior to the scheduled plenary hearing in this matter. We note further, in response to the Board's exceptions, that both offered witnesses were known to the Board's counsel, as a result of the police report, at the time the Board certified these charges to the Commissioner in October 1988. Nonetheless, at all times prior to May 1, 1989, the date of the scheduled plenary hearing, the Board repeatedly failed to provide Respondent with the requested information on the contents of the other alleged calls, waiting until oral argument on the Respondent's motion for partial summary decision, just prior to plenary hearing, to attempt to present such witnesses. Contrary to its assertion, the Board had more than ample opportunity to produce factual allegations in support of that charge.

[5] We note that, in contrast, the sworn statement is clear that the tenure charge alleging the harassing call to Mrs. Pisarchuk, which formed the basis for Respondent's guilty plea, is "[b]ased upon the information contained in that [police] report."

We reject the Board's contention that the police report and an interview with the investigating police officer provided it with sufficient probable cause to credit the evidence in support of the charge. As noted, the statement of evidence supporting the charges failed to provide any factual basis for the Board's allegation of other harassing calls. Moreover, neither the police report nor the interview were included as exhibits to or otherwise incorporated within that statement of evidence. The sworn statement relates only that the Board's counsel had obtained a copy of the police report. The statement does not even mention an interview with the investigating officer. Nor were those items provided by the Board to the Commissioner with the certified charges.

We therefore conclude that the statement of evidence lacks sufficient supporting facts so as to support a finding of probable cause on the tenure charge alleging other harassing calls.

Under these circumstances, in which we have concluded that the Board did not have probable cause to certify the tenure charge alleging other harassing calls and was subsequently unable to provide the contents of the alleged calls at the time this matter was proceeding to plenary hearing, we conclude that the defect is of such nature as to warrant an affirmance of the Commissioner's decision to dismiss that charge. Cf. In the Matter of the Tenure Hearing of Charles Apkarian, Docket #A-927-86T8 (App. Div. 1987), certif. den., 111 N.J. 592 (1988). Thus, on the basis of the record and for the reasons expressed herein, we affirm the Commissioner's grant of Respondent's motion for partial summary judgment.

As to the remaining charge of unbecoming conduct based upon Respondent's guilty plea to a violation of N.J.S.A. 2C:33-4, after a thorough review of the record, we affirm the decision of the Commissioner substantially for the reasons expressed therein.

Attorney exceptions are noted.
June 6, 1990

JAMES PARKER AND JOSEPH PELLEGRINO,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE MATAWAN-ABERDEEN REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, August 31, 1989

For the Petitioners-Respondents, Oxfeld, Cohen, Blunda Friedman, Levine & Brooks (Mark J. Blunda, Esq., of Counsel)

For the Respondent-Appellant, DeMaio & DeMaio (Vincent C. DeMaio, Esq., of Counsel)

For the Participants, Klausner & Hunter (Stephen B. Hunter, Esq., of Counsel)

James Parker and Joseph Pellegrino (hereinafter "Petitioners"), tenured teaching staff members serving as teachers of physical education and health, challenged the action of the Board of Education of the Matawan-Aberdeen Regional School District (hereinafter "Board") in abolishing their positions as the result of a reduction in force ("RIF") in the spring of 1988 while retaining teachers with less seniority.

On July 17, 1989, an Administrative Law Judge ("ALJ") determined that Petitioners had failed in their proofs to establish that the Board had violated their tenure or seniority rights, finding that the Board had continued no one in employment with less seniority than Petitioners. Accordingly, he recommended dismissal of their petitions.

On August 31, 1989, the Commissioner modified the ALJ's recommended decision, concluding that the Board had indeed violated the seniority rights of Petitioner Pellegrino in the spring of 1988 when it dismissed him and assigned secondary health classes to a non-certified staff member and to a teacher with less seniority. The Commissioner rejected as immaterial the Board's argument that it had corrected the assignments in January 1989 so as to give the health classes to staff members with greater seniority than Petitioner Pellegrino,[1] asserting that such revisions did not

[1] We note that the Board asserts that the controverted health classes were not scheduled to be taught until January 1989.

alter the impropriety of the Board's action in the spring of 1988 at the time of the RIF. Accordingly, the Commissioner directed that Petitioner Pellegrino be compensated for the salary and emoluments that would have been owing to him had he actually taught the two health assignments.

The Board has appealed the Commissioner's determination awarding compensation to Petitioner Pellegrino for violation of his seniority rights. The Board argues that while it had initially erred in applying the seniority rules, it had subsequently corrected the error so that Petitioner Pellegrino suffered no harm from either the improper initial assignment, since it never was implemented, or from the corrected assignment, since no one with less seniority performed the job he sought.

After a thorough review of the record, we reverse the Commissioner on the points of appeal currently before us for the reasons expressed herein.

While the Commissioner was correct in assessing whether Petitioner Pellegrino's seniority rights had been violated on the basis of the relative seniority of the teachers involved here at the time of the RIF, see Kathi L. Savarese v. Board of Education of the Borough of Bernardsville, decided by the Commissioner, July 24, 1989, slip op. at 20-21, aff'd by the State Board of Education, January 3, 1990, we find that the Commissioner erred in affording relief to Petitioner on that basis. Petitioner Pellegrino, we emphasize, has the ultimate burden of demonstrating both that his seniority rights were violated and that he suffered harm so as to entitle him to redress as a result of that violation.

The Board, as noted, counters Petitioner Pellegrino's allegations by arguing that the improper initial assignments were subsequently revised so that the health classes were, in fact, taught by staff members with greater seniority than Petitioner Pellegrino. Documents indicating assignment revisions in January 1989 were introduced into evidence. While it is true that such revisions do not alter the impropriety of the Board's action at the time of the RIF, subsequent revision of the assignments which properly recognizes the tenure and seniority rights of the affected parties as they existed at the time of the initial action[2] is material to and does impact upon whether Petitioner is entitled to relief as a result of that initial action.

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[2] In this respect, we note that the instant case differs from the situation in Savarese, supra, in which the district board contended that the teacher improperly assigned to teach family life at the time of the RIF had acquired proper certification for the course prior to the effective date of the RIF. We affirmed the Commissioner's decision therein that the petitioner was entitled by virtue of her tenure status to be retained in that assignment since the teacher retained by the board did not possess proper certification at the time of the RIF, regardless of whether he subsequently acquired it prior to the effective date thereof.

We have carefully reviewed the record in this case, with particular attention to the evidence relating to the revised assignments, and find that it fails to support a conclusion that the controverted classes were in fact taught by teachers with less seniority than Petitioner Pellegrino.[3] Petitioner has had every opportunity to elicit proof or submit documentation in support of his claim, but has failed to do so, and, on the basis of the record before us, we find no basis for remanding this matter or granting the relief sought.[4]

Thus, in that Petitioner Pellegrino has failed to establish that he suffered any harm from the Board's initial action in the spring of 1988, we conclude that he has no entitlement to relief. We, therefore, reverse the Commissioner on the points of appeal before us and dismiss Petitioner Pellegrino's appeal.

We also correct an apparent typographical omission on page 19 of the Commissioner's decision. The final paragraph should indicate that Petitioner Parker's tenure and seniority rights were not violated.

Attorney exceptions are noted.
May 2, 1990

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[3] We note that while the Board continues to allege in its appeal brief before us that it corrected the assignments so that health classes in the district were actually taught at the secondary level in 1988-89 by teachers with greater seniority than Petitioner Pellegrino, Petitioner chose not to file an answering brief. By letter dated December 22, 1989, the parties hereto, through their counsel, were directed to submit stipulations of fact as to the individuals who actually taught physical education and health education at the secondary level in the district during the 1988-89 school year and the number of classes taught by each. In response thereto, counsel for the Board represented that he was unable to submit the requested information inasmuch as he had received no response from counsel for Petitioners to the proposed stipulation he had prepared, which included a schedule certified by the Assistant Superintendent in charge of Personnel. We note also that we received no response from Petitioners' counsel to the December 22 letter.

[4] We note, in response to Petitioner Pellegrino's exceptions citing the Board's April 4, 1989 post-hearing brief to the ALJ as evidence that Intervenor Nolte was improperly placed to teach health for the period from September 1988 until January 1989, that, by letter to the ALJ dated April 5, 1989, the Board's counsel corrected his "misstatement of fact" contained in that brief, stating that the Board's witness had actually represented that Nolte was assigned to teach health only for the marking period beginning in January 1989.

BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BUREAU OF PUPIL TRANSPORTATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION AND PASSAIC COUNTY SUPERINTENDENT OF SCHOOLS, PASSAIC COUNTY,	:	DECISION ON MOTION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, September 25, 1989

For the Petitioner-Cross/Appellant, Podvey, Sachs, Meanor & Catenacci (Robert L. Podvey, Esq., of Counsel)

For the Respondent-Appellant, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

On September 25, 1989, the Commissioner rendered his substantive decision in this matter, holding that the petition of the Board of Education of the City of Paterson challenging reduction of its State aid for transportation for 1989-90 was untimely with respect to claims therein relating to: 1) disallowances of costs for 1983-1986 that were specified in an audit report stemming from a Level III monitoring review of the district, and 2) the disallowance of transportation contracts for 1987-88 by the County Superintendent. The Commissioner, however, held that the petition was timely as to the Board's challenge to disallowances which were identified as "potential exceptions" on the basis of audit projections made as part of the Level III audit, but which, in the Commissioner's judgment, were not final until March 1989. Accordingly, the Commissioner dismissed the Board's petition with the exception of its claim relating to the potential disallowance, which he remanded to the Office of Administrative Law for a full hearing on the merits.

The State Respondents appealed to the State Board of Education from that portion of the Commissioner's decision remanding the potential disallowance for full hearing. The Board appealed the dismissal of the remainder of its petition.

Briefs were timely filed. The record closed on December 28, 1989, and the papers were transmitted to each member of the State Board as required by N.J.A.C. 6:2-3.1(a). As provided by N.J.A.C. 6:2-3.1(c), our Legal Committee then reviewed the appeal, and, at its meeting on January 17, 1990, determined that the issues involved in this matter were such that a written report as provided by N.J.A.C. 6:2-3.1(d) was necessary for proper resolution.

On February 6, 1990, the Board filed a notice seeking to expedite the State Board's decision. Based upon review of the notice and given that a Legal Committee Report had been assigned, the Board's motion was characterized as a motion for a stay, to which the State Respondents were given the opportunity to respond.

We have reviewed the arguments of the parties and, with reference to the standards articulated in Crowe v. De Gioia, 90 N.J. 128 (1982), have evaluated whether a stay is warranted. See Nathan Scheinholz and Wayne Fuller v. Board of Education of the Township of Ewing and Wayne Pickering v. Board of Education of Ewing, decision on motion by the State Board, October 4, 1989.

In this case, we find the interests of the district's students to be paramount, and conclude that those interests are best effectuated in this instance by staying any further withholding of State transportation aid pending our final disposition of the underlying case.

There is no question that the State may recoup in future years any monies owing to it by virtue of our final agency decision in the underlying case. There is, however, no way to compensate the students of Paterson for any educational loss resulting in this year from further withholding of State transportation aid. In this respect, we cannot ignore that, while the potential for loss of educational benefits as a consequence of the withholding of State aid might be de minimis in many districts, Paterson has failed to meet the standards under which the fulfillment of its constitutional responsibility to provide a thorough and efficient education is measured and is in Level III of the monitoring process. See Board of Education of the Township of Irvington v. Mayor and Council of the Township of Irvington, decision on motion by the State Board, September 7, 1988, slip op. at 7.

In the absence of any assurance that the withholding of almost $2 million[2] in State transportation aid for the 1990-91 school year will not negatively impact the ability of the district to achieve State mandated educational standards, we conclude that the proper course is the grant of a stay of further withholding.

In sum, by our decision today, we stay further withholding by the Division of Finance of State transportation aid on the basis of the disallowance of costs for 1983-1986 resulting from the Level III monitoring review or the disallowance of contracts by the County Superintendent for 1987-88. This determination does not

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[2] The Paterson Board represents that the amount which might be withheld for 1990-91 is $1,952,282. While the State Respondents represent that the State's potential liability totals more than $4 million, they did not specify the amount that, absent a stay, would be subject to withholding when State aid is awarded for the 1990-91 school year.

entitle Paterson to any amounts previously withheld. Nor, except to the extent required by the Commissioner's remand, is the matter to proceed to a hearing on the merits.

March 7, 1990

PENTA ASSOCIATES II AND COASTAL LEARNING CENTER,

PETITIONERS-APPELLANTS,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION AND THE COMMISSIONER OF EDUCATION,

RESPONDENTS/CROSS-APPELLANTS.

STATE BOARD OF EDUCATION

DECISION

Transferred by the Law Division, November 26, 1986

Decided by the Commissioner of Education, May 22, 1989

For the Petitioners-Appellants, Apostolou & Middleton (Timothy Middleton, Esq., of Counsel)

For the Respondents/Cross-Appellants, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This is a single action which has been brought jointly by two commonly owned entities: Coastal Learning Center, Inc. ("Coastal"), a for profit school providing education to handicapped children pursuant to N.J.S.A. 18A:46-14(g), and Penta Associates II ("Penta II"), a partnership whose partners are the same individuals as the shareholders in Coastal Learning Center, Inc. Penta II rents property to Coastal Learning Center, upon which site Coastal operates its educational program.

These entities are challenging the validity of N.J.A.C. 6:20-4.4(a)(39), which limits, in cases of related party transactions, rental costs allowable in the calculation of actual costs per pupil for purposes of tuition charges to be paid by district boards of education to private schools for the handicapped. The challenge being made is to the constitutionality of the regulation, both facially and as applied.

The regulation at issue was adopted by the State Board of Education on August 6, 1986, effective September 8, 1986,[1] and provides as follows:

[1] The regulation was adopted as N.J.A.C. 6:20-4.4(a)(37) and recodified on May 4, 1987 as N.J.A.C. 6:20-4.4(a)(39). 19 N.J.R. 751(a).

N.J.A.C. 6:20-4.4 Non-allowable costs

(a) A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:

* * *

39. Certain costs related to transactions between related parties in which one party to the transaction is able to control or substantially influence the actions of the other. Such transactions are defined by the relationship of the parties and include, but are not limited to, those between divisions of an institution; institutions or organizations under common control through common officer, directors, or members; and an institution and a director, trustee, officer, or key employee of the institution or his or her immediate family either directly or through corporations, trusts, or similar arrangements in which they hold a controlling interest. Such costs shall include:

i. Rental costs for buildings and equipment in excess of the actual allocated costs of ownership (such as straight line depreciation, mortgage interest, real estate taxes, property insurance and maintenance costs) incurred by the related property owner including a 2.5 percent return calculated on the actual costs of ownership incurred by the related party. The lease agreement shall include a list of anticipated costs to be incurred by the property owner, prepared in the form supplied by the Department of Education, signed by the property owner and notarized.

ii. Rental costs under a sub-lease arrangement with a related party for buildings and equipment in excess of the actual allocated costs related to the lease (such as rent, lease commission expense and maintenance costs) incurred by the sub-lessor. No profit, return on investment or windfall of any kind shall be included in the sub-rental cost. The sub-lease agreement shall include a list of anticipated costs to be incurred by the sub-lessor, signed by the sub-lessor and notarized;

iii. Cost or purchasing building, equipment or other goods from related parties in excess of the original cost to the related party less depreciation claculated using the straight line method; [emphasis added]

N.J.A.C. 6:20-4.4(a)(39) is part of Subchapter 4 entitled "Tuition for Private Schools for the Handicapped," N.J.A.C. 6:20-4.1 through 4.9, which applies to all private schools to which district boards of education send handicapped students for instruction pursuant to N.J.S.A. 18A:46-14(g).[2] The regulations in this subchapter, as adopted and as currently in effect, impose on such private schools stringent bookkeeping requirements and accounting practices, require submission of detailed budgets, limit the annual surcharge included in a for profit school's tuition to 2.5% of allowable actual costs, permit non-profit schools to include in their tuition rate an amount that permits the school to establish a working capital fund not in excess of 15% of its actual allowable costs, and require annual detailed audits by the Department of Education. The provision at issue was adopted as an amendment to N.J.A.C. 6:20-4.4, which, as indicated above, enumerates those costs which are non-allowable in calculating actual cost upon which the tuition charged to public schools is based.

As stated, the challenge in this case is limited to the validity of the exclusion from allowable costs for purposes of tuition charges of rental charges in excess of 2.5% of the actual cost of ownership in cases of related party transactions as codified by N.J.A.C. 6:20-4.4(a)(39). Consequently the validity of other regulatory provisions applicable to private schools providing instruction pursuant to N.J.S.A. 18A:46-14(g), including N.J.A.C. 6:20-45 which limits to 2.5% of allowable costs the surcharge to be included in tuition charged by for profit schools, are not at issue in this case.[3]

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[2] Prior to 1973, statutory authority to provide educational programs by sending handicapped students to private schools at public expense was limited to the authority to send such students to non-profit schools. N.J.S.A. 18A:46-14(g) (1971). Following a ruling by the Attorney General that there was no constitutional bar to public payment of tuition for a handicapped student to attend a school operated for profit, the Legislature amended N.J.S.A. 18A:46-14(g) to eliminate that limitation. L. 1973 c.4 (effective January 16, 1973). The Statement accompanying the proposed amendment stated that tuition rates remained fixed by district boards pursuant to N.J.S.A. 18A:46-21, which at that time provided that the tuition rates charged to district boards by a nonpublic school could not exceed the maximum day school cost of education per pupil of children in special education classes in the public schools. Statement accompanying Senate Bill No. 1111. N.J.S.A. 18A:46-21 currently provides that "...in no case shall the tuition rate exceed the actual cost per pupil as determined under rules prescribed by the Commissioner and approved by the State Board of Education." N.J.S.A. 18A:46-21, L. 1986 c. 50 Sec. 1 (effective July 16, 1986).

[3] We note that the validity of the 2.5% limitation on the surcharge that may be included in tuition charged to the public schools by for profit schools is the subject of litigation in Deron School of New Jersey, Inc. v. New Jersey State Department of Education, and Saul Cooperman, Commissioner of Education, decided by the Commissioner, October 20, 1989, appeal from which is now pending before the State Board. In that case, the Commissioner upheld the validity of the 2.5% limitation on surcharge.

The matter is before this agency pursuant to order of Superior Court, Law Division, which transferred the matter with consent of the State defendants to the Commissioner of Education. Following transfer, Petitioners, Penta Associates II and Coastal Learning Center, Inc., filed a five count Petition of Appeal to the Commissioner.

The Petitioners did not differentiate themselves in their petition with respect to the claims being made or the relief being sought, and even the language used in the petition reflects Petitioners' lack of clarity as to the relationship between the rights being asserted and the individual entities on whose behalf the petition was filed. Count I alleged that Penta II would have to sell its property shortly due to economic hardship caused by the regulation and that Coastal would be unable to meet its lease payments or, alternatively, Penta II would be deprived of a fair rate of return on "their" investment. Count II alleged that "Petitioners" had invested thousands of dollars in erecting the facility and that the regulation violated "Petitioners'" constitutional rights in that it did not allow a fair rate of return on "its" investment. Count III alleged that the regulation violated "Petitioner's" fifth amendment rights in that it was confiscatory. Count IV alleged that the regulations violated "Petitioners" 14th amendment equal protection rights because they allow a non-related party leasing to a private school to do so at the prevailing market rate and obtain a fair rate of return while not permitting a related party to do so. Count V alleged that the regulation was unreasonable, arbitrary and capricious and violated "Petitioners'" 14th amendment substantive due process rights.

The relief sought on all counts was a declaration that the regulation was unconstitutional and of no force and effect; permanently enjoining enforcement; permanently enjoining discrimination against related party landlords; and requiring application of N.J.A.C. 6:20-4.4(a)(29) in determining allowable rental costs in both related and non-related party transactions.

A prehearing order issued on April 24, 1987 specified the issues as: 1) Whether the regulation was facially valid as a matter of constitutional law, 2) Whether the regulation was constitutional as applied; that is, whether it resulted in an unlawful taking of property in violation of the due process clause of the fifth amendment, and 3) Whether the regulation allowed for a fair rate of return.

Following denial of cross-motions on the issue of facial validity, and denial of Respondents' motion to dismiss Coastal as a party, it was determined that the matter would proceed by motion for summary decision on the issue of the constitutionality of the regulation as applied to Petitioners. Following discovery, the Administrative Law Judge ("ALJ") determined on motion that the issue of facial constitutionality should be decided in the context of the motion with respect to the "as applied" challenge without hearing. Following further briefing, the ALJ issued his Initial Decision on March 23, 1989.

The ALJ rejected Petitioners' claims both with respect to the facial validity of N.J.A.C. 6:20-4.4(a)(39) and the effect of its application to Petitioners, and granted State Respondents' motion for summary decision.

In arriving at this determination, the ALJ found that the regulation at issue applied only to Coastal, which did not own any property, and had only an indirect impact on Penta II, which was the property owner, but which remained unregulated. The ALJ therefore rejected the applicability to the matter before him of cases involving the validity of rent control ordinances. He further concluded that the regulation had not resulted in a "taking" of Petitioners' property in the constitutional sense in that the effect of the regulation had not been to deprive them of reasonable use of their property, but rather, at most, limited the allowable reimbursement that "Petitioners" might receive if they chose to rent the property they owned through Penta II to the school they ran as Coastal.

The ALJ also determined that the regulation was not facially unconstitutional. He found that Petitioners had not established that the regulation was arbitrary, capricious or irrational, concluding that, even in the absence of any specific evidence that Petitioners had "rent gouged," Petitioners had not demonstrated that the Department of Education's concern with the potential for rental abuse was irrational or whimsical, and that the Department's concern with the potential for abuse in related party lease arrangements provided a reasonable basis for promulgation of N.J.A.C. 6:20-4.4(a)(39).

In this respect, the ALJ found it apparent that, in promulgating the regulation, the State Board of Education was concerned not only with rent gouging, but also with the situation where persons seeking to provide private schooling for handicapped children formed partnerships or corporations solely for the purpose of acquiring property and later renting to themselves. The ALJ found that this concern was evident in the 1978 report issued by the New Jersey Commission of Investigation (SCI) on the misuse of public funds in the operation of non-public schools for the handicapped and in the summary of the proposed amendment that had appeared in the New Jersey Register. 18 N.J.R. 1237.

The ALJ also rejected Petitioners' claim that the regulation was overly broad and sweeping, emphasizing that it did not prohibit related party transactions, but rather imposed reasonsable restrictions on the extent of reimbursement which related parties could receive for rental expenses. In this respect, the ALJ found that the arrangement between Coastal and Penta II was exactly the sort of arrangement that the regulation was intended to address.

The ALJ further concluded that the State Board had been engaged in rule making and not in rate making when it promulgated N.J.A.C. 6:20-4.4(a)(39), and, therefore, had not been required either to make the same findings of fact or to provide for a guaranteed rate of return as is required where a public body is engaged in rate making or the regulation of public utilities. The

ALJ specifically found that the regulation was not an across-the-board rent control ordinance so as to bring it within the rubric of Helmsley v. Borough of Fort Lee, 78 N.J. 200 (1978), appeal dismissed, 440 U.S. 978 (1979), and that the regulation had not been shown to have a confiscatory impact on related individuals who are unregulated and may rent to unregulated parties.

The ALJ also rejected the argument that the regulation was facially defective in that it did not allow for a fair rate of return under any set of facts. Again distinguishing the regulation from rent control ordinances which limit the prices to be charged by businesses, the ALJ observed that the regulation at issue here limited only what private schools can receive as reimbursement for rent paid to related party landlords and did not require those landlords to continue to rent to the related party private school. In that Penta II could avoid the impact of the regulation if it desired, the ALJ concluded that it was not facially confiscatory.

Nor did the ALJ find that Petitioners were deprived of equal protection of the law because the regulatory scheme treated related party landlords differently than unrelated third party landlords. Finding that the party challenging a regulation bears the burden for demonstrating that a classification lacks a rational basis, the ALJ concluded that the differences between related party and unrelated party landlords provided a sufficient rational basis to withstand an equal protection challenge.

The Commissioner fully agreed with the ALJ's findings and conclusions, although, in response to Respondents' exceptions, he found that a transcript of the tape the State Board meeting considered by the ALJ could not be deemed reliable evidence. The Commissioner, however, rejected Respondents' arguments that the ALJ had erred in allowing Coastal standing, finding that, if anything, Coastal's status as a co-petitioner served to illustrate its less than arms length relationship with Penta II.

The Commissioner agreed fully with the ALJ that both on its face and as applied, the regulation was valid and reasonable and not arbitrary, capricious or in violation of equal protection. The Commissioner emphasized that the State as a whole and the State Board of Education in particular had a strong interest in assuring the quality of education provided to handicapped children and in safeguarding against practices that increase costs, especially where they would permit obtaining public monies not otherwise obtainable. Observing that, as had been set forth in the New Jersey Register, as of July 1, 1985, 21 schools had set up common ownership that gave the appearance of being used to disguise activities not otherwise allowable, the Commissioner emphasized that the regulation at issue was not intended to give landlords a rent reflective of the open competitive market in cases of common ownership. Rather, the intent was to restrict less than arms length transactions so as to insure that the tuition rates charged the public schools were based on costs reflective of the open competitive market.

The Commissioner also concluded that the regulation was constitutional as applied to Penta, finding that there had been no taking of its property in that Penta was not a regulated party and

was free to rent to whomever it chose at whatever rate it wished. Concluding that Penta had no legal entitlement to a guaranteed rate of return subsidized through public monies, the Commissioner also found that Coastal had provided no evidence that it had or would operate at a loss as a result of the regulation.

Penta II and Coastal jointly appealed. In their brief, they maintain that Penta II is a regulated party, that the regulation substantially impairs Penta II's ability to charge a fair rental value in that if Coastal operates at a loss, Penta II will necessarily suffer because the two are related parties. Penta II and Coastal assert that it is economically prohibitive for Penta II to do business with an entity other than Coastal because Penta built a specialized facility for Coastal.

Petitioners assert that Hutton Park Gardens v. West Orange Town Council, 68 N.J. 543 (1975), which involved the constitutionality of a rent control ordinance and held that property owners subject to the ordinance were entitled to a just and reasonable return on their investment, and Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591 (1944), which involved the validity of rate reductions under the Natural Gas Act, are controlling here. Penta II and Coastal contend that under the standards established by those cases, the regulation at issue here is invalid because an injury to Coastal caused by lack of reimbursement will injure Penta II and vice versa, and that the impact is to deny "Petitioners," specifically Penta II, the opportunity to charge fair market value for rent since to charge Coastal fair market value would force Coastal to operate at a loss.

Petitioners argue that the regulation sets a rate, and since it impacts on Penta II, must allow a just and reasonable rate of return by permitting Penta II to charge an open market price, specifically fair market value as calculated by Petitioners' expert Mr. Turteltaub. In that the regulation limits the allowable rental charge below that, Petitioners assert that it is necessarily confiscatory as applied to them.

Petitioners argue that as applied to Coastal, the regulation is unconstitutional because it will force Coastal to operate at a deficit and that Coastal will either have to discontinue operations or breach its lease with Penta II. Petitioners further maintain that it will be difficult or impossible for Coastal to locate an alternative site to lease that would be satisfactory.

Although not pleaded or included in the prehearing order, Petitioners claim in this appeal that under the contract clause of the U.S. and New Jersey Constitutions, the regulation is necessarily unconstitutional as applied to them.

They also argue that the regulation is arbitrary as applied to them in that it was intended to insure that tuition rates were reflective of the open competitive market, but only allows Coastal reimbursement and Penta II to charge rental far below what would be charged in the open competitive market. They renew their argument that, although they are not public utilities, the standards established by Hutton, supra, and Hope, supra, must apply and, since Penta II would incur hardship in converting the facility to other uses, the return of 2.5% is confiscatory as applied to them.

Finally, Petitioners renew their claim that the regulation is irrational, arguing that it defies economic logic in that vertical integration between a landlord and a tenant would promote more economic efficiency, and continue to maintain that the regulation is arbitrary in that there is no evidence of rent gouging.

The State Respondents have cross-appealed, seeking a determination that Coastal does not have standing with respect to those claims which assert Penta II's rights.

We have carefully reviewed Petitioners' claims and find them to be entirely without merit.

Initially, we emphasize that Petitioners are not challenging the authority of the State Board of Education to promulgate rules to insure that the tuition rates paid by district boards of education to private schools providing instructional programs to handicapped children pursuant to N.J.S.A. 18A:46-14(g) do not exceed the actual cost per pupil. N.J.S.A. 18A:46-21.[4] See Council of Private Schools v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). Nor are they challenging the validity of the limitation on the surcharge that may be included by for profit private schools in tuition to be charged district boards of education.[5] Rather, we reiterate that the claims here are limited to the validity of N.J.A.C. 6:20-4.4(a)(39), which limits to 2.5% in cases of related party transactions the amount of return that may be included as allowable cost in the tuition to be charged to district boards of education by private schools.

As found by the ALJ, the regulation, which applies to both for profit and not for profit private schools,[6] does not prohibit related party transactions. Nor does it regulate what a related party landlord may charge for rental, or prohibit a private school from agreeing to pay a higher rental charge than that which it may include in tuition charged to the public schools. Rather, the only limitation imposed by the regulation is to the amount that may be included by the private school in tuition charges to be borne by the public schools, and there is nothing in the regulation to require a related party landlord to rent to the private school. Consequently, Penta II, as an entity, is not a regulated party under the terms of the regulation, and in that the regulation neither requires Penta II to rent to Coastal nor controls the rent Penta II may charge even to Coastal, we conclude that neither the public utilities cases nor the rent control cases relied upon by Petitioners are applicable to Penta II's claims.

Further, as set forth in the decisions below, the effect of the regulation on Penta II as an entity does not deprive it of the reasonable use of its property. Although Penta II has provided a specialized facility to its lessee Coastal, the degree of specialization is not such as to show that this circumstance alone precludes reasonable alternative use or has diminished the value of

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[4] See supra note 2.

[5] See supra note 3.

[6] See supra note 2.

the property. Nor has Penta II pointed to any other circumstances that combined with the impact of the regulation on it would have such effect. In short, the regulation in no way prevents Penta II as an entity from disposing of its property as it chooses and does not limit, either facially or as it effects it, Penta II's ability to make reasonable use of the property. Therefore, as the ALJ and Commissioner concluded, the regulation does not constitute a takingof Penta II's property in the constitutional sense. e.g. Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984); Hodel v. Virginia Surface Mining and Reclaim Ass'n., 452 U.S. 264 (1981); Sixth Camden Corp. v. Evesham Township, 420 F. Supp. 709 (D. N.J. 1976).

We agree with State Respondents that Coastal as an entity does not have an interest with respect to the effects of the regulation on Penta II as an entity of such nature as to confer standing on it to assert those claims, although we find that Coastal clearly has standing as an entity to challenge the regulation as it effects itself. Coastal, however, has not shown any indication that it has in fact operated at a loss or demonstrated that this result is inevitable under the operation of the regulation. To the contrary, any impact on Coastal's rate of return is the result of the manner in which it has chosen to provide facilities for its program and the terms it agrees to with its related party landlord, and it has not been shown that, under the regulation facially or as it applies in this instance, the only option open to Coastal is to rent from Penta II at a higher rate than that which it may include in its tuition charge to the public schools.

It is evident from both the pleadings and the arguments put forth by Petitioners that the fundamental basis for their claims rests on the fact of the common ownership of the entities involved here. Petitioners' claims are clearly based on the premise that, because Coastal and Penta II are related parties, an injury to Coastal is an injury to Penta II and vice versa. As set forth above, even given the nature of the entities involved here, the regulation does not lead inevitably to this result.

Again, the regulation is designed to eliminate the potential inherent in related party transactions that merely by virtue of having legal title to the property assigned to a related party, the proprietors of private schools may artifically inflate costs at the expense of the public schools, thereby realizing a rate of return over actual cost that exceeds that rate of return permitted private schools who either retain title or rent facilities from non-related parties.

The legitimacy of this concern is reflected both in the 1978 report issued by the New Jersey Commission of Investigation and the statement in the New Jersey Register that, as of 1985, 21 private schools had chosen to structure their facilities arrangements by creating commonly owned or controlled entities for purposes of property ownership. 18 N.J.R. 1237.

We find that the distinction drawn by the regulatory scheme between related party transactions and arms length transactions is well justified in that the actual cost to a school for renting facilities from an unrelated landlord is fixed entirely by market forces and is not within the control of the school. To allow inclusion in tuition charged the public schools of the fair market

value for the cost to the private school of renting property does not enhance the rate of return of the private school in such cases. In contrast, where the lessor is commonly owned or controlled by the school, market forces are not controlling of the rental transaction, specifically with respect to rate of return, and any gain realized from the rental transaction innures to the benefit of the common owners of the school.

The effect of the regulation with respect to for profit private schools such as Coastal, which choose to meet their facilities needs through related party transactions, is to restrict to 2.5% the overall rate of return which the common owners may receive through tuition charged the public schools. By limiting the amount of return on rental transactions between related parties that may be charged to the public schools, the regulation insures that the maximum rate of return that may be realized by for profit schools through tuition paid by the public schools is uniform regardless of the form of property ownership, thereby insuring that the cost to the public schools for providing educational services to handicapped students is not artifically inflated by the form of property ownership. This effectuates the mandate of N.J.S.A. 18A:46-21 that the tuition rate paid by district boards shall not exceed the actual cost of providing the instructional program and insures that tuition monies paid by the public schools are utilized for purposes related to the quality of the education provided to handicapped students. See Council of Private Schools v. Cooperman, supra at 547.

Although not claimed or addressed below, we find no merit to Petitioners' argument that the regulation unconstitutionally impairs the obligation of contracts. While the authority to abridge existing contracts between private parties is subject to some limits even where, as here, the substance of the regulation is legitimate, any alteration required in this case was minimal given the amounts involved.[7] Allied Structural Steel Co. v. Spannaus. 438 U.S. 234

[7] We note that although Penta II and Coastal entered a three-year lease agreement on February 15, 1984, prior to the effective date of the regulation at issue, the original term of this agreement has expired regardless of Petitioners' arguments that they continue to be bound by its terms on a month to month basis.

While the record before us does not contain a complete copy of that lease agreement, the parties thereto were only bound by the terms and conditions therein until its termination date, February 14, 1987. In the absence of any evidence to the contrary, the parties were free, prior to the termination date and in accord with any notice provisions in the lease, to terminate the agreement effective at the end of the original term or to renew it for an additional period on modified terms.

Thus, the maximum amount that arguably could be involved with respect to the parties contractual obligations is the difference between the amount of return to Penta II pursuant to the lease and that portion which could be included in tuition pursuant to N.J.A.C. 6:20-4.4(a)(39) for the period between September 8, 1986, the effective date of the regulation, and February 14, 1987, the date on which the original term of the lease expired. Although Petitioners did not provide us with a basis upon which to calculate the exact amount, as represented in their brief, such calculation could be at a rate of no more than $8,000 per year for a period of approximately five months.

(1978). Further, the regulation is aimed at effectuating the broad interest in insuring that tuition paid by public schools for the education provided handicapped students by private schools represents the actual cost of providing the education, and was adopted as an amendment to regulations already governing allowable cost. Id. Compliance with the terms in this case, results at most, in a temporary cost of less than $8,000 to Coastal or its related party landlord as reflected in a reduced rate of return to the common owners.[8]

In sum, the regulation at issue here does no more than limit that portion of the cost to be borne by the public schools which represents the rate of return in cases where a private school chooses to meet its facilities needs by establishing a separate entity that it owns or controls for purposes of property ownership. It does not mandate any particular form of property ownership so as to limit in any way the ability of a related party landlord to use the property as it chooses. In this case, the school and its commonly owned landlord, having chosen this form of property ownership as the manner in which they would conduct their profit making enterprise, can not assert any entitlement to a rate of return for renting the property that would allow the overall rate of return of the enterprise to exceed that to which for profit private schools generally are allowed. Nor can Penta II, as the related party landlord, claim that its form of organization entitles it to the same rate of return that it may have realized had Coastal been an unrelated party or had it not chosen to rent to a entity whose rate of return is guaranteed through tuition charged the public schools.

Therefore, for the reasons set forth above, as well as those expressed by the Administrative Law Judge and Commissioner, the State Board of Education affirms the decision of the Commissioner with the modification that, as an entity, Coastal Learning Services, Inc. does not have standing with respect to claims asserting the rights of Penta II as an entity.

February 7, 1990

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8 See supra note 7.

PAMELA PROBST,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 5, 1989

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

For the Respondent-Appellant, Capehart & Scatchard
(Joseph F. Betley, Esq., of Counsel)

Pamela Probst (hereinafter "Petitioner"), a tenured teaching staff member, alleged that the Board of Education of the Borough of Haddonfield (hereinafter "Board") improperly established her salary for the 1988-89 school year, following the withholding of her increments in the previous year.

The applicable salary guides in the district for the years pertinent hereto were as follows:

STEP	MIDDLE STEP	1986-1987	1987-1988	1988-1989
J		$24,600	$25,900	$27,200
	J/K	25,000	26,300	27,600
K		25,400	26,700	28,000
	K/L	25,800	27,100	28,400
L		26,200	27,500	28,800
	L/M	26,600	27,900	29,200
M		27,000	28,300	29,600

The facts, which are not in dispute, indicate that in 1986-87, Petitioner was at middle step J/K in the bachelor's column of the district's salary guide and received an annual salary of $25,000. On June 25, 1987, the Board took action to withhold Petitioner's employment and adjustment increments for 1987-88 pursuant to N.J.S.A. 18A:29-14 and, as a result, her salary remained at $25,000 that year. The Board took no action to withhold Petitioner's increments in 1988-89, nor to restore her previously withheld increments, and established her salary at $27,100, an

increase from her previous year's salary of $25,000 based upon an employment increment of $800 and an adjustment increment of $1,300. The parties agree that had Petitioner's increments not been withheld in 1987-88, her salary in 1988-89 would have been $29,200, the amount shown at middle step L/M in the bachelor's column of the 1988-89 salary guide.

Petitioner challenged the Board's action in establishing her 1988-89 salary at $27,100, contending that she was entitled to receive $28,400, the amount set forth at middle step K/L of that year's guide.

On August 10, 1989, an Administrative Law Judge ("ALJ") agreed with the Petitioner and recommended that the Board be directed to pay Petitioner $1,300, representing the difference between the salary she actually received in 1988-89 ($27,100) and the amount which he concluded she should have received ($28,400). Noting that $27,100 was the middle step K/L salary on the Board's 1987-88 salary guide, the ALJ concluded that Petitioner's salary for 1988-89 should have been established according to middle step K/L on the Board's 1988-89 guide. The ALJ asserted that there was no authority for a district board to use a "real dollars" analysis in the years following an increment withholding to avoid having a teacher advance one step on the salary guide appropriate in that specific year or for a board to pay a teacher according to the terms of the prior year's guide. The ALJ recommended denial of Petitioner's claims for attorney's fees, costs and pre-judgment interest.

On October 5, 1989, the Commissioner adopted the ALJ's decision, asserting that following Petitioner's satisfactory performance in 1987-88, the Board was obliged to move her to middle step K/L ($27,100) and also to move her across to the 1988-89 adjusted salary scale ($28,400) since that was the scale in place for that year. Accordingly, the Commissioner directed the Board to tender to Petitioner the sum of $1,300.

The Board has filed the instant appeal from the Commissioner's decision. After a thorough review of the record, we reverse the Commissioner for the reasons expressed herein.

"[D]espite an erratic history, many of the questions surrounding increment withholding have now been resolved. It is now well established that an increment withholding is permanent unless and until a future board takes affirmative action to restore it, and the fact that a teacher may always lag behind is attributable to the effect of an earlier employment decision." Lulewicz v. Board of Education of the Township of Livingston, decided by the State Board of Education, November 5, 1989, slip op. at 3, appeal pending (App. Div.), citing North Plainfield Education Ass'n v. Bd. of Educ., 96 N.J. 587 (1984), Dowling v. Board of Education of the Township of Middletown, decided by the Commissioner, June 30, 1987, and N.J.S.A. 18A:29-14.

N.J.S.A. 18A:29-14 provides that a district board may withhold "the employment increment, or the adjustment increment, or both" (emphasis added) of any member in any year.[1] It also makes clear that it is not mandatory for a board to restore previously denied increments.

The Board herein withheld both the employment and adjustment increments of the Petitioner in 1987-88, so that her salary remained at $25,000. Moreover, the Board refused to take affirmative action to restore those increments in 1988-89. Because of the Board's previous action, Petitioner's entitlement under the education laws, in the absence of either affirmative action by the Board restoring those increments or of an increment withholding in 1988-89, was limited to a salary amount which included an employment increment based upon years of service, representing an advancement on the district's salary guide from middle step J/K to middle step K/L, and an adjustment increment reflecting the contractual increase for that particular year negotiated through the collective negotiations process. See Lulewicz, supra.

Thus, while the Board's action sets Petitioner's 1988-89 salary at an amount below that established by the negotiated guide for employees whose years of service placed them at middle step K/L in the bachelor's column of the district's salary guide for that year, Petitioner's salary merely reflects the effect of the Board's previous decision to withhold both her employment and adjustment increments in 1987-88. See North Plainfield, supra; Lulewicz, supra.

Although Lulewicz involved a petitioner at the maximum step of his district's salary guide at the time of the increment withholdings, we emphasized therein that:

> [T]he result under the education laws is consistent in any case in which an adjustment increment has been withheld and the district board has not acted to restore it, regardless of what step on the salary guide the teaching staff member occupies at the time of the withholding. In contrast to situations where the employment increment alone is withheld, when both the

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[1] We note that, as originally defined by statute, an employment increment is based upon years of service and an adjustment increment is designed to bring teaching staff members lawfully below their place on the salary schedule according to years of service to their appropriate place on the salary schedule. While the definitional section, N.J.S.A. 18A:29-6, was repealed when the Teacher Quality Employment Act, 18A:29-5, L. 1985, c. 321, s.16 (1985), was enacted, that Act in no way altered the terms of N.J.S.A. 18A:29-14 or the Board's authority thereunder to withhold a teaching staff member's employment increment, adjustment increment, or both. Such withholding includes entire contractual amounts. Cf. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978).

> employment and adjustment increments or the adjustment increment alone is withheld, the affected individual may always lag behind.

Lulewicz, supra, slip op. at 6-7 (emphasis added).

Thus, the fact that Petitioner will lag behind other teaching staff members who, as a result of entirely meritorious service, had not been subject to any increment withholdings and whose years of employment entitled them to placement at middle step K/L of the district's salary guide and to a salary amount which included adjustment increments for all years of employment does not violate the education laws. Rather, any discrepancy between the salary of such staff members and Petitioner is the result of the Board's earlier employment decision. See Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn., 79 N.J. 311, 321 (1979); Lulewicz, supra.

The fact that the specific amount established by the Board as Petitioner's 1988-89 salary at middle step K/L also happens to appear on the district's 1987-88 salary guide at middle step K/L is immaterial. Under the particular facts of this case, the employment and adjustment increments for individuals advancing from middle step J/K to middle step K/L were identical in 1987-88 and 1988-89, leading to such a consequence.

Nor is this result altered by the fact that the salary amount established for Petitioner in 1988-89 is not set forth in the district's negotiated salary guide for that year. "Entitlement to salary amounts beyond statutory minimums is contractual and not an affirmative entitlement under the education laws." Lulewicz, supra, at 7; N.J.S.A. 18A:29-5 et seq. "The statutory language of N.J.S.A. 18A:29-14 is express in providing authority to withhold employment and/or adjustment increments, and the effect of the terms of that statute must control the salary amounts to which Petitioner is entitled absent affirmative Board action to restore those previously withheld adjustment increments." Id., citing North Plainfield, supra.[2]

We therefore conclude that as a result of the Board's earlier decision to withhold Petitioner's employment and adjustment increments, in the absence of affirmative action by the Board to restore those increments or to withhold her increments for 1988-89,

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[2] We note, in response to Petitioner's exceptions, that N.J.S.A. 18A:29-4.1 does not mandate a different result. That statute merely permits a district board to adopt salary schedules for all full-time teaching staff members which may not be less than those required by law. It does not provide substantive entitlement to a salary amount shown on an adopted schedule in the years following an increment withholding.

Petitioner was entitled under the education laws to an employment increment in the amount of $800 and an adjustment increment of $1,300, amounts reflected in the district's salary guides for those staff members advancing from middle step J/K to middle step K/L that year. In view of the fact that the Board included these amounts in establishing Petitioner's 1988-89 salary, we conclude that the Board did not violate the education laws, and we, therefore, reverse the Commissioner and dismiss the petition. In so deciding, we note that we are not passing upon any additional relief to which Petitioner might be entitled under the specific terms of any collective negotiations agreements with the Board.

Attorney exceptions are noted.
April 4, 1990

Pending N.J. Superior Court

R.V., on behalf of his minor children, L.V. AND J.V.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE WOODSTOWN-PILESGROVE REGIONAL SCHOOL DISTRICT, SALEM COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, October 13, 1989

Decision on motion by the State Board of Education, February 7, 1990

For the Petitioner-Respondent L.V., Rafferty & Trace (Mary Cay Trace, Esq., of Counsel)

For the Petitioner-Respondent J.V., Edward L. Gatier, Esq.

For the Respondent-Appellant, Jordan & Jordan (John D. Jordan, Esq., of Counsel)

On March 31, 1989, Petitioners J.V. and L.V., female students at Woodstown High School, were barred by the school's principal from participating in extracurricular activities for the remainder of the school year for their alleged violation of a school rule prohibiting visitation of rooms between males and females during field trips. The alleged incident occurred on March 17, 1989 at a motel in Toms River, where the Petitioners were staying in a room with two other girls for a mock trial competition. It was alleged that a number of boys of similar age had climbed onto the girls' balcony and been admitted to the room. Petitioners maintained that they had prevented the boys from entering the room.

On April 10, Petitioners requested the Board of Education of the Woodstown-Pilesgrove Regional School District (hereinafter "Board") to review the principal's action. On April 21, Petitioners filed the instant petition with the Commissioner, requesting a stay of that disciplinary action until the Board could conduct its hearing on the matter. On April 24, an Administrative Law Judge ("ALJ") ordered that "the Board's disciplinary action be stayed pending hearing before an ALJ" and that the Board go forward with its consideration of this matter at its next meeting in order to exhaust administrative remedies.

On June 20, 1989, at a special session, the Board heard Petitioners' appeal. During those proceedings, Petitioners sought to restrict the hearing to a review of whether the principal had acted reasonably based upon the limited information before him at the time he had acted. The Board agreed to so limit the proceedings, and, after a hearing, voted to support the principal's action.

On August 28, 1989, the ALJ, after determining that the issue was whether the punishment was reasonable, dependent upon all the underlying facts, and conducting a full hearing into the matter, found that the Petitioners were the nonculpable victims of the boys' illegal conduct. Concluding that the Petitioners had proven the arbitrary and unreasonable interpretation and application of the field trip rule, the ALJ ordered that the Board's sanctions be set aside and that all school records of such action be expunged.

On October 13, 1989, the Commissioner adopted the ALJ's decision with modification. The Commissioner found that neither the principal nor the Board had acted unreasonably given the manner in which the issue was framed by the Petitioners during their hearing before the Board. However, the Commissioner concluded that the Board had "abrogated its responsibility," albeit by Petitioners' instigation, by failing to make a determination as to the actual facts of the events leading to the disciplinary action, and, focusing instead on the appropriateness of the principal's actions given what he knew at the time. Thus, while finding that both the principal and the Board had acted reasonably within the specific parameters of the case as originally framed, the Commissioner concluded that his and the ALJ's ultimate findings with respect to the incident necessarily rendered those actions null and void.

The Board has filed the instant appeal from the Commissioner's decision, arguing that since the Commissioner had determined that the Board's action was reasonable, he had no right to reverse its decision; that the Board had not abrogated its responsibility since it was the Petitioners who chose to litigate the narrow issue; and that participation in extracurricular activities is a privilege, not a right.

After a thorough review of the record, we affirm the ultimate determination by the Commissioner to set aside the disciplinary action imposed upon the Petitioners. However, we modify the Commissioner's analysis as follows.

We initially reject the Commissioner's assertion that the Board abrogated its responsibility in agreeing to limit its hearing, at Petitioners' request, to a determination of whether the principal had acted reasonably based upon the information before him at the time of his action. In the absence of a remand to the Board for further inquiry prior to agency review in proceedings before the Commissioner, see Laba v. Newark Board of Education, 23 N.J. 364

(1957), there was no obligation on the Board's part to conduct a hearing on all the underlying facts of the alleged incident, given that both the Board and the Petitioners were agreeable to limiting the issue in proceedings before the Board.

We note further that the petition herein, filed with the Commissioner prior to the Board's determination of Petitioners' appeal of the principal's action, requests only a stay of the sanctions imposed by the principal pending a hearing on that appeal by the Board. There is nothing in the record before us to indicate that the Petitioners appealed the merits of the Board's action to the Commissioner or amended their petition accordingly. Nonetheless, the ALJ proceeded to plenary hearing on the merits of the Board's action, with no objection thereto on the record from the Board. The Commissioner adopted with modification the Initial Decision, and the Board has filed the instant appeal to the State Board from the Commissioner's decision without objecting to the Commissioner's jurisdiction, in the absence of a formal appeal or amended petition, over the merits of the Board's action. It is thus apparent that the parties, including the Board, were agreeable to litigating that issue despite the lack of a formal appeal or amendment to the petition and that the Board has willingly accepted the Commissioner's and the State Board's jurisdiction to determine the reasonableness of its disciplinary action at issue herein.[1]

Moreover, inasmuch as the ALJ concluded that the appropriate issue for determination by the agency was broader than that acted upon by the Board, so as to be dependent upon underlying facts which had not been determined by the Board, a remand for further inquiry before the Board would have been appropriate prior to an agency determination on that issue.[2] See Laba, supra. However, in that we find that the ALJ conducted a full and fair evidentiary hearing on the actual facts of the events leading to the disciplinary action, in which the Board participated as a party, such a remand to the Board for inquiry into those facts would not be

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1 We note that by letter to the parties' counsel dated May 9, 1989, the ALJ confirmed that the issue in this matter "was revealed at our telephone conference, i.e., whether or not the Board's disciplinary action was arbitrary and unreasonable."

2 We note that since there was no formal appeal of the Board's action on the merits, the grounds for the Petitioners' action were not specifically delineated so as to provide direction regarding the issues for determination. The ALJ determined the issue to be decided -- whether the Board's action was arbitrary and unreasonable -- during a telephone conference with the parties' counsel prior to action by the Board on the Petitioners' appeal of the sanctions imposed by the principal, see supra n.1., and, as a result, the ALJ determined that it was unnecessary to conduct a prehearing conference or issue a prehearing order.

in the interests of judicial economy and would clearly be unnecessary at this juncture.[3]

Notwithstanding such procedural complications, the ultimate merits of this case are dependent upon the events at the motel during the mock trial field trip, which remain the focal point and basis for the Board's action. To that extent, and notwithstanding the cited irregularities, we find that all issues pertinent to that incident were fully and fairly litigated below, and after a thorough review of the record, including the testimony given before the ALJ, we agree with the ALJ and Commissioner that, on the ultimate merits of this case, the evidence does not sustain the disciplinary action taken against the Petitioners by the Board. We therefore affirm the Commissioner's determination to set aside the disciplinary action taken against the Petitioners[4] and direct the Board to expunge its records of such action.

Robert A. Woodruff abstained.
Attorney exceptions are noted.
July 5, 1990

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[3] In response to the Board's exception arguing that the State Board would be required to direct such a remand, we note that the Board's reliance upon Laba, supra, in support of its "right and obligation" to hear the testimony and make its own findings of fact is misplaced. Laba does not require such a remand. Rather, it recognizes that there is no rational basis precluding a remand for further inquiry where appropriate. As observed by the Appellate Division, citing Laba under comparable circumstances in Kopera v. West Orange Bd. of Education, 60 N.J. Super. 288, 297 (App. Div. 1960): "Since the Commissioner's opinion does not say what he found to be the underlying facts, nor whether he found the evaluation unreasonable, we must remand the case to the Commissioner for such findings or make them ourselves." (Emphasis added.)

[4] We note that the sanctions imposed, Petitioners' prohibition from extracurricular activities for the balance of the 1988-89 school year, were effectively rendered moot by the stay issued by the ALJ on April 24, 1989.

S.M.F., through her guardian ad litem, A.F.F.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF WANAQUE AND LAWRENCE MENDELOWITZ, PASSAIC COUNTY,

RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, May 16, 1989

For the Petitioner-Appellant, Robert Saul Molnar, Esq.

For the Respondent-Respondent, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (Frank N. D'Ambra, Esq., of Counsel)

Petitioner A.F.F., the mother of S.M.F., a former student at the Haskell Elementary School in the Wanaque school district, alleged that S.M.F. had been denied a thorough and efficient education in the district pursuant to Article VIII, Section 4, paragraph 1 of the New Jersey Constitution in that the Board of Education of the Borough of Wanaque (hereinafter "Board") had arbitrarily and capriciously denied her access to cross-grading[1] and early entry into the district's program for gifted, creative and talented pupils ("GCT") while she was a second grade student in the district. Petitioner alleged that the refusal to cross-grade S.M.F. at a time when she was qualified therefor based on her intellectual abilities was discriminatory since other students were being cross-graded at that time. S.M.F. unilaterally withdrew from the district after 2nd grade, and Petitioner requested tuition reimbursement for S.M.F.'s placement in private and public schools outside the district and other appropriate relief.

On March 30, 1989, an Administrative Law Judge ("ALJ") recommended grant of the Board's motion for summary decision and dismissal of the petition. Upon scrutiny of the parties' briefs and affidavits, and of admissions in pleadings and stipulations, the ALJ found that pupils have been cross-graded in the district since 1980

1 We note that cross-grading allows pupils to receive higher grade instruction in specific subjects.

when deemed appropriate; that the Board incorporates a GCT program in its curriculum beginning with third grade for pupils who are deemed eligible on the basis of in-district criteria; that S.M.F. had been granted early admission into first grade in the district; that the principal and second grade teacher of S.M.F. determined that cross-grading was neither necessary nor appropriate, expressing concerns related to S.M.F.'s emotional and social development; and that S.M.F. was denied admission into GCT since eligibility begins with a pupil's entry into the third grade. The ALJ stressed that while the New Jersey Constitution and the statutory and regulatory schemes required local boards to develop programs under the thorough and efficient mandate to meet the individual educational, emotional and social needs of its pupils, local boards must retain their discretionary authority to determine whether to admit particular pupils into such programs.

Asserting that any factual disputes were de minimis and not related to the principal issues herein, the ALJ concluded that the Board had not violated the thorough and efficient education mandate of the New Jersey Constitution or the statutory and regulatory schemes related thereto; that the Board's denial of cross-grading to S.M.F. in second grade and denial of her admission to the GCT program prior to third grade was a proper exercise of its discretionary authority; and that tuition reimbursement for S.M.F.'s attendance at private and public schools outside the district after her withdrawal from the Wanaque school district was not warranted or authorized as a matter of law.

On May 14, 1989, the Commissioner adopted the ALJ's findings and conclusions, and dismissed the petition. Petitioner thereupon filed the instant appeal from the Commissioner's decision, arguing that summary decision was improperly granted.

After a thorough review of the record, we affirm the decision of the Commissioner. Considering the moving papers and pleadings in a light most favorable to Petitioner and resolving all doubts against the Board, Ruvolo v. American Cas. Co., 39 N.J. 490, 499 (1963), we agree that the Board is entitled to a grant of its motion for summary decision. While Petitioner does dispute certain statements made by the Board's affiants, there is nothing in the record to support her claim that the Board discriminated against S.M.F. or acted arbitrarily when, on the basis of the educational opinions of the school's teaching staff, S.M.F. was denied cross-grading and early entry into the GCT program.

As found by the ALJ, the disputed facts relate not to the propriety of such action, but to such peripheral matters as what Petitioner was told concerning the availability of cross-grading, whether S.M.F. was provided with supplemental materials as requested by Petitioner, the substance of conversations Petitioner had regarding S.M.F.'s eligibility for cross-grading and whether Petitioner was told by the GCT teacher that the unilateral withdrawal of S.M.F. from the district was the proper thing to

do.[2] Even accepting as true all of Petitioner's proferred facts would not alter our decision herein.

There is no dispute that S.M.F. had been admitted into first grade at an age younger than the district normally permitted, so she would have been younger than most, if not all, of her classmates, and Petitioner does not dispute the assertion by S.M.F.'s second grade teacher that S.M.F. was placed in the highest reading and mathematics groups for that grade. S.M.F.'s former principal and teacher aver that providing her with cross-grading in second grade would have had a potentially deleterious effect on her emotional and social development. It is further averred by the principal that, based upon social, emotional and educational considerations, the GCT program was devised so as not to include students below third grade -- the program was designed to emphasize the application of skills, and fundamental and social skills needed to be developed prior to entry thereto.[3]

The fact, as attested to by Petitioner's affiant without further background information, that a first grade student in the district was provided with cross-grading does not in any way indicate that the Board's actions with regard to S.M.F. were arbitrary or discriminatory. There is no dispute that cross-grading was made available to other elementary pupils at the lower grades. The Board, however, contends that, based upon the educational opinions of its teaching staff, S.M.F. was not yet ready for such placement in second grade. As noted, Petitioner has provided us with no evidence to the contrary.

Thus, we agree with the Commissioner that there is no genuine issue of material fact sufficient to preserve this matter for hearing on Petitioner's claim that the Board denied S.M.F. a thorough and efficient education by arbitrarily and capriciously denying her access to cross-grading and early entry into its GCT program.

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[2] We note that Petitioner does not allege in her petition of appeal that S.M.F. was withdrawn from the district as a result of misinformation from the teaching staff at S.M.F.'s school regarding cross-grading or the GCT program. Rather she maintains that the decision to remove S.M.F. from the district was the direct result of the failure and denial of the Board to give cross-grading or any other alternative programs to S.M.F.

[3] We note that Petitioner does not specifically challenge the district's policy of admitting only students above second grade into its GCT program, but maintains that S.M.F. should have been granted early entry thereto. Nor does Petitioner contend or demonstrate that any other students in the district were granted early admission into the GCT program prior to third grade.

Finally, we reject as entirely without merit Petitioner's argument that a gifted and talented child is "educationally handicapped" and is thereby entitled to place the burden on the district board, pursuant to Lascari v. Board of Educ., 116 N.J. 30 (1989), to prove that it had provided an appropriate education. Lascari, as Petitioner concedes, was decided under the provisions of the Education for All Handicapped Children Act of 1975 (EAHCA), P.L. 94-142, 89 Stat. 773, codified at 20 U.S.C. 1401-61, and involved a child who had been classified as "neurologically impaired" and suffering from "a neurologic dysfunction in the form of a marked dyslexia..." Lascari, supra, at 31. There has been no determination nor allegation in this case that S.M.F. suffered from any such handicap contemplated under the EAHCA, which was designed to ensure that handicapped children received a free, appropriate education and that such education was tailored to the unique needs of each handicapped child. Id. at 34. Thus, any attempt by Petitioner to place this matter within the holding of Lascari is misplaced.

We, therefore, affirm the Commissioner's decision to grant the Board's motion for summary decision and dismiss the petition. Petitioner's request for oral argument is denied as not necessary for a fair determination of this case.

Attorney exceptions are noted.
December 5, 1990

EDU #6263-88
C # 203-89
SB # 53-89

KATHI L. SAVARESE,

PETITIONER-CROSS/APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERNARDSVILLE, SOMERSET COUNTY,

RESPONDENT-APPELLANT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, July 24, 1989

For the Petitioner-Cross/Appellant, Zazzali, Zazzali, Fagella & Nowak (Richard A. Friedman, Esq., of Counsel)

For the Respondent-Appellant, Schwartz, Pisano, Simon, Edelstein & Ben-Asher (Nathanya G. Simon, Esq., of Counsel)

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

January 3, 1990

NATHAN SCHIENHOLZ AND WAYNE FULLER,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT-APPELLANT,	:	STATE BOARD OF EDUCATION
AND	:	DECISION
WAYNE E. PICKERING,	:	
PETITIONER-CROSS/APPELLANT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, June 19, 1989

Decision on motion by the State Board of Education, October 4, 1989

Decision on motion by the State Board of Education, December 6, 1989

For the Petitioners-Respondents, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Carroll & Weiss (David W. Carroll, Esq., of Counsel)

For the Petitioner-Cross/Appellant, John J. Barry, Esq.

In these consolidated petitions, Nathan Schienholz, Wayne Fuller and Wayne E. Pickering ("Petitioners") claimed that they were tenured as "principals" by virtue of their former service as elementary principals, and they challenged the employment by the Ewing Township Board of Education ("Board") of a non-tenured individual as principal of Ewing High School when a vacancy occurred in 1988.

The Petitioners, each of whom held principal certification, had previously been dismissed from their assignments as elementary principals as the result of reductions in force ("RIF") -- Fuller in 1982, Schienholz and Pickering in 1983 -- and had been placed on a preferred eligibility list in order of seniority for

reemployment.[1] Subsequent to the RIF's, Schienholz served in the district as a teacher and an elementary vice principal, Fuller served as a high school vice principal, and Pickering served as a teacher until January 1984 when he resigned to accept an assignment as elementary principal in another district.

In 1984, the Board appointed an outside candidate as principal of Ewing High School when a vacancy occurred. He served for only 15 months, and for the next nine months, acting principals filled that role. In 1986, a vice principal at the school was appointed principal, but he served for just under two years. As a result, in April 1988, the Board commenced another search for a principal to begin employment by July 1, 1988. The Board did not give Petitioners formal notice of that vacancy or offer any of them the assignment.

In a letter dated June 21, 1988, the Petitioners advised the Board that the vacancy had come to their attention and that one of them should be employed therein by virtue of their tenure in the district as principals. Nonethless, at its meeting of June 27, 1988, the Board appointed a non-tenured candidate, Dr. Benjamin S. Miller, to that assignment, effective July 1.

Petitioners challenged that action, claiming tenure rights to the assignment pursuant to Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988). The Board did not dispute that Petitioners were tenured, but argued that their tenure rights were limited to their previous experience as elementary principals.

On May 4, 1989, an Administrative Law Judge ("ALJ") determined that the Petitioners had met the statutory requirements for tenure in the position of "principal," concluding that the tenure statutes "clearly provided that tenure, including tenure rights, is not acquired in specific assignments but in one of the positions enumerated in N.J.S.A. 18A:28-5." Initial decision, at 8. Petitioners' tenure rights, she concluded, were not limited to elementary school principal assignments, but included those as a high school principal.

The ALJ asserted that while none of the Petitioners had seniority rights to the high school principal assignment since none had served in that capacity, the Court in Capodilupo and Bednar recognized that a tenured teacher had tenure rights to a position that were superior to those of a non-tenured teacher. She further concluded that in light of Bednar, the Board's representation of educationally-based reasons for its decision to employ a non-tenured individual was not relevant, and that, in light of the State Board's decision in Mirandi v. West Orange Bd. of Ed., decided by the State Board of Education, April 7, 1989, the Petitioners' tenure rights to

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[1] We note that there is no dispute that the Petitioners served as elementary principals for the requisite amount of time pursuant to N.J.S.A. 18A:28-5 for the acquisition of tenure.

the controverted assignment were not foreclosed by the passage of time between their RIF's and the instant vacancy.

The ALJ concluded, however, that all three Petitioners were barred by waiver and estoppel from claiming their tenure rights to the assignment. Asserting that the Petitioners were aware of the vacancy and the nationwide recruitment effort, but failed to indicate interest in the assignment or make a claim thereto until after the selection process had been completed, the ALJ concluded that the Petitioners had waited too long to make their interest known, and she dismissed their petitions.

On July 19, 1989, the Commissioner, while agreeing that Petitioners Schienholz and Fuller were qualified by virtue of their tenure as principals for the high school assignment, concluded that Petitioner Pickering was not tenure-eligible since he had voluntarily resigned from employment in the district in 1984, prior to the decisions in Capodilupo and Bednar. In addition, the Commissioner rejected the ALJ's conclusion that Petitioners Schienholz and Fuller were barred by waiver and estoppel from asserting their tenure rights herein, noting that under Bednar and Capodilupo, the Board was required to give them notice that they were tenure-eligible for the vacancy if they were interested in being considered before it opened the assignment to non-tenured applicants. Finding that the Board had not provided such information to Petitioners, the Commissioner concluded that the Board's action was in direct contravention of Capodilupo and Bednar insofar as it created "competing rights" for non-tenured persons who were not eligible to apply if either Fuller or Schienholz indicated interest.

The Commissioner further concluded that the Board had the discretion of selecting which of those tenure-eligible individuals interested in the vacancy was best qualified without considering their seniority since they had no seniority in the category in which the vacancy occurred. He directed the Board to interview Petitioners Schienholz and Fuller in order to select one as principal of Ewing High School.

The Board filed an appeal from the Commissioner's decision, arguing that the scope of the Petitioners' tenure under N.J.S.A. 18A:28-5 should extend only to the "position" of elementary principal to which they were appointed and in which they served for the requisite probationary period; that Capodilupo and Bednar are distinguishable in that they dealt with the tenure rights of teachers, not principals; and that the Petitioners' claims are barred by waiver and estoppel since Petitioners were aware of the vacancy and the Board relied upon their silence and failure to indicate interest therein as an indication that the search for a new candidate was proper. The Board also maintained that in rejecting the ALJ's decision on waiver and estoppel, the Commissioner failed to disturb any specific findings of fact made by the ALJ, particularly with regard to Petitioners' knowledge of the vacancy.

Petitioner Pickering filed a cross-appeal, alleging that his resignation from his teaching position did not constitute a waiver of his reemployment rights under N.J.S.A. 18A:28-12 and that he expressly stated in his 1984 letter of resignation that he wished

to remain on the preferred eligibility list as an elementary principal. He contends, in addition, that, pursuant to N.J.S.A. 18A:28-12, he should be the one reemployed in the vacancy since he is "the most senior of the Principals riffed by respondent."

On October 4, 1989, we granted the Board's motion for a stay of the Commissioner's decision pending our decision on the merits of those appeals.

After a thorough review of the record, we reverse the Commissioner's determination that Petitioner Pickering was not eligible by virtue of tenure for the instant vacancy and affirm on all other points of appeal currently before us as modified accordingly.

We initially must agree with the ALJ and Commissioner's determination of the scope of the tenure acquired by the Petitioners pursuant to N.J.S.A. 18A:28-5. Given the statutory scheme, we have no choice but to conclude that tenure is achieved in and tenure protection attaches to the position of "principal," rather than the specific assignments of elementary or high school principal. Although elementary and high school principals are separated into distinct categories for seniority purposes under our regulations, N.J.A.C. 6:3-10(1), Petitioners' statutorily-created tenure rights are not so limited.[2] See Mirandi, supra, slip op. at 8. "Principal" is a separately tenurable position under N.J.S.A. 18A:28-5, and the Petitioners were authorized by virtue of their principal certifications to serve at all grade levels. See N.J.A.C. 6:11-10.4; Capodilupo, supra; Howley v. Bd. of Ed. of the Township of Ewing, decided by the Commissioner, December 20, 1982, aff'd by the State Board of Education, June 1, 1983.

Moreover, notwithstanding the fact that Capodilupo and Bednar involved teachers rather than principals, we conclude that the holdings therein with respect to the tenure rights of individuals dismissed as the result of reductions in force cannot be limited to teachers. The Court in Bednar was firm in its declaration that "the rights conferred by the tenure statute may not be dissolved by implementing regulations." Bednar, supra, at 243. We find that this holding is equally applicable to tenured principals.

We further conclude that Petitioner Pickering was eligible by virtue of tenure for the instant principal vacancy despite his

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[2] We note in addition, in response to Petitioner Pickering's exceptions, that tenure protection as against non-tenured individuals following a reduction in force is, under Bednar and the statutory scheme, distinct from entitlement based upon relative seniority within an applicable category, and is not predicated upon seniority rights. Moreover, unlike seniority protection, the statutory scheme does not make a distinction between retention and reemployment rights for purposes of tenure protection.

resignation from his teaching position in 1984, prior to the decisions in Capodilupo and Bednar. The courts have declined to apply a new legal rule retrospectively only when it constitutes a "significant change in the law." Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 82 (1982). Capodilupo and Bednar, however, merely further defined and effectuated the protection which the tenure statutes afford tenured teaching staff members whose positions are abolished pursuant to N.J.S.A. 18A:28-9. The Appellate Division recognized that N.J.S.A. 18A:28-10, which requires dismissals in a RIF to be made on the basis of seniority, does not thereby authorize "regulatory dilution of tenure rights by affording a non-tenured teacher 'seniority.'" Bednar, supra, at 243.

As we subsequently asserted in Mirandi, supra, slip op. at 7, in which we recognized the tenure rights of a teaching staff member on a preferred eligibility list pursuant to N.J.S.A. 18A:28-12:

> It is evident from the terms of the statutes that the tenure rights of a teaching staff member dismissed as the result of a reduction in force pursuant to N.J.S.A. 18A:28-9 have not been fully effectuated until such individual is reemployed pursuant to N.J.S.A. 18A:28-12.

Pickering's resignation from his teaching position did not waive or terminate his rights under N.J.S.A. 18A:28-12 to a position as principal. In Boguszewski v. Board of Education of the Borough of Demarest, 1979 S.L.D. 232, in which a tenured teaching staff member declined an offer of a part-time teaching assignment following abolition of his full-time teaching position, the Commissioner concluded that the petitioner, while thereby waiving his rights to the part-time position, was entitled to remain on a preferred eligibility list pursuant to N.J.S.A. 18A:28-12 for the full-time position and be offered such position in the event it was reestablished by the district board.

In Mishkin v. Board of Education of the Borough of Mountainside, 1984 S.L.D. 1975 (App. Div. 1984), the petitioner's full-time speech correctionist position had been abolished as the result of a RIF, and petitioner had accepted a part-time assignment. Petitioner resigned from that part-time four-day-per-week position, but specifically affirmed in her resignation letter that she was prepared to work on a full-time basis. The Court affirmed dismissal of the petitioner's claim to employment in a four-day-per-week speech correctionist position, but rejected the State Board's conclusion that petitioner's tenure and seniority rights to a full-time position were terminated upon the acceptance of her resignation by the district board. Citing Boguszewski, supra, the Court noted that had petitioner refused the part-time position when it was first created, she would have remained upon a preferred eligibility list for reemployment pursuant to N.J.S.A. 18A:28-12, and the Court found "neither reason nor authority to regard her 'resignation' letter as a relinquishment of those statutory rights." Mishkin, supra, at 1976.

Likewise, we conclude that Petitioner's resignation from his teaching position did not act as a waiver of his statutory rights to remain on a preferred eligibility list in order of

seniority for reemployment as a principal. Moreover, in his resignation letter, Pickering expressly preserved his rights under N.J.S.A. 18A:28-12 by requesting to remain on the preferred eligibility list. Id. See Bartz v. Board of Education of the Township of Green Brook, decided by the State Board of Education, August 5, 1987, slip op. at 11-12.

Thus, in view of our finding that Petitioner Pickering remained on the preferred eligibility list despite his resignation from his subsequent teaching position, as we stressed in Mirandi, supra, his tenure rights pursuant to Bednar would not be fully effectuated until he was reemployed as a principal. We therefore conclude that Petitioner Pickering, along with Petitioners Schienholz and Fuller, was eligible by virtue of tenure as a principal for the high school principal vacancy that occurred in 1988 at Ewing High School.

We agree with the Commissioner that the defenses of waiver and estoppel raised by the Board do not operate as a bar to the Petitioners' tenure rights to the instant vacancy. Waiver is the voluntary relinquishment of a known right evidenced by a clear, unequivocal and decisive act from which an intention to relinquish that right can be based. Country Chevrolet v. North Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983). Given Petitioners' tenure rights to the instant vacancy, the Board was obligated to offer them the assignment prior to conducting a search for a non-tenured candidate. Only then, by unequivocally declining interest in that particular assignment, could Petitioners be deemed to have voluntarily relinquished their tenure rights thereto. To the contrary, even in the absence of notice from the Board, Petitioners herein expressly notified the Board of their interest in the assignment.

Nor do we find this case proper for the application of estoppel. Estoppel, a doctrine grounded in equity, is designed to preclude one who performs an act or takes a position upon which it is intended that another should rely from repudiating the act or position where an unjust and unconscionable result would flow from such repudiation. Deerhurst Estates v. Meadow Homes, Inc., 64 N.J. Super. 134 (App. Div. 1960). Waiver is distinguished from estoppel in that the latter requires reliance. Country Chevrolet, supra, at 380.

Since the Board herein failed in its obligation to recognize Petitioners' tenure rights, we conclude that Petitioners should not now be estopped under equitable principles from asserting those rights. This is not a situation where Petitioners were silent following formal notice from the Board or an offer of employment. Petitioners were never notified of the vacancy nor offered the assignment. Instead, the Board began a nationwide search for non-tenured candidates. Moreover, despite notification from the Petitioners of their claim to the assignment, the Board proceeded to appoint Dr. Miller, a non-tenured candidate.

Under the circumstances, we conclude that it was not sufficient that Petitioners may have been aware of the vacancy. The Board was obligated to offer the assignment to the Petitioners as a

result of their status as tenured principals, and by failing to do so while continuing with an extensive nationwide personnel search, the Board may not now assert its reliance upon the Petitioners' silence in its investment of time, money and effort in its search for non-tenured candidates. By failing to recognize and acknowledge the Petitioners' tenure rights, the Board created its own detrimental situation.

We also concur with the Commissioner that the Board may select, from among the Petitioners, the individual it concludes is best qualified for the assignment. We reject Petitioner Pickering's argument that he should have been the one appointed to the vacancy by virtue of his superior seniority as an elementary principal. Seniority is acquired only in the specific job categories enumerated in N.J.A.C. 6:3-1.10(1). None of the Petitioners herein had served as a high school principal in the district. Thus, none of them had acquired seniority in the specific category applicable to this assignment, high school principal, although their tenure rights as "principals" entitled them to the assignment as against non-tenured individuals. See Bednar, supra. While this vacancy occurred "in a position for which such person shall be qualified," N.J.S.A. 18A:28-12,[3] the Board is not required to consider Petitioners' relative seniority within a regulatory category which is separate and distinct from the category applicable to the instant assignment in effectuating their tenure rights thereto.[4]

Accordingly, we direct the Board to interview forthwith all three Petitioners and to select one of them to serve as principal of Ewing High School. The Board is also directed to compensate the Petitioner who is selected and who accepts the assignment for all back pay and emoluments from July 1, 1988, less mitigation.

We further direct, in light of the circumstances, whereby Ewing High School is currently in the middle of an academic year and has experienced a series of principals and acting principals over the past five years, that in order to minimize the disruption to the students and the educational process, Dr. Miller may, at the Board's discretion, continue to serve as principal of the school through the 1989-90 academic year. His continuation in that assignment does not, however, otherwise affect any of the Petitioners' rights or the Board's obligations as determined herein.

John T. Klagholz abstained.

Attorney exceptions are noted.
February 7, 1990

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[3] We note that the Petitioners were "qualified," within the meaning of N.J.S.A. 18A:28-12, for the high school principal vacancy by virtue of their principal certifications, which are valid for all levels. See Mirandi, supra, slip op. at 8.

[4] See supra n.2.

BARBARA A. TODISH,	:	
PETITIONER-APPELLANT,	:	
V.	:	
JANE NEWMAN,	:	
RESPONDENT,	:	STATE BOARD OF EDUCATION
AND	:	DECISION
THE DIVISION OF TEACHER CERTIFICATION, NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, November 27, 1989

For the Petitioner-Appellant, Barbara A. Todish, pro se

For the Respondent, Robin T. McMahon, Esq.

For the Respondent-Respondent, David Earle Powers, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

Appellant Barbara Todish was accepted by the Alternate Route Certification Program in January 1988, receiving a Statement of Eligibility permitting her to seek employment. She was offered employment by the Newark Board of Education in April 1988, and received a provisional teaching certificate valid for one year. As required by the Alternate Route Certification Program, she began participation in the instructional training program.

In January 1989, the Board notified Appellant that her employment was terminated effective February 20, 1989.[1] She was then notified that she was ineligible to continue participation in the instructional training program.

By petition filed on March 29, 1989, Appellant sought a determination that she was entitled to continue to participate in the alternate route instructional training program despite the fact that she was not employed as a full time teacher. She further sought a determination of predominant interest and for consolidation

[1] Appellant challenged her dismissal by Petition to the Commissioner. The Commissioner sustained the propriety of her termination, and we affirmed that decision on July 6, 1989. Appeal from that decision is pending before the Appellate Division.

of the instant matter with an action before the Public Employees Relation Commission (PERC).[2]

The Administrative Law Judge found that, in the absence of identical parties and common question of fact or law, the matter pending before PERC could not be consolidated with the matter before him, and he therefore denied Appellant's motion. On the substantive question involved, the ALJ found that employment as a full time teacher was a prerequisite to participation in the alternate route training program. He therefore recommended that the Petition of Appeal be dismissed.

The Commissioner adopted the ALJ's determination for the reasons expressed in the Initial Decision, and dismissed the Petition.

By her appeal to the State Board of Education, Appellant apparently is seeking to continue to participate in the instructional training program so as to receive "final and formal evaluation." In the alternative, she asks that the State Board of Education await the decision of the Appellate Division in her challenge to termination of her employment by the Newark Board of Education.[3]

We, like the ALJ and the Commissioner, find that continued employment as a full time teacher is a requirement for participation in the alternate route instructional training program. As argued by Respondent, eligibility for the provisional certificate requires an offer of employment by a district approved by the Commissioner to conduct the certification training program. N.J.A.C. 6:11-4.2(b)(3). The school district therefore is obligated to provide training only to those provisional certificate holders whom it employs. In that Appellant's employment by the Newark Board was terminated, the district had no obligation to train her.

In sum, Appellant has no legal right to continued participation in the instructional training program and has not provided us with any basis for reversing the Commissioner's decision.

Therefore, we affirm the decision of the Commissioner adopting the recommendation of the ALJ substantially for the reasons expressed therein. In that we have not found that oral argument is necessary for a fair determination of this matter, we deny Appellant's request to be allowed to give oral argument.

May 2, 1990

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[2] The matter pending before PERC apparently involves an unfair labor practice allegation against the Newark Teachers Union relating to its failure to provide legal representation for Appellant.

[3] See supra note 1.

HELEN YORKE,	:	
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, September 18, 1989

For the Petitioner-Respondent, Klausner, Hunter & Oxfeld
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Rubin, Rubin & Malgran
(David B. Rubin, Esq., of Counsel)

Helen Yorke (hereinafter "Petitioner"), a tenured teaching staff member assigned as a teacher of high school mathematics, challenged the action of the Board of Education of the Township of Piscataway (hereinafter "Board") in withholding her salary increments for the 1988-89 school year. The Board's action was based upon Petitioner's teaching performance in 1987-88, which performance was evaluated on ten occasions during that year by a team of five supervisors. A summary evaluation recommending denial of Petitioner's salary increments for 1988-89 was prepared at the end of the year by Carl Anthony, supervisor of the mathematics department. Petitioner was granted the opportunity to be heard prior to the Board's action.

On August 10, 1989, an Administrative Law Judge ("ALJ") recommended dismissal of the petition, concluding that Petitioner had failed to meet her burden of showing by a preponderance of credible evidence that the Board had acted in an arbitrary, capricious or unreasonable manner or in violation of N.J.S.A. 18A:29-14. The ALJ determined:

> The evidence in this case establishes that the underlying facts, petitioner's deficiencies regarding lesson preparation and organization along with knowledge and effective use of subject content, were as those who made the evaluation claimed. Given that fact, it is reasonable to CONCLUDE as the team did based upon those facts and accepting the team as the experts that petitioner did not earn a salary increment for 1988-89. That vice principal Walsh evaluated petitioner's performance in a more positive manner than did [Carl] Anthony does not overcome the fact that Anthony was the supervisor of the

> high school department of mathematics and the team apparently placed reliance in his judgment that petitioner's performance was deficient as did the Piscataway Township Board of Education.

Initial Decision, at 11-12.

On September 18, 1989, the Commissioner rejected the Initial Decision, concluding that the facts underlying the summary evaluation upon which the Board based its decision to withhold Petitioner's increment were not as claimed. The Commissioner concluded that the series of ten evaluations, taken as a whole, did not justify the summary evaluation on which the Board based its action. That summary evaluation, the Commissioner held, was both misleading in tone and a general misrepresentation of the facts.

The Commissioner further determined that because the prior evaluations on which the summary evaluation was ostensibly based did not give Petitioner any indication of significant dissatisfaction until late in the school year, and because no further evaluations were conducted, Petitioner had no meaningful opportunity for remedy. Accordingly, the Commissioner concluded that Petitioner had met her burden of proof and directed the Board to restore her withheld increments.

After a thorough review of the record, including documents submitted to the Board by the Petitioner, we reverse the decision of the Commissioner.

It is well established that the only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusion. Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 295-96 (App. Div. 1960). The State Board therefore may not substitute its judgment for either the board or those who made the evaluation, but may only determine: (1) whether the underlying facts were as those who made the evaluation claimed and, (2) whether it was reasonable for them to conclude as they did based upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the mise en scene. Id. at 296-97. The burden of proving unreasonableness is on the party challenging the board's action. Id. at 297. Based upon the entire record, including the testimony before him,[1] the ALJ concluded that the Petitioner had not met that burden. We agree.

Although we find the summary evaluation to be a harsh summation of the ten classroom observations made during 1987-88 by Petitioner's team of supervisors, those ten individual evaluations, which were provided to the Board by the Petitioner, do identify substantive deficiencies in Petitioner's teaching performance.

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[1] We note that the parties did not provide copies of the transcripts to the Commissioner or to the State Board.

Seven of the ten evaluations, representing four of the five members of her evaluation team, noted deficiencies in Petitioner's knowledge and effective use of subject content. In fact, the two mathematics supervisors on Petitioner's evaluation team, Carl Anthony and John MacFadyn, consistently cited her need for attention in that area, particularly in her demonstrated knowledge of the subject and her utilization of the subject area vocabulary. Comments included with several of those evaluations cited Petitioner's use of incorrect and questionable mathematical terms and solutions. Both of the March 28 evaluations, conducted by Anthony during successive class periods, rated Petitioner as needing improvement in the subject content area, and one also rated her as needing improvement in lesson preparation and organization.

We reject the Petitioner's argument that the Board's action was unreasonable in that she had received no advance notice that her performance was viewed as being so deficient as to result in the withholding of her increments for the 1988-89 school year. N.J.S.A. 18A:29-14 provides that "[a]ny board of education may withhold, for inefficiency or other good cause, the employment increment, or the adjustment increment, or both, of any member in any year...." Accordingly, boards have the inherent right to exercise their preeminent function to pass upon the quality of teacher performance. Clifton Teachers Ass'n. v. Clifton Bd. of Ed., 136 N.J. Super. 336, 339 (App. Div. 1978). The underlying purpose behind the evaluation procedure is to ensure that a teacher receives adequate notice of any unsatisfactory performance and of ways to improve future performance. Pollack v. Board of Education of the Township of Ridgefield Park, decided by the State Board of Education, February 6, 1985, aff'd, Docket #A-3128-84T7 (App. Div. 1986). We find this purpose to have been fully satisfied.

Concerns about Petitioner's teaching performance were brought to her attention as early during the 1987-88 school year as November 11, 1987 when, as the result of the October 21 and November 6 observations by team members Anthony and MacFadyn, Petitioner was informed of her need to give attention to her knowledge of the subject area and her use of the subject area vocabulary. Incorrect and questionable uses of mathematical terms and solutions were brought to her attention. As noted, the two mathematics supervisors on her team consistently pointed out deficiencies in Petitioner's knowledge and effective use of subject content during observations in 1987-88. Seven of the ten evaluations found some deficiency in that area. Thus, while Petitioner may not have known with certainty that a recommendation would be made to withhold her increments, an unfavorable evaluation should not have surprised her.

Moreover, it is significant to note that although deficiencies in the Petitioner's teaching performance were cited primarily by the two mathematics supervisors on her 5-member evaluation team, Anthony and MacFadyn, and particularly by Anthony as a result of his March 28 observations, the recommendation to withhold Petitioner's increments appears to have been made by the team as a whole. There is nothing in the record before us to indicate that the recommendation to withhold her increments was made

by Anthony alone. In fact, according to the ALJ, the school's principal, a member of the supervisory team which evaluated Petitioner's performance, testified that the decision to recommend the withholding of Petitioner's salary increments was not made by Anthony alone, but by the entire team. Initial Decision, at 9. On the basis of the record before us, Petitioner has not demonstrated otherwise.[2]

Thus, mindful of the fact that we should not substitute our judgment for that of the Board, Kopera, supra, we agree with the ALJ that the Board had a reasonable basis for its conclusions and that the Petitioner has failed to meet her burden of establishing that the Board's action in withholding her increments for 1988-89 was arbitrary, capricious or unreasonable. As has been frequently noted, the purpose of N.J.S.A. 18A:29-14 is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 321 (1979). Accordingly, we reverse the decision of the Commissioner and dismiss the petition of appeal.

Alice Holzapfel opposed.
July 5, 1990

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[2] See supra n. 1.

Pending N.J. Superior Court