

State of New Jersey  
Department of Education  
Trenton

NEW JERSEY  
**SCHOOL LAWS**

Enacted during the Legislative Session of 1962

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SCHOOL LAW DECISIONS  
July 1, 1961, to June 30, 1962  
July 1, 1962, to December 31, 1962

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*Keep with 1938 Edition of New Jersey School Laws*

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SCHOOL LAWS, SESSION OF 1962  
AMENDMENTS\*

CHAPTER 14, LAWS OF 1962

AN ACT concerning State competitive scholarships and amending the "State Competitive Scholarship Act" passed May 25, 1959 (P. L. 1959, c. 46).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 10 of the act of which this act is amendatory is amended to read as follows:

10. A State competitive scholarship may be used in any institution of collegiate grade in New Jersey which offers a college curriculum leading to or accreditable toward an undergraduate degree and which is accredited by the State Board of Education. Of the total number of scholarships available for initial award in any year not more than 35% of that number may be used in institutions of collegiate grade outside the State which are approved for this purpose by the State Department of Education.

2. This act shall take effect immediately.

Approved March 26, 1962.

CHAPTER 23, LAWS OF 1962

AN ACT concerning elections in certain regional school districts, and amending section 18:8-16 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 18:8-16 of the Revised Statutes is amended to read as follows:

18:8-16. Regional school district elections for the purpose of raising annual appropriations or for authorizing the issuance of bonds of the regional school district or for any other purpose provided in chapter 8 of this Title shall be called and conducted by the regional board of education in the manner provided for such elections in school districts governed by the provisions of chapter 7 of this Title, with at least 1 polling place in each of the constituent school districts. The annual regional school district election shall be held on the first Tuesday in February, *except that in any regional school district consisting of a consolidated school district or a school district comprising 2 or more municipalities, created pursuant to chapter 122 of the laws of 1960, which regional school district is a constituent school district of a larger regional school district the annual regional school district*

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\* Italics show amendments of 1962.

*election shall be held on the second Tuesday in February.* Except as otherwise provided in chapter 8 of this Title, only the total vote of all the constituent school districts in the regional school district shall be considered in determining the result of any regional school district election and any proposition, question or proposal must be adopted by the affirmative vote of a majority of the legal ballots cast thereon in the entire regional school district without regard to the majorities of the legal ballots cast thereon in the constituent school districts.

2. This act shall take effect immediately.

Approved April 6, 1962.

#### CHAPTER 32, LAWS OF 1962

AN ACT concerning leave of absence from public employment, and amending section 38:23-2 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 38:23-2 of the Revised Statutes is amended to read as follows:

38:23-2. The head of every public department and of every court of this State, every superintendent or foreman on the public works of this State, the heads of the county offices of the several counties and the head of every department, bureau and office in the government of the various municipalities, shall give a leave of absence with pay to every person in the service of the State, county or municipality who is a duly authorized representative of the Grand Army of the Republic, United Spanish-American War Veterans, Disabled American Veterans of the World War, Veterans of Foreign Wars, Indian War Veterans, American Legion, Jewish War Veterans of the United States, Catholic War Veterans of the United States, Women's Overseas Service League, American Veterans World War II, Reserve Officers Association of the United States, Marine Corps League of the United States, Army and Navy Legion of Valor, the Twenty-ninth Division Association, Council of State Employees, War Veteran Public Employees Association, New Jersey Civil Service Association, Blind Veterans Association of New Jersey, *Army and Air National Guard Association of New Jersey, and The National Guard Association of the United States*, to attend any State or national convention of such organization.

A certificate of attendance to the State convention or encampment shall, upon request, be submitted by the representative so attending.

Leave of absence shall be for a period inclusive of the duration of the convention with a reasonable time allowed for time to travel to and from the convention.

2. This act shall take effect immediately.

Approved April 16, 1962.

CHAPTER 34, LAWS OF 1962

AN ACT concerning education, and amending section 18:7-76 of the Revised Statutes.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 18:7-76 of the Revised Statutes is amended to read as follows:

18:7-76. The board may insure school buildings, furniture, and other school property, and receive, *lease* and hold in trust for the district any and all real or personal property for the benefit of the schools thereof.

2. This act shall take effect immediately.

Approved April 19, 1962.

CHAPTER 133, LAWS OF 1962

AN ACT to amend "An act concerning State aid for certain libraries and providing for an appropriation," approved December 1, 1959 (P. L. 1959, c. 177.)

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. Section 5 of the act of which this act is amendatory is amended to read as follows:

5. State funds shall be provided annually as follows:

(a) Each municipality that supports, in whole or in part, library service from municipal tax sources pursuant to chapter 33 or 54 of Title 40 of the Revised Statutes shall qualify for the sum of \$0.35 per capita of the population of the municipality provided that:

1. Its annual expenditure for library purposes shall be equal to or in excess of the local fair share as determined in section 4 of this act; and

2. The municipality shall be a member of a *regional or* county library system, or its annual expenditure for library purposes shall not be less than \$50,000.00, or, if it is a member of a federation, the sum of the annual expenditure for library purposes of the municipalities contracting to form the federation shall not be less than \$50,000.00.

(b) Each municipality that supports, in whole or in part, library services from municipal tax sources pursuant to R. S. 40:33-1 et seq., or R. S. 40:54-1 et seq., and does not qualify for aid under subdivision (a) of this section shall qualify for the sum of \$0.05 per capita.

2. Section 8 of the act of which this act is amendatory is amended to read as follows:

8. Each county that shall, after the effective date of this act, establish a free county library *or unite with one or more other counties in the establish-*

*ment and maintenance of a regional library pursuant* under chapter 33 of Title 40 of the Revised Statutes, or each federation that shall be established, provided that such federation includes all municipalities situated within the county, shall receive from State funds the sum of \$20,000.00 per year for a period of 3 years in addition to other aids under this act.

3. Section 11 of the act of which this act is amendatory is amended to read as follows:

11. The sums payable as State aid, as finally determined by the commissioner, shall be payable on October 1 following the final determination in each such year. Payments shall be made by the State Treasurer upon certificate of the Commissioner of Education and warrant of the Director of the Division of Budget and Accounting. Payment shall be made to the governing body of each municipality qualifying for aid under this act provided that it is not a member of a *regional or county library system*. Payment shall be made to the treasurer of each county for the municipalities qualifying for aid under this act and that participate in a *regional or county library system*. Upon resolution of the *regional library board of trustees or the county library commission, as the case may be*, these funds may be reallocated to the municipalities in whose name the county receives aid, provided that this reallocation shall not exceed for any one municipality \$0.15 per capita of the population of that municipality.

4. Section 13 of the act of which this act is amendatory is amended to read as follows:

13. On or before March 1 in each year each *library* receiving State aid according to the provisions of this act shall make and transmit a report to the Bureau of Public and School Library Services of such information, based upon the statistics of the preceding calendar year, as the head of the bureau shall require.

5. This act shall take effect immediately.

Approved July 27, 1962.

#### CHAPTER 202, LAWS OF 1962

AN ACT concerning the oath of allegiance and office and providing for the taking of the same as a prerequisite to the assumption of public office, position or employment in this State, and amending section 41:1-3 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 41:1-3 of the Revised Statutes is amended to read as follows:

41:1-3. In addition to any official oath that may be specially prescribed, every person who shall be elected, appointed or employed to, or in, any public office, position or employment, legislative, executive or judicial, of, or in, any county, municipality or special district other than a municipality therein, or of, or in, any department, board, commission, agency or instrumentality

thereof shall, before he enters upon the execution of his said office, position, employment or duty take and subscribe the oath of allegiance and office as follows:

“I, \_\_\_\_\_ do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of \_\_\_\_\_ according to the best of my ability.

*I do further solemnly swear (or affirm) that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the government established in the United States or in this State; and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which so approves, advocates or advises the use of such means. So help me God.”*

2. This act shall take effect immediately.

Approved December 18, 1962.

CHAPTER 231, LAWS OF 1962

AN ACT concerning education, relating to tenure of school employees and amending sections 18:13-16, 18:13-17, 18:13-19 and 18:13-20 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 18:13-16 of the Revised Statutes is amended to read as follows:

18:13-16. The services of all teachers, principals, *assistant principals, vice-principals*, superintendents, assistant superintendents, and *such other employees* of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any 4 consecutive academic years, for the equivalent of more than 3 academic years, some part of which must be served in an academic year after July 1, 1940; provided, that the time any *such employee* had taught in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district, *except that no employee shall obtain tenure in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964.*

An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation.

*Other provisions of this section notwithstanding, any employee under tenure or eligible to obtain tenure pursuant thereto, who is transferred or promoted with his consent to another position covered by this section on or after July 1, 1962, shall not obtain tenure in the new position until (a) after the expiration of a period of employment of 2 consecutive calendar years in the new position unless a shorter period is fixed by the board, or (b) after employment for 2 academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year, or (c) after employment in the new position within a period of any 3 consecutive academic years, for the equivalent of more than 2 academic years; provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such employee, 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, such employee 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.*

2. Section 18:13-17 of the Revised Statutes is amended to read as follows:

18:13-17. No teacher, principal, superintendent, assistant superintendent or any other employee under the tenure referred to in section 18:13-16 of this Title shall be dismissed or subjected to a reduction of salary in the school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not.

3. Section 18:13-19 of the Revised Statutes is amended to read as follows:

18:13-19. Nothing contained in sections 18:13-16 and 18:13-17 of this Title or any other provisions of law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of superintendents of schools, assistant superintendents, principals, teachers, or other employees holding tenure pursuant to section 18:13-16 employed in the school district whenever, in the judgment of the board of education it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization of the district, or other good cause. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion or political affiliation. Any dismissals occurring because of the reduction of the number of persons under the terms of this section shall be made on the basis of seniority according to standards to be established by the Commissioner of Education with the approval of the State Board of Education. In establishing such standards, the commissioner shall classify, in so far as practicable, the fields or categories of administrative, supervisory, teaching or other educational services which are being performed in the school districts of this State and may, at his discretion,

determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole. Whenever it is necessary to reduce the number of persons covered by this section, the board of education shall determine the seniority of such persons according to the standards established by the Commissioner of Education with the approval of the State Board of Education and shall notify each person as to his seniority status. A board of education may request the Commissioner of Education for an advisory opinion with respect to the applicability of the standards to particular situations and all such requests shall be referred to a panel to consist of the county superintendent of schools of the county in which the school district is situate, the secretary of the State Board of Examiners, and 1 assistant commissioner of education to be designated by the Commissioner of Education. No determination of any panel shall be binding upon the board of education or any other party in interest, nor upon the Commissioner of Education and the State Board of Education in the event of an appeal pursuant to sections 18:3-14 and 18:3-15 of the Revised Statutes. All persons dismissed shall be placed on a preferred eligible list to be prepared by the board of education of the school district, and shall be re-employed by the board of education of the school district in order of seniority as determined by the said board of education. In computing length of service within the district, the time of service by such superintendents of schools, whether served as superintendents of schools, city superintendents or supervising principals, assistant superintendents, principals, teachers, *or other employees holding tenure pursuant to section 18:13-16* in or with the military or naval forces of the United States of America or of this State subsequent to September 1, 1940, shall be credited in determining seniority under this act as though such superintendents, assistant superintendents, principals, teachers, *or other employees holding tenure pursuant to section 18:13-16* had been regularly employed within the district during the time of such military service. Should any superintendent of schools, assistant superintendent, principal, teacher, *or other employee holding tenure pursuant to section 18:13-16* under tenure be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal in such order when and if a vacancy in a position for which such superintendent, assistant superintendent, principal, teacher, *or other employee holding tenure pursuant to section 18:13-16* shall be qualified. Such re-employment shall give full recognition to previous years of service.

The services of any superintendent of schools, assistant superintendent, principal, teacher, *or other employee holding tenure pursuant to section 18:13-16* may be terminated, without charge or trial, 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.

4. Section 18:13-20 of the Revised Statutes is amended to read as follows:

18:13-20. Any teacher, principal, superintendent of schools, *assistant superintendent, or other employee*, under tenure of service, desiring to relinquish his position, shall give the employing board of education 60 days' written notice of his intention, unless the local board of education shall ap-

prove of a release on shorter notice. Any teacher failing to give such notice shall be deemed guilty of unprofessional conduct, and the commissioner may suspend his certificate for a period not exceeding 1 year.

5. This act shall take effect *immediately*.

Approved February 1, 1963.

CHAPTER 248, LAWS OF 1962

AN ACT concerning certain pensioners, and amending section 43:3-5 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 43:3-5 of the Revised Statutes is amended to read as follows:

43:3-5. The provisions of this chapter shall not apply to any appointment of a temporary nature made or created by any rule or order of procedure of any court of this State, so as to interfere with any rule or order of procedure in such courts for the proper administration of justice therein; nor shall the provisions of this chapter apply to any person appointed to the office of court crier in any court where the term of such office is indefinite, or to any person who is appointed to the office of magistrate of any municipal court in a municipality having a population of less than 5,000, where the salary paid to such municipal magistrate is less than the amount of his pension; nor to the appointment and employment of any pensioned former municipal manager or licensed accountant as an engineer or consultant or member of any commission or board by any municipality, county or by the State, or as a teacher or lecturer in any school or educational institution in the State; nor to the employment, by the State or by any county, municipality or school district in any position or employment, to the duties of which the holder thereof is not required to devote his full time, at a salary or compensation of not more than \$1,800.00 per calendar year, of any person who is receiving or who shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality or school district of this or any other State; nor to any person who has or who may hereafter receive permanent disability in the performance of his duty while serving as a member of the Armed Forces of the United States, the New Jersey State Police, or the police department, or the fire department of any county or municipality in this State. The provisions of this section shall not authorize the employment as a policeman or fireman of any person who is receiving or shall be entitled to receive any pension or subsidy from this or any other State or any county, municipality, or school district of this or any other State as a result of services as a member of a police department or a fire department.

2. This act shall take effect immediately.

Approved March 1, 1963.

SCHOOL LAWS, SESSION OF 1962  
SUPPLEMENTS

CHAPTER 108, LAWS OF 1962

AN ACT supplementing the "Teachers' Pension and Annuity Fund-Social Security Integration Act," approved June 1, 1955 (P. L. 1955, c. 37).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. The reduction provided in section 68 of the act to which this act is a supplement shall not be made in the case of men born after January 1, 1892 and before July 2, 1893 and after July 1, 1898, and in the case of women born after January 1, 1892 and before July 2, 1896 and after July 1, 1901 provided such individuals have retired *or, in the case of individuals who were born prior to January 1, 1900, shall file application for retirement prior to January 1, 1963, for retirement to become effective not later than July 1, 1963, and, in the case of such individuals who were born on or after January 1, 1900, shall file application for retirement prior to January 1, 1964, for retirement to become effective not later than July 1, 1964, and provided further that such individuals do not earn additional quarters of social security coverage from public employment in New Jersey after the date of retirement or the effective date of this act, whichever is later, and before reaching age 65. Wherever a reduction in retirement allowances has been made prior to the effective date of this act and with respect to any retired member covered by this act, an amount equal to the total of all such monthly reductions shall be paid to any such retired member. The liability created by this act shall be computed by the actuary and shall be paid by the State in annual installments over a period of 30 years commencing July 1, 1963, in such a manner as will provide for this liability.*

2. Limitation "(b)" of the reduction provided in section 68, of the act to which this act is a supplement, notwithstanding, the eligibility to the old age insurance benefit shall be computed from the effective date of this act until December 31, 1964 in the same manner as computed by the Federal Social Security Administration but in accordance with the provisions of Title II of the Social Security Act in effect on December 31, 1959. In determining such eligibility only the quarters of coverage and wages or compensation for services performed in the employ of the State, or 1 or more of its instrumentalities, or 1 or more of its political subdivisions, or 1 or more instrumentalities of its political subdivisions, or 1 or more instrumentalities of the State and 1 or more of its political subdivisions shall be included.

3. This act shall take effect immediately.

Approved July 10, 1962.

CHAPTER 128, LAWS OF 1962

AN ACT to amend "An act concerning education, authorizing the creation of certain regional school districts and supplementing chapter 8 of Title 18 of the Revised Statutes," approved September 27, 1960 (P. L. 1960, c. 122).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section 1 of chapter 122 of the laws of 1960 is amended to read as follows:

1. Whenever the board of education of a consolidated school district or of a school district comprising 2 or more municipalities and the State Commissioner of Education, after study and investigation, shall deem it advisable for such school district to become a regional school district for *the* school purposes of *such school* district, and shall determine whether the amounts to be raised for annual or special appropriations for such regional school district are to be apportioned upon the basis of apportionment valuations as defined in section 54:4-49 of the Revised Statutes, or of average daily enrollment of pupils from the constituent municipalities in such *regional* school district during the preceding year, the board of education shall call and conduct a special election which shall be held in the manner provided for the conduct of special school district elections in chapter 7 of Title 18 of the Revised Statutes and shall submit a proposal for creation of a regional school district to become effective on July 1 next ensuing such election. The proposal so submitted shall state whether the amounts to be raised for annual or special appropriations for such regional school district are to be apportioned upon the basis of such apportionment valuations or of average daily enrollment of pupils from the constituent municipalities in the school district during the preceding school year.

*There may be included, as a part of the proposal to be submitted as aforesaid, the authorization of bonds of such regional school district for any purpose or purposes described in section 18:7-85 of the Revised Statutes. Such an authorization shall for all the purposes of said Title 18, and particularly of chapter 8 and article 18 of chapter 5 thereof, be deemed to constitute a proposal authorizing the board of education of such regional school district to issue bonds of such regional school district. A copy of such proposal may be submitted prior to such election for consideration by the State Commissioner of Education and the Local Government Board under and for all the purposes of section 18:5-86 of the Revised Statutes. If such proposal includes such an authorization and pursuant to such proposal such school district shall vote to become a regional school district, such proposal shall after such vote be authority for the issuance of bonds of such regional school district to the amount and for the purpose or purposes set forth therein and, from and after the date of such vote, shall for all the purposes of chapters 7 and 8 of said Title 18, and of any other provisions of said Title, be deemed to constitute a proposal duly adopted on said date by the legal voters of such regional school district authorizing the board of education thereof to issue bonds of such regional school district for the purpose or purposes and in the amount or amounts set forth in such proposal. The bonds so authorized shall be issued, shall be dated and sold in all respects in accordance with the*

*provisions of said chapters, and shall mature within the period or respective periods of time prescribed by such provisions, in each case computed from the date of such bonds.*

2. Section 7 of chapter 122 of the laws of 1960 is amended to read as follows:

7. Upon the effective date of the creation of the regional school district the officer having custody of the funds of the district to be dissolved shall deliver all of the funds in his possession to the secretary of the regional board of education who shall give his receipt therefor and shall immediately turn the same over to the custodian of school moneys of the regional school district. All personal property, books, papers, vouchers and other documents belonging to the district being dissolved shall be transferred to the said secretary who shall cause a complete inventory to be made of all assets, real and personal, received by the regional school district. Upon the effective date of the creation of the regional school district *all proceeds of taxes of any nature raised or to be levied for use or benefit of the dissolving school district and rights and claims with respect thereto, and all the property, funds, moneys and assets of the dissolving district shall vest in the regional school district and the regional school district shall be subject to all the contracts, debts and other obligations of the dissolving district. Upon the effective date of the creation of the regional school district all bonds and notes of the dissolving district theretofore issued and outstanding shall be and shall constitute obligations of and payable as to both principal and interest by the regional school district, and, unless otherwise required or provided for by law, in the same manner and to the same extent as if such bonds and notes had been issued by the regional school district.*

3. Section 8 of chapter 122 of the laws of 1960 is amended to read as follows:

8. The board of education of the regional school district shall be a body corporate. The board shall organize forthwith upon election or appointment of its members and on and after the effective date of the creation of the regional school district the affairs of *such* district shall be conducted and governed in accordance with the provisions of chapter 8 of *said* Title 18, as amended and supplemented, *and the corporate title of any such regional school district hereafter established shall be as provided for or permitted by the provisions of said chapter 8.*

4. This act shall take effect immediately.

Approved July 25, 1962.

#### CHAPTER 134, LAWS OF 1962

AN ACT providing for the establishment and maintenance of regional libraries, and supplementing chapter 33 of Title 40 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Any 2 or more counties may, by joint agreement adopted by similar resolutions of their boards of chosen freeholders, provide for the establish-

ment and maintenance of a regional library for the use and benefit of the residents of the municipalities within said counties.

2. The regional library agreement shall provide for:

(a) the establishment and maintenance of a regional library upon the approval of such agreement by such counties as the agreement shall provide;

(b) a proposed initial budget for the regional library;

(c) the apportionment of the initial, annual and other appropriations for the regional library among the participating counties and the factor or factors upon which such apportionments shall be based;

(d) the withdrawal of any participating county from such agreement, the termination of the regional library and the apportionment of all assets and obligations of the regional library among the participating counties in the event of such withdrawal or termination;

(e) the number and initial terms of the members of the board of trustees of the regional library within the limits set forth in this act; and

(f) such other matters not inconsistent with the provisions of this act as may be necessary or desirable to accomplish the objectives of this act.

3. The regional library agreement may, from time to time, be amended or supplemented by the adoption of similar resolutions by all the boards of chosen freeholders of the participating counties. A copy of the original regional library agreement, of any amendments or supplements thereto and of the resolutions approving such agreement, amendments or supplements shall be filed with the Commissioner of Education and with the Director of the Division of Local Government.

4. Upon the introduction of a resolution approving such agreement, or any amendment or supplement thereto, such resolutions, agreement, amendment, or supplement shall be and remain on file for public inspection in the office of the clerk of the board of chosen freeholders. Such resolution shall be published at least once 2 weeks or more before final consideration and passage in a newspaper published in the county or having a substantial circulation therein.

5. The regional library shall be under the management and control of a board of trustees to be designated as "the trustees of the . . . (names of the participating counties) regional library" or by other appropriate designation. The board of trustees shall consist of 1, 2 or 3 members from each of the participating counties, as provided in the agreement. The trustees shall be appointed by the respective boards of chosen freeholders for 5-year terms ending on December 31. Vacancies shall be filled for the unexpired term only. No trustee shall be appointed to more than 2 consecutive 5-year terms. Trustees shall serve without compensation.

The initial terms of the trustees shall be so fixed in the joint library agreement to insure that no 2 terms of the trustees appointed from any one county shall expire in the same year, and, as nearly as may be, that the least possible number of terms of all the trustees shall expire in the same year.

6. The board of trustees shall organize annually and elect, from among its members, a president and vice-president. It shall also appoint a treasurer and secretary. The treasurer may be treasurer of one of the participating counties. All officers shall serve for 1 year and until their successors are elected.

7. The board of trustees shall be a body public and corporate and may:

- (a) sue and be sued;
- (b) adopt a corporate seal;
- (c) hold in trust and manage all property of the regional library;
- (d) acquire and dispose of any real and personal property, including books and all other library materials, by purchase, sale, gift, lease, bequest, device or other similar manner for its corporate purposes;
- (e) employ and fix the compensation of a library director, to whom it shall delegate the administrative responsibilities of the library, and such other professional librarians and other employees it deems necessary;
- (f) adopt rules and regulations and do all things necessary for the proper establishment and operation of the library;
- (g) contract with other counties, municipalities, library boards of trustees and other agencies for the furtherance of its purpose; and
- (h) invest any funds in the same manner as the governing body of a municipality is authorized by law to invest moneys held by it.

8. The board of trustees shall make annual reports to the boards of chosen freeholders of the participating counties, to the governing bodies of such municipalities with which it has contractual arrangements to provide library services and to the boards of trustees of public libraries within such municipalities.

9. The board of trustees shall annually, not later than November 1, *propose* to the boards of chosen freeholders of each of the participating counties the total sum required for the operation and other expenses of the library for the ensuing calendar year, including such sums proposed for the acquisition of lands or buildings or the improvement thereof, and that part of this total sum to be provided by each such county in accordance with the method of apportionment provided in the regional library agreement. If any board of chosen freeholders shall object to the amount or apportionment so *proposed*, the director thereof shall confer with the directors of the boards of chosen freeholders of the other participating counties and with the board of trustees. If, thereafter, any *such director of a* board of chosen freeholders shall object to such amount or apportionment, the matter shall be referred by *said respective directors to their boards of chosen freeholders* for determination. Such determination shall be made on the basis of fairness and equity, to promote the objectives of this act and the terms of the regional library agreement and to insure the public interest.

10. Each board of chosen freeholders shall certify to its county board of taxation the sum to be provided by that county as certified or determined

pursuant to section 8 of this act. The county board of taxation shall apportion such sum, in accordance with the provisions of section 54:4-49 of the Revised Statutes, among the municipalities within that county served by the regional library pursuant to the regional library agreement. The amounts thus apportioned shall be assessed, levied and collected in each such municipality in the same manner and at the same time as other county taxes are assessed, levied, and collected. Each such county shall pay over the sum so collected, in quarterly installments on February 15, May 15, August 15 and November 15 of each year, to the treasurer of the regional library.

11. The treasurer of the board of trustees shall receive and hold, in behalf of the board, all funds of the library and shall pay out or transfer such funds, as directed by resolution of the board of trustees, by check signed by him and countersigned by the president of the board of trustees or other trustee or trustees designated by the board of trustees. The treasurer shall give adequate bond or bonds, conditioned for the faithful performance and discharge of his duties, payable to the board of trustees and to the participating counties, in an amount or amounts required by the board of trustees. All accounts and financial transactions of the regional library shall be audited annually by a registered municipal accountant of New Jersey and filed with the Director of the Division of Local Government on or before May 31.

12. The board of trustees may enter into agreements with the governing body of any municipality which is not then served by the regional library to increase or improve the library services available to the residents of said municipality or to the residents of the municipalities then served by the regional library. Any such agreement shall specify the services to be rendered by the regional library and by the municipality and the amount and nature of payment of any consideration for such services. Any municipality may enter into such agreements with the board of trustees for periods of not more than 5 years and may renew such agreements for like periods.

No such agreement shall be concluded (a) without the approval of the boards of chosen freeholders of the counties participating in the regional library and, (b) in the event that the municipality maintains a municipal public library, without the approval of the board of trustees of such library. Such agreement may be amended and supplemented, from time to time, and a copy of such agreement, amendments and supplements, together with resolutions of the board of trustees approving such agreement, amendments and supplements, shall be filed with the Commissioner of Education and with the Director of the Division of Local Government.

13. Money paid to the regional library for lost or damaged books or other library materials, for use of "pay" or "rental" collections and for the sale of library books or other library property shall be held by the board of trustees and spent only for the purchase of books or other materials or for the replacement of library property.

Fines, nonresident fees and other miscellaneous revenue received by the regional library shall be turned over to the treasurers of the participating counties in proportionate shares as stipulated in the regional library agreement or in accordance with the apportionment of annual appropriations set forth therein. Each board of chosen freeholders of the participating counties

may, by resolution, reappropriate the sums so received to the board of trustees, in addition to the other moneys appropriated for regional library purposes.

14. Upon the establishment of a regional library, the terms of office of all members of any county library commission of any participating county shall terminate. The assets and obligations of any such commission and of the county library under its supervision shall devolve upon such county, unless otherwise provided in the regional library agreement.

15. Any regional library established pursuant to this act shall be deemed a "public agency or organization" as that term is used in the Public Employees' Retirement Act (P. L. 1954, c. 84) and as defined in section 71 of said act.

16. If the board of chosen freeholders of any participating county shall determine by resolution to withdraw its participation in the support, maintenance and control of the regional library, it shall give notice thereof to the boards of chosen freeholders of other participating counties and to the board of trustees of the regional library. The directors of all boards of chosen freeholders participating in the regional library and the board of trustees shall confer as soon as practicable for the purpose of reaching an agreement among the participating counties as to the time and method of withdrawal by such county, the use of the library facilities thereafter, the adjustment, apportionment, accounting for, settlement, allowance and satisfaction of the rights and liabilities in or with respect to any property, obligations or other matters or things connected with said library and any other matters relating to the regional library. If said boards of chosen freeholders shall be unable to agree as to the terms and conditions of such withdrawal, the matter shall be referred by the board of chosen freeholders of the county which has adopted a resolution to withdraw to the Director of the Division of Local Government for determination on the basis of fairness and equity, the objectives of this act and the regional library agreement, and the public interest. Upon final approval of the resolution or determination by the Director of the Division of Local Government, the participation of the county in the support, maintenance and control in the regional library shall terminate in accordance with the terms of the withdrawal agreement or determination.

17. This act shall take effect immediately.

Approved July 27, 1962.

#### CHAPTER 171, LAWS OF 1962

AN ACT supplementing the "Public Employees' Retirement-Social Security Integration Act," approved June 28, 1954 (P. L. 1954, c. 84).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The reduction provided in section 59 of the act to which this act is a supplement shall not be made in the case of men born after January 1, 1892 and before July 2, 1893 and after July 1, 1898, and in the case of women born after January 1, 1892 and before July 2, 1896 and after July 1, 1901

provided such individuals have retired or, *in the case of individuals who were born prior to January 1, 1900, shall file application for retirement prior to January 1, 1963, for retirement to become effective not later than July 1, 1963, and, in the case of such individuals who were born on or after January 1, 1900, shall file application for retirement prior to January 1, 1964, for retirement to become effective not later than July 1, 1964, and provided further that such individuals do not earn additional quarters of social security coverage from public employment in New Jersey after the date of retirement or the effective date of this act, whichever is later, and before reaching age 65. Wherever a reduction in retirement allowances has been made prior to the effective date of this act and with respect to any *retired member* covered by this act, an amount equal to the total of all such monthly reductions shall be paid to any such *retired member*. The liability created by this act shall be computed by the actuary and shall be paid by the employers in annual installments over a period of 30 years commencing July 1, 1963, in such a manner as will provide for this liability.*

2. Limitation “(b)” of the reduction provided in section 59, of the act to which this act is a supplement, notwithstanding, the eligibility to the old age insurance benefit shall be computed from the effective date of this act until December 31, 1964 in the same manner as computed by the Federal Social Security Administration but in accordance with the provisions of Title II of the Social Security Act in effect on December 31, 1959. In determining such eligibility only the quarters of coverage and wages or compensation for services performed in the employ of the State, or 1 or more of its instrumentalities, or 1 or more of its political subdivisions, or 1 or more instrumentalities of its political subdivisions, or 1 or more instrumentalities of the State and 1 or more of its political subdivisions shall be included.

3. This act shall take effect immediately.

Approved November 29, 1962.

#### CHAPTER 195, LAWS OF 1962

AN ACT concerning annual leave for vacation purposes of certain employees in the classified service of the State, and supplementing chapter 14 of Title 11 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any employee in the permanent State classified service dies, having to his credit any annual vacation leave properly accumulated in accordance with section 11:14-1 of the Revised Statutes, there shall be calculated and paid to his estate a sum of money equal to the compensation which would have been received by the employee during such period of vacation leave had the employee lived.

2. This act shall take effect immediately.

Approved December 11, 1962.

CHAPTER 196, LAWS OF 1962

A SUPPLEMENT to "An act concerning civil service employees in the various counties, municipalities and school districts in the State, and supplementing subtitle 3, Title 11, of the Revised Statutes of New Jersey," approved July 18, 1939 (P. L. 1939, c. 232).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Whenever any employee in the permanent classified service of a county, municipality or school district dies, subsequent to the enactment of this act, having to his credit any annual vacation leave properly accumulated in accordance with the act to which this act is a supplement, there shall be calculated and paid to his estate a sum of money equal to the compensation which would have been received by the employee during such period of vacation leave had the employee lived.

2. This act shall take effect immediately.

Approved December 11, 1962.

CHAPTER 216, LAWS OF 1962

AN ACT concerning education and supplementing article 3 of chapter 7 of Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Any candidate may withdraw his name as a candidate *for election at the annual school election* by filing a notice in writing, signed by him, of his withdrawal with the secretary of the board of education on or before 4 o'clock P.M. of the *thirtieth* day before the date of the election and thereupon the name of such candidate shall be withdrawn by the secretary. *The name of such candidate shall not be printed on the ballot. The names of any candidates originally designated on the ballot below the name of the withdrawn candidate shall be advanced one place each, respectively, on the ballot.*

2. This act shall take effect immediately.

Approved January 9, 1963.

CHAPTER 229, LAWS OF 1962

AN ACT to amend "An act relating to the public schools of this State, and supplementing Title 18 of the Revised Statutes," approved April 22, 1940 (P. L. 1940, c. 47) and chapter 145, public laws of 1951 supplementary thereto.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section 1 of the act of which this act is amendatory is amended to read as follows:

1. Whenever 50% or more persons employed by a board of education shall indicate in writing their desire to participate in any hospital service plan or group insurance plan, *for themselves, or for themselves and their husbands or wives and dependent children*, or purchase of bonds or stamps of the United States Government and such board of education by majority vote of the entire board approves such participation, then, and thereupon, the proper disbursing officers of the board of education, under such rules and regulations as may be established by the board, are hereby empowered and directed to deduct specified fees, premiums or amounts for the purchase of bonds or stamps from the payments of the salaries made to such employees as shall participate in such plan, insurance, or purchase, and said disbursing officer shall, thereupon, pay to the respective corporation for such insurance or hospital service or directly or indirectly to the Federal Government for United States bonds or stamps by warrant drawn in the manner provided by law for the payment of bills the sum total of said deductions from the salaries of such employees. Sanction by the board of education to participate in such hospital service, insurance plans or purchase shall in no wise impose any liability or responsibility whatever on such board of education except to show that payments have been made for the purpose or purposes above set forth and that United States bonds or stamps in the amount of the deductions made for their purchase by the board of education for each employee shall be delivered to such employee. The making of the above deductions shall be construed as equivalent to voluntary payments by an employee and any and all rights of an employee now existing under the laws of this State shall be and remain the same as if the foregoing deductions were not made.

2. Section 1 of chapter 145 of the public laws of 1951 is amended to read as follows:

1. Whenever a group has or shall have been established in accordance with the provisions of section 1 of the act of which this act is a supplement, the board of education of the school district in which the group or groups are formed may pay as additional compensation to the individual members of the group or groups, a part or all of the premiums on the group policy or policies, *covering themselves, or themselves and their husbands or wives and dependent children*.

3. This act shall be operative from the effective date thereof and also shall be operative retroactively to July 1, 1959.

4. This act shall take effect immediately.

Approved January 31, 1963.

#### CHAPTER 236, LAWS OF 1962

AN ACT to amend "A supplement to the 'Public Employees' Retirement-Social Security Integration Act,' approved June 28, 1954 (P. L. 1954, c. 84)," approved January 21, 1960 (P. L. 1959, c. 196).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Section I of the act of which this act is amendatory is amended to read as follows:

1. Notwithstanding any other provision of law, a member of the Public Employees' Retirement System of New Jersey shall be entitled to purchase prior service credit for *his* years of *other eligible public employment; but his prior public employer or employers, as the case may be*, shall not be liable for any payment to the system by reason of the said member's purchase of benefits under this act and any and all contributions required hereunder shall be made by the member. Proof of such prior service shall be furnished by the affidavit of the member, supported by other evidence if required by the board of trustees of the said retirement system, and the said board may prescribe rules and regulations to effectuate the purposes of this act. Any such member desiring to acquire such credits for prior service shall be required to contribute either in a lump sum or by installment payments an amount calculated in accordance with the rules and regulations of the board of trustees to cover the required contribution for his acquisition of such prior service credits.

2. This act shall take effect immediately.

Approved February 21, 1963.

#### CHAPTER 244, LAWS OF 1962

AN ACT concerning educational institutions and supplementing chapter 16 of Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Any professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher or any other person employed in a teaching capacity by the State Board of Education or by the Commissioner of Education in any New Jersey State College, in the New Jersey School for the Deaf, or in any other educational institution, against whom an action in damages is instituted for any act or acts arising out of the performance of the duties of his office or position or out of, or in the course of his employment, shall be furnished by the State with legal counsel to advise and defend him and the State shall defray the fees and expenses of counsel in such suit; but should such employee decline the services of the counsel provided, then and in that event the State shall be relieved of all further responsibility.

2. Should the action instituted result in a verdict against the employee, then and in that event any appeals taken by the employee must be taken at the cost and expense of the employee; provided, that if, upon an appeal taken by an employee, the court of higher jurisdiction reverses the decision of the lower court, the cost of such an appeal, including the services of counsel, reasonable counsel fees and expenses shall be borne by the State. If the verdict of the court of original jurisdiction is in the employee's favor and the complaining person appeals the verdict, then and in this event the State shall furnish counsel and defray the fees and expenses of the appeal.

3. It shall be the duty of the State to save harmless and protect any person covered by this act from financial loss arising out of any claim, de-

mand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person or damage to property, within or without the institution; provided, such person at the time of the accident, injury or damage was acting in the discharge of his duties within the scope of his office, position or employment or under the direction of the State Board of Education or the Commissioner of Education; and the State may arrange for and maintain appropriate insurance with any company created by or under the laws of this State, or in any insurance company authorized by law to transact business in this State, or the State may elect to act as self-insurers to maintain the aforesaid protection.

4. This act shall take effect immediately.

Approved February 28, 1963.

SCHOOL LAWS, SESSION OF 1962  
ACTS AND RELATED LAWS

CHAPTER 41, LAWS OF 1962

AN ACT concerning the establishment and operation of county colleges and providing for the method of financing and raising the necessary funds therefor.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. As used in this act:

(a) "County college" means an educational institution established or to be established by one or more counties, offering programs of instruction, extending not more than 2 years beyond the high school, which may include but need not be limited to specialized or comprehensive curriculums, including college credit transfer courses, terminal courses in the liberal arts and sciences, and technical institute type programs.

(b) "State board" means the State Board of Education.

(c) "Commissioner" means the Commissioner of Education.

(d) "Capital outlay expense" means those funds devoted to or required for the acquisition, landscaping or improvement of land; the acquisition, construction, reconstruction, improvement, remodeling, alteration, addition or enlargement of buildings or other structures; and the purchase of furniture, apparatus and other equipment.

(e) "Operation expense" means those funds devoted to or required for the regular or ordinary expenses of the college, including administrative, maintenance and salary expenses but excluding capital outlay expenses.

(f) "Local Bond Law" means the Local Bond Law of Title 40A of the New Jersey Statutes.

2. When the board of chosen freeholders of one or more counties, after study and investigation, shall deem it advisable for such county or counties to establish a county college, such board or boards of county freeholders may petition the State board for permission to establish and operate a county college. A report shall be attached to such petition and shall include information on the higher educational needs of the county or counties, a description of the proposed county college, the proposed curriculum, an estimate of the cost of establishing and maintaining such county college, and any other information or data deemed pertinent.

Upon receipt of such petition by the State board, it shall be referred to the commissioner who shall make an independent study as to the higher educational needs of the county or counties, the necessity or advisability of establishing such county college, and whether the county or counties could,

with the State aid provided for in this act, financially support such college. The commissioner shall submit a report containing his conclusions to the State board and to the petitioning board or boards of chosen freeholders.

The State board, after studying both the petition of the board or boards of chosen freeholders and the report of the commissioner, shall determine whether there is a need for such college and whether the county or counties have the financial capacity to support such college. If the State board finds such a need to exist and further finds that establishing and maintaining such college is financially feasible, it shall approve the petition and shall so notify the board or boards of chosen freeholders.

3. Whenever the board or boards of chosen freeholders receive notification that the State board approves the establishment of a county college, each participating board may provide by resolution for the establishment of a county college in accordance with the provisions of this act and the regulations of the State board. Prior to the final passage of said resolution, the board shall have published, in full, in a newspaper circulating in the county, the resolution together with the time and place of a public hearing to be had upon said resolution. Said publication shall be at least 10 days prior to the time fixed for the public hearing.

Within 5 days after passage, the resolution shall be published in full in a newspaper circulating in the county and a copy of said resolution shall be filed for public inspection with the clerk of the board of chosen freeholders and with the clerk of each municipality in said county. The resolution shall become effective in said county 45 days after passage unless there is filed with the county clerk within said 45 days, a petition requesting a referendum in said county signed by either 5% or 10,000 of the registered voters of said county, whichever is lesser, or such a petition authorized by the governing body of a municipality or municipalities representing in total at least 15% of the population of said county. If such petition is so filed, the proposal for the establishment of a county college shall be submitted to the registered voters of said county at the next general election.

Where a county college is to be established by more than one county, similar resolutions authorizing the establishment of such county college shall be passed by the board of chosen freeholders in each participating county. If a petition such as is described above is filed in one or more said participating counties, then the proposal for the establishment of a county college shall be submitted to the registered voters of the county or counties in which such petition or petitions are filed.

The county clerk of each participating county shall notify the commissioner and the board of chosen freeholders of each other participating county upon the elapse of 45 days after the passage of the resolution in said county whether the question of the establishment of a county college is to be submitted to the registered voters of said county at the next general election.

4. If a proposal for the establishment of a county college is to be submitted to the registered voters of the county, the county clerk shall have published at least 10 days before said general election notice thereof in a newspaper circulating in the county and the county clerk shall have printed or cause to be printed on the official ballot to be used at such general election the following:

If you favor the proposition printed below, make a cross (X), plus (+) or check (✓) in the square opposite the word "Yes." If you are opposed thereto, make a cross (X), plus (+) or check (✓) in the square opposite the word "No."

	Yes.	Shall a county college be established in _____ pursuant to "An act concerning the establishment and operation of county colleges and providing for the method of financing and raising the necessary funds therefor." approved _____ ?
	No.	

If a county college is to be established in one county, the name of the county, and if it is to be established in more than one county, the names of the counties, should be inserted in the question and the date of approval of this act should also be inserted in the appropriate blank of said question.

In any county in which voting machines are used the question shall be placed upon the official ballots to be used upon the voting machines without the foregoing instructions to the voters and shall be voted upon by the use of such machines without marking as aforesaid.

If the question of the establishment of a county college is submitted to the people of the county, that county clerk shall send notice of the results of said election to the commissioner and the board of chosen freeholders of each of the participating counties.

5. If at said election the proposal for the establishment of the county college is approved by a majority of all the votes cast both for and against said question in the county, then the board of chosen freeholders shall proceed to establish a county college.

Where the county college is to be established by more than one county, then the boards of chosen freeholders of the participating counties shall not establish a county college until the commissioner notifies said boards that a similar resolution of the board of chosen freeholders in each participating county has become effective upon the elapse of the 45-day period or the proposal for the establishment of a county college has been approved by a majority of the registered voters of said county at a general election.

6. If a majority of the votes in a county are cast against a proposal for the establishment of a county college, the board of chosen freeholders of such county may not establish a county college unless thereafter the board:

(a) Submits a petition to the State board in accordance with the provisions of section 2 of this act, and

(b) Submits a proposal for the establishment of a county college at a general election and has it approved by a majority of the votes of the county voting thereon.

The board of chosen freeholders shall not resubmit a proposal which has been defeated to the voters of the county before the third general election

thereafter, however, an alternate proposal may be submitted at any general election.

7. The State board shall establish rules and regulations governing:

(a) The establishment of county colleges; and

(b) The operation of county colleges which shall include but need not be limited to:

- (1) accounting systems, auditing and other financial controls,
- (2) determining tuition rates,
- (3) attendance of nonresident pupils,
- (4) standards for granting diplomas, certificates or degrees, and
- (5) minimum qualifications for professional staff members.

8. For each county college there shall be a board of trustees, consisting of the county superintendent of schools and 8 persons to be appointed by the director of the board of chosen freeholders with the advice and consent of that board.

When a county college is established by more than one county the board of trustees shall be increased by 2 members for each additional participating county. The membership of the board of trustees shall be apportioned by the commissioner among the several counties as nearly as may be according to the number of inhabitants in each county as shown by the last Federal census, officially promulgated in this State. Each apportionment shall continue in effect until a reapportionment shall become necessary by reason of the official promulgation of the next Federal census or the enlargement of the board by the admission of one or more additional counties as provided for in section 24 of this act. Each county shall be entitled to have at least one member and the county superintendent of the schools of said county on the board of trustees.

9. Appointed members of the board of trustees shall be citizens of the United States who have been residents of the county appointing them for a period of 4 years prior to said appointment. The term of office of appointed members, except for the first appointments, shall be for 4 years. Each member shall serve until his successor shall have been appointed and qualified.

Vacancies shall be filled in the same manner as the original appointment for the remainder of the unexpired term. Members shall serve without compensation but shall be entitled to be reimbursed for all reasonable and necessary expenses.

In the case of a county college established by one county, the term of office of members initially appointed to the board of trustees shall be as follows: 2 persons shall receive terms of 1 year, 2 terms of 2 years, 2 terms of 3 years and 2 terms of 4 years.

In the case of a county college established by more than one county, the commissioner shall fix the terms of the members initially appointed to the board of trustees so that as nearly as possible,  $\frac{1}{4}$  of the appointed members will receive terms of 4 years,  $\frac{1}{4}$  terms of 3 years,  $\frac{1}{4}$  terms of 2 years and the remainder terms of 1 year. Such terms shall be allocated by the com-

missioner among the participating counties, in accordance with the number of members on the board of trustees appointed to each county, starting with the terms of 4 years, by allocating one of such terms to each of the participating counties in alphabetical order of the names of such counties, and continuing, still in such order, with the terms of 3 years, the terms of 2 years and the terms of 1 year.

Members initially appointed to the board may serve from the time of their respective appointments, but the term of such office shall be deemed to commence as of November 1 of the year in which the appointment was made.

10. The board of trustees of a county college shall organize annually on the first Monday in November by the election of a chairman, vice-chairman and such other officers as the board shall determine.

11. The board of trustees shall be a body corporate and shall be known as the "Board of Trustees of ....." (here insert the name of the county college).

The board of trustees, in accordance with the rules and regulations of the State board, shall have custody of and be responsible for the property of the college and shall be responsible for the management and control of said college. The board shall make an annual report in the manner prescribed by the State board to the commissioner and to the board of chosen freeholders of each participating county.

12. For the effectuation of the purposes of this act, the board of trustees of a county college, in addition to such other powers expressly granted to it by this act and subject to the rules and regulations of the State board, is hereby granted the following powers:

- (a) To adopt or change the name of the county college;
- (b) To adopt and use a corporate seal;
- (c) To sue and be sued;
- (d) To determine the educational curriculum and program of the college;
- (e) To appoint and fix the compensation and term of office of a president of the college who shall be the executive officer of the college and an ex officio member of the board of trustees;
- (f) To appoint, upon nomination of the president, members of the administrative and teaching staffs and fix their compensation and terms of employment subject to the provisions of section 13 of this act;
- (g) To appoint or employ such other officers, agents and employees as may be required to carry out the provisions of this act and to fix and determine their qualifications, duties, compensation, terms of office and all other conditions and terms of employment and retention;
- (h) To fix and determine tuition rates and other fees to be paid by students;
- (i) To grant diplomas, certificates or degrees;

(j) To enter into contracts and agreements with the State or any of its political subdivisions or with the United States, or with any public body, department or other agency of the State or the United States or with any individual firm or corporation which are deemed necessary or advisable by the board for carrying out the provisions of this act;

(k) To accept from any government or governmental department, agency or other public or private body or from any other source grants or contributions of money or property which the board may use for or in aid of any of its purposes;

(l) To acquire (by gift, purchase, condemnation or otherwise), own, lease, use and operate property, whether real, personal or mixed, or any interest therein, which is necessary or desirable for college purposes;

(m) To determine that any property owned by the county college is no longer necessary for college purposes and to sell the same at such price and in such manner and upon such terms and conditions as shall be established by the State board;

(n) To exercise the right of eminent domain pursuant to the provisions of Title 20 of the Revised Statutes to acquire any property or interest therein;

(o) To make and promulgate such rules and regulations, not inconsistent with the provisions of this act or with the rules and regulations of the State board, that are necessary and proper for the administration and operation of a county college and to implement the provisions of this act; and

(p) To exercise all other powers not inconsistent with the provisions of this act or with the rules and regulations of the State board which may be reasonably necessary or incidental to the establishment, maintenance and operation of a county college.

13. The teaching staff employees and administrative officers other than the president of the county college are hereby held to possess all the rights and privileges of teachers employed by local boards of education. The president and teaching staff members shall be eligible for membership in the Teachers' Pension and Annuity Fund.

For the benefit of its other officers and employees, the county college, as a public agency, may elect to participate in the Public Employees' Retirement System.

14. Counties, municipalities, school districts or special schools may sell, give or lease any of their property to the board of trustees of a county college pursuant to the rules and regulations of the State board.

15. Each county college shall have a board of school estimate.

In the case of a county college established by one county, such board shall consist of the chairman of the board of chosen freeholders, 2 members of the board of chosen freeholders appointed by that board and 2 members of the board of trustees appointed by that board.

In the case of a county college established by more than one county, such board shall consist of the chairman of the board of chosen freeholders from

each participating county, one member of the board of chosen freeholders from each participating county appointed by that board and one member of the board of trustees from each participating county appointed by that board.

16. Appointments to the board of school estimate shall be made annually on or before December 1 and any vacancy in the board's membership shall be filled by the board which originally appointed the members. The secretary of the board of trustees shall be the secretary of the board of school estimate but shall receive no additional compensation therefor.

The board of school estimate shall fix and determine the amount of money necessary to be appropriated for use of the county college for the operation and capital outlay expenses for the school year, exclusive of the amount to be received from the State and other sources.

17. On or before February 1 in each year, the board of trustees of the county college shall prepare and deliver to each member of the board of school estimate an itemized statement of the amount of money estimated to be necessary for the operation and capital outlay expenses for the ensuing year.

Between February 1 and February 15 of each year, the board of school estimate shall fix and determine the amount of money necessary for the operation and capital outlay expenses of the college for the ensuing year, exclusive of the amount to be received from the State and from other sources.

The board of school estimate shall, on or before February 15 of each year, make a certificate of such amount signed by at least a majority of its members. Copies thereof shall be delivered to the commissioner, to the board of trustees of the college and to each participating board of chosen freeholders.

In the case of a county college established by more than one county, the amount to be raised for the annual operation and capital outlay expenses shall be apportioned among the participating counties upon the basis of appropriation valuations, as defined in section 54:4-49 of the Revised Statutes. In such case, the certificate of the board of school estimate shall certify the proportioned part of the total to be raised by each participating county.

18. The board of chosen freeholders shall, upon receipt of the certificate, appropriate the amount of the operation expenses certified therein, in the same manner as other appropriations are made by said board and the amount shall be assessed, levied and collected in the same manner as moneys appropriated for other purposes in the counties are appropriated, levied and collected.

19. The board of chosen freeholders shall, upon receipt of the certificate, appropriate the amount of the capital outlay expenses certified therein by either:

(a) The method provided for in section 18 of this act; or

(b) An ordinance authorizing the borrowing of such amount and securing the repayment thereof, together with the interest thereon, by the issuance of bonds in the name of the county. The bonds so issued shall be designated "county college bonds." They shall be issued and sold pursuant to the Local Bond Law. No county shall issue such bonds if the amount thereof together with the amount of prior outstanding county college bonds shall exceed an

amount equal to  $\frac{1}{2}$  of 1% of the equalized valuation of property in said county unless such bond issue shall first have been approved by the commissioner and the Division of Local Government.

20. If the board of trustees shall determine that it is necessary in any school year to raise money in addition to the amount in its annual budget for such year for:

(1) current expenses for the operation and maintenance of the college when the amount necessary therefor was underestimated in the budget;

(2) repair or utilization of property destroyed or made unsuitable by accident or other unforeseen cause; or

(3) meeting emergencies arising since the preparation of such budget; the board shall prepare and deliver to each member of the board of school estimate a statement of the amount of money determined to be necessary therefor.

The board of school estimate shall meet within a reasonable time after the delivery of the statement and fix and determine the amount necessary for such purpose or purposes. In the case of a county college established by more than one county, the board shall apportion upon the basis of the appropriation valuations as defined in section 54:4-49 of the Revised Statutes, such amount among the participating counties. The board shall then certify the amount so determined and apportioned to the commissioner, the board of trustees of the college and to each participating board of chosen freeholders.

The board of chosen freeholders, upon receipt of such certificate, shall appropriate the amount certified therein and shall raise such amount in the manner provided for by sections 18 and 19 of this act.

21. Notwithstanding the time limitations specified in section 17 of this act, during the calendar year in which the board or boards of chosen freeholders first establish a county college, the board of trustees of the county college may prepare and deliver to the board of school estimate of the college an estimate of the amount necessary to finance the county college until the first regular budget is adopted and available.

The board of school estimate shall meet within a reasonable time after the delivery of said estimate and shall fix and determine the amount necessary to so finance the county college and, if more than one county participated in establishing the county college, shall apportion said amount upon the basis of apportionment valuations as defined in section 54:4-49 of the Revised Statutes. The board shall then certify the amount so determined to the commissioner, the board of trustees of the college and to the board of chosen freeholders of each participating county.

The board of chosen freeholders shall, upon receipt of the certification, appropriate its share of said amount in the manner provided for by sections 18 and 19 of this act.

22. The State board shall formulate annual budget requests for State support of county colleges. Within the limits of funds appropriated to the State board for such purposes and in accordance with rules and regulations

prescribed by the State board, the board of trustees of a county college may apply to the State board and receive State support:

(a) For capital projects approved by the State board in amounts not to exceed  $\frac{1}{2}$  of the cost of said capital projects, and

(b) For operational costs to the extent of  $\frac{1}{3}$  thereof or \$200.00 per equated full-time student, including such students resident in other counties, whichever is the lesser amount.

State support for the operational costs of county colleges shall be made within limits of State appropriation and only after an annual review and approval by the State board of the financial program for operation of the county college, including the charges to be made for student tuition and fees and the establishment of the county share of said costs.

23. The county board of chosen freeholders in any county not operating a county college may, subject to regulations of the State board and in accordance with uniform standards based upon scholarship and financial need, pay the tuition for any of their residents who attend any county college which is financed in part from State funds.

The board of trustees of a county college shall accept pupils from any county which does not have its own county college to the extent that the college's facilities will permit.

24. If the board of trustees of a county college shall determine that it is in the best interest of the college to allow one or more additional counties to join in the operation of said county college and the board or boards of chosen freeholders of the county or counties then operating the county college shall approve, said board of trustees and the commissioner, pursuant to the rules and regulations of the State board, shall fix the terms and conditions under which said additional county or counties may participate in the operation of the county college.

25. Nothing in this act shall be construed to prohibit or prevent the referenda procedure specified in chapter 37 of Title 19 of the Revised Statutes.

26. This act shall take effect July 1, 1963.

Approved May 14, 1962.

#### CHAPTER 42, LAWS OF 1962

AN ACT authorizing boards of chosen freeholders of any county to make appropriations for junior colleges.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. It shall be lawful for the board of chosen freeholders of a county *having a population in excess of 300,000* and they are hereby authorized and empowered to make appropriations for and pay to any accredited nonprofit

junior college established and located in said county for the maintenance, support and operation of said educational institution.

2. This act shall take effect immediately.

Approved May 14, 1962.

CHAPTER 67, LAWS OF 1962

AN ACT concerning education, authorizing the State Board of Education to lease the A. Harry Moore School from the Jersey City Board of Education for use as a demonstration school for Jersey City State College, amending the State School Aid Act of 1954, and making an appropriation to the Jersey City State College.

BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:

1. *The State Board of Education is hereby authorized to enter into a lease with the Jersey City Board of Education, for a term not to exceed 20 years, for use of the A. Harry Moore School in Jersey City as a demonstration school for use of Jersey City State College. Terms of the lease shall be subject to the approval of the State Treasurer, the Director of Budget and Accounting, the Legislative Budget and Finance Director, the President of the Senate, and the Speaker of the General Assembly.*

*The execution of said lease shall be deemed to constitute a transfer of use of the said A. Harry Moore School from the Jersey City Board of Education to the State Board of Education within the contemplation of subtitle 5 of Title 11, Civil Service, of the Revised Statutes.*

2. Section 6 of chapter 85 of the laws of 1954 is amended to read as follows:

6. (a) In addition to all other aid, each school district or State college operating an approved special class or classes shall be paid \$2,000.00 per class for such classes, and each school district sending atypical children to special classes outside the district of residence shall be paid  $\frac{1}{2}$  the amount by which the tuition charged for such pupils exceeds \$200.00.

(b) For every mentally retarded or physically handicapped pupil furnished individual instruction or training at home or in school, by reason of the fact that there are too few mentally retarded or physically handicapped pupils in the district to form a class or by reason of the impracticability of transporting such a pupil to a class maintained in another district, the school district shall be paid  $\frac{1}{2}$  the cost of such education as determined by the Commissioner of Education.

3. There is hereby appropriated to the Jersey City State College, in addition to sums heretofore or hereafter appropriated for the year 1962-63, the sum of \$200,000.00 for the operation of said demonstration school. In addition thereto, all funds received by the Jersey City State College as tuition payments or from other sources from the operation of said school are

hereby appropriated to the Jersey City State College for operational expenses of said school.

4. This act shall take effect immediately.

Approved June 4, 1962.

CHAPTER 105, LAWS OF 1962

AN ACT concerning education, authorizing boards of education to require the classification of bidders, and supplementing Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. As used in this chapter:

“Person” means and includes any individual, co-partnership, association, corporation or joint stock company, their lessees, trustees, assignees or receivers appointed by any court whatsoever.

“Board of education” means and includes the board of education of any local school district, consolidated school district, regional school district, county vocational school and any other board of education or other similar body other than the State Board of Education, established and operating under the provisions of Title 18 of the Revised Statutes and having authority to engage contractors for the performance of public works for the board.

2. *Every* board of education *shall* require that all persons proposing to bid on any contract with the board for public work shall first be classified by the State Board of Education as to the character and amount of public work on which they shall be qualified to submit bids. So long as such requirement is in effect, the board of education shall accept bids only from persons qualified in accordance with such classification.

3. Any person desiring such classification shall file with the State Board of Education a statement under oath in response to a questionnaire, prepared and standardized for like classes of work, by the State Department of Education. The statement shall develop fully the financial ability, adequacy of plant and equipment, organization and prior experience of the prospective bidder, and also such other pertinent and material facts as may be deemed desirable.

4. The State Department of Education shall classify all such prospective bidders as to the character and amount of public work on which they shall be qualified to submit bids. The classification shall be made and an immediate notice thereof shall be sent to the prospective bidder or bidders by registered mail within a period of 15 days after the date of receipt of the statement in response to the questionnaire; *provided, however, that if the State Department of Education shall require additional information from the prospective bidder, the classification shall be made and the notice sent within 15 days after receipt of such additional information.*

5. Any person, after being notified of his classification, being dissatisfied therewith or with the classification of another person or persons, may request in writing a hearing before the Commissioner of Education, and may present such further evidence with respect to his financial ability, plant and equipment or prior experience, or that of the other person or persons, as might tend to justify a different classification.

Where the request for a hearing is related to the classification of another person, the applicant for the hearing shall notify such other person, by registered mail, of the time and place of hearing and at the hearing shall present to the commissioner satisfactory evidence that such notice was given before any matters pertaining to the classification of such other person shall be taken up.

After the hearing the commissioner may change or affirm the classification or classifications, the subject of the hearing.

Decisions of the commissioner, made after hearing, shall be subject to appeal to the State Board of Education in accordance with the procedure described in sections 18:3-14 and 18:3-15 of the Revised Statutes.

6. Nothing contained in this act shall be construed as depriving any board of education of the right to reject *all bids*. Where there have been developments subsequent to the qualification and classification of a bidder which in the opinion of the awarding board would affect the responsibility of the bidder, *information to that effect shall forthwith be transmitted to the State Department of Education for its review and reconsideration of the classification*. Before taking final action on any such bid, the board of education concerned shall notify the bidder and give him an opportunity to present *to the State Department of Education* any additional information which might tend to substantiate the existing classification.

7. *No person shall be qualified to bid on any contract with the board who shall not have submitted a statement as required by section 3 of this act within a period of 6 months preceding the date of opening of bids for such contract. Every bidder shall submit with his bid an affidavit that subsequent to the latest such statement submitted by him there has been no material adverse change in his qualification information except as set forth in said affidavit. The specifications for every contract subject to this chapter shall provide that the board of education, through its architect or other authorized agent, shall upon completion of the contract report to the State Department of Education as to the contractor's performance, and shall also furnish such report from time to time during performance if the Contractor is then in default.*

8. Any person who makes, or causes to be made, a false, deceptive or fraudulent statement in the questionnaire required to be submitted, or in the course of any hearing under this act shall be guilty of a misdemeanor, and upon conviction shall be sentenced to pay a fine of not less than \$100.00 nor more than \$1,000.00; or, in the case of an individual or the officer or employee charged with the duty of making such questionnaire for a person, firm, copartnership, association or corporation, to pay such fine or undergo imprisonment, not exceeding 6 months, or both. *All such persons and any copartnership, association, corporation or joint stock company of which any*

*such person is a partner or officer or director, and any corporation of which he owns more than 25% of the stock, shall for 5 years from the date of such conviction be disqualified from bidding on all public work in this State.*

9. The board of education shall cause the forfeiture as liquidated damages to the board of any certified check or certificate of deposit deposited *as bid security* by any person who makes or causes to be made any false, deceptive or fraudulent statement in the questionnaire or bid affidavit required to be submitted, or in the course of any hearing under this act.

10. The State Board of Education *shall* establish such reasonable regulations as to it may seem appropriate for controlling the qualifications of prospective bidders. The regulations *shall* fix the qualification requirements for bidders according to available capital and equipment, and with due regard to *the organization and prior experience of the bidder and all other pertinent and material facts*. No regulations of the State Board of Education for controlling the qualifications of bidders shall become effective until at least 30 days after the regulations shall have been formally adopted and published in not less than 10 newspapers of this State.

11. No action for damages out of any court of competent jurisdiction shall lie against the State Board of Education or any State official because of any action taken by virtue of the provisions of this act.

12. This act shall take effect January 1, 1963.

Approved July 6, 1962.

#### CHAPTER 129, LAWS OF 1962

AN ACT validating the rental of personal property by agreement of lease or otherwise heretofore entered into by certain boards of education, in certain cases.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. Any rental of personal property by agreement of lease or otherwise heretofore entered into by any board of education operating under the provisions of chapter 7 of Title 18 of the Revised Statutes is hereby validated and confirmed notwithstanding the absence of any specific statutory authority therefor at the time of the making of said lease or other agreement, provided said lease or other agreement was otherwise valid.

2. This act shall take effect immediately.

Approved July 25, 1962.

#### CHAPTER 172, LAWS OF 1962

AN ACT concerning education, and authorizing State support to counties granting financial assistance to junior colleges.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. The board of chosen freeholders of any county which grants financial assistance to a *qualified* junior college in the county, pursuant to c. 43, P. L. 1941, as the title and body of said act were amended by c. 30, P. L. 1947, or c. 42, P. L. 1962, shall be entitled to apply to the State Board of Education for and may receive State support toward the operational costs of such junior college in accordance with the provisions of this act.

*The county's application shall be upon forms prepared and provided by the State board and shall contain such information as the State board shall require to carry out the provisions of this act. Each application shall contain a certification by the county board of chosen freeholders that the higher educational requirements of the county and surrounding areas makes it necessary and in the public interest for the county and State to provide financial assistance to the junior college for which State support is sought.*

*For the purposes of this act, a "qualified junior college" or "qualified county-assisted junior college" shall mean a junior college, other than a junior college established pursuant to the provisions of c. 41, P. L. 1962, which is certified annually, on or before January 31, by the Commissioner of Education to the State Treasurer to be operated in accordance with the applicable rules and regulations relating to the operation of county junior colleges which have been adopted by the State board pursuant to the provisions of chapter 41, P. L. 1962.*

2. The State Board of Education shall formulate annual budget requests for funds for State support of *qualified* county-assisted junior colleges. Within the limits of funds appropriated to the State Board of Education for such purposes, the board of chosen freeholders of any county having a *qualified county-assisted junior college* may apply to the State board and receive State support for the operational costs of such junior college in an amount equivalent to the annual amount last appropriated and paid by the county for junior college support or \$200.00 per equated full-time student in the junior college who is a resident of the State, whichever is the lesser amount.

*Funds paid to a board of chosen freeholders pursuant to the provisions of this act shall be used by said board only for the purpose of paying the operational costs of the junior college and shall be paid to the junior college in the manner prescribed by the State board. Such funds that are unexpended at the end of a fiscal period shall be returned by the county board to the General Treasury of the State unless the State board and the Director of the Division of Budget and Accounting of the Department of the Treasury shall otherwise direct.*

3. The State Board of Education may adopt such rules and regulations as shall be necessary to implement the provisions of this act.

4. This act shall take effect July 1, 1963.

Approved December 3, 1962.

CHAPTER 212, LAWS OF 1962

AN ACT concerning education, authorizing the appointment of school business administrators, defining their qualifications and duties, providing for acquisition of tenure by school business administrators, and amending section 18:5-51 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey*:

1. A board of education may, under rules and regulations prescribed by the State Board of Education, 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 the board of education, and fix his salary, whenever the necessity for such appointment shall have been agreed to by the county superintendent of schools and approved by the Commissioner of Education and the State Board of Education. No school business administrator shall be appointed except in the manner provided in this section.

The appointee shall be a suitable person who holds an appropriate certificate as prescribed by the State Board of Education. He shall be considered a member of the professional staff of the district. No person shall act as school business administrator or perform the duties of a school business administrator, as prescribed by the rules and regulations of the State Board of Education, unless he holds such a certificate.

The boards of 2 or more districts may jointly employ a school business administrator.

2. Section 18:5-51 of the Revised Statutes is amended to read as follows:

18:5-51. No secretary, assistant secretary, *school business administrator*, or business manager of any board of education in any municipality devoting his full time to the duties of his office, after 3 years' service, shall be discharged, dismissed, or suspended from office, nor shall his compensation be decreased, except for neglect, misbehavior, or other offense and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not.

3. Any person who has acquired, or shall hereafter acquire tenure as a secretary or business manager under any board of education of a school district, and who shall be appointed a school business administrator shall have tenure as a school business administrator.

4. This act shall take effect immediately.

Approved January 8, 1963.

CHAPTER 225, LAWS OF 1962

AN ACT concerning education, authorizing boards of education to participate in the organization, operation and maintenance, and to utilize the services of a noncommercial, nonprofit, educational television station, *or to contract for such services* and to incur the expenses necessary therefor, and supplementing Title 18 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Every board of education is hereby authorized to make use of television as an educational aid *by contracting for the services of any noncommercial, nonprofit educational television station located within or without the State but such contract shall not require the board to incur expenses in any 1 year period in excess of an amount equal to \$2.00 per pupil in average daily enrollment in the district.*

2. *Every board of education, in addition to the powers set forth in section 1 of this act and subject to the rules and regulations of the State Board of Education, may participate in the organization and operation of a noncommercial, nonprofit, educational television station in this State and utilize the services therefrom, and in order to effectuate such purpose, every board of education is authorized:*

a. To enter into any contractual arrangement agreeable to the board with any other public or private agencies or organizations, including membership in a noncommercial, nonprofit corporation or association duly organized under the laws of this State to operate such a station;

b. To designate 1 or more representatives to the board of trustees of such corporation or association, and otherwise to participate in its affairs in compliance with the charter and by-laws of such organization.

c. To procure for the public schools under the board's jurisdiction the services of such a station, by subscription or otherwise; and

d. To incur such expenses as the board may deem advisable for such purposes, by way of dues, subscription charges, assessments, capital contributions and otherwise, but in amounts not exceeding in any 1 year \$2.00 per pupil in average daily enrollment in the district.

3. The average daily enrollment shall be calculated and determined upon the basis of the preceding school year in the same manner as the same was calculated and determined by the Commissioner of Education for the apportionment of current expenses State aid for schools among the participating school districts.

4. Anything herein to the contrary notwithstanding, no board of education shall participate in any educational television program *or enter into any contract* which may be disapproved by the Commissioner of Education as being incompatible with the policies, rules or regulations established by the State Board of Education governing public instruction in this State.

5. Any board of education which has become a participant in any educational television organization may terminate its participation therein at the end of any school year by giving to such organization not less than 30 days' written notice of the board's withdrawal therefrom.

6. This act shall take effect immediately.

Approved January 17, 1963.

CHAPTER 232, LAWS OF 1962

AN ACT to facilitate the education facilities for physically handicapped and mentally retarded children by 2 or more boards of education by the establishment of jointure commissions.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. When 2 or more boards of education determine to carry out the duties imposed upon them in regard to the education and training of physically handicapped and mentally retarded pupils, by chapters 178 and 179 of the laws of 1954, by joint agreement, the boards of education may, in accordance with rules and regulations of the State Board of Education, and with the approval of the Commissioner of Education by the adoption of similar resolutions establish a jointure commission for the purpose of providing such services. Said commission shall, in accordance with rules of the State Board of Education, be composed of representatives of the respective boards of education, and shall organize by the election of a president and vice-president.

2. The commission may, in accordance with rules of the State Board of Education

a. Provide and maintain the necessary facilities by acquiring land, building, enlarging, repairing, furnishing, leasing or renting;

b. Do all acts and things necessary for the lawful and proper conduct of the educational program for such children as are referred to the commission by boards of education which are members of the commission;

c. Employ necessary principals, teachers and other officers and employees. Such principals, teachers, officers, and other employees shall be held to possess the same rights and privileges as those who are similarly employed by local boards of education;

d. Accept pupils from other school districts and fix tuition rates;

e. Fix and determine the amount to be assessed to each member board of education for capital and current operating costs.

3. Within the limited responsibilities of this act and except as otherwise provided, the commission shall have and may exercise all the powers of a board of education in carrying out the purpose of this act.

4. Each member board shall, in accordance with rules adopted by the State Board of Education

a. Proceed to raise the amounts assessed by the commission, in the same manner as other school funds for capital and current expense purposes are raised;

b. Pay to the commission such amounts as are assessed by the commission;

c. Be responsible for the classification of children within the district and making referral to the commission;

d. Provide required transportation for pupils, to and from school, referred to the commission.

5. In accordance with rules of the State board

a. A member district may withdraw from the commission;

b. A nonmember district may become a member of the commission.

6. State aid in the amount of  $\frac{1}{2}$  the assessment by the commission for operational expenses shall be paid to the member district, in addition to other State aid paid to the district.

Class aid shall be apportioned to member districts in accordance with the number of pupils enrolled from each district.

7. This act shall take effect immediately.

Approved February 1, 1963.

SCHOOL LAWS, SESSION OF 1962  
RESOLUTIONS

CHAPTER JOINT RESOLUTION 16, LAWS OF 1962

A JOINT RESOLUTION creating a commission to study the advisability of making mandatory the conduct of motor vehicle driver education programs in secondary schools and related matters as to issuance of drivers' licenses to youth.

WHEREAS, The increase in motor vehicle accidents in which young drivers are involved is the subject of widespread concern; and

WHEREAS, The significantly better safety ratio factor among young drivers who have had the benefit of the motor vehicle driver education program conducted on a voluntary basis in our public and private secondary schools warrants consideration of making such training programs mandatory; and

WHEREAS, The problems of financing a mandatory program, establishment of uniform rules as to the training and related matters involved in making mandatory driver training in schools warrant study and consideration and a special report and recommendations prior to legislative action; now, therefore

BE IT RESOLVED *by the Senate and General Assembly of the State of New Jersey:*

1. There is hereby created a commission to consist of 7 members, 2 to be appointed from the membership of the Senate by the President thereof, no more than one of whom shall be of the same political party and 2 to be appointed from the membership of the General Assembly by the Speaker thereof, no more than one of whom shall be of the same political party, the Commissioner of Education or his designated representative, the Director of the Division of Motor Vehicles or his designated representative and the State Treasurer or his designated representative, all of whom shall serve without compensation. Vacancies in the membership of the commission shall be filled in the same manner as the original appointments were made.

2. The commission shall organize as soon as may be after the appointment of its members and shall select a chairman from among its members and a secretary who need not be a member of the commission.

3. It shall be the duty of said commission to examine the record in New Jersey and other States with respect to the results of programs of motor vehicle driver education programs in secondary schools with consideration of the desirability and advisability of making such programs mandatory in New Jersey. The commission shall give consideration to the cost involved in such a program and of the means of providing the necessary funds therefor, the establishment of uniform standards of instruction for, and satisfactory

completion of, driver education programs. The commission may consider the advisability of raising the minimum age and conditions for initial licensing of drivers with special regard to the conduct of a mandatory driver education program.

4. The commission shall be entitled to call to its assistance and avail itself of the services of such employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for said purpose, and to employ such stenographic and clerical assistants and incur such traveling and other miscellaneous expenses as it may deem necessary, in order to perform its duties, and as may be within the limits of funds appropriated or otherwise made available to it for said purposes.

5. The commission may meet and hold hearings at such place or places as it shall designate during the sessions or recesses of the Legislature and shall report its findings and recommendations to the Governor and the Legislature on or before *May 1*, 1963, accompanying the same with any legislative bills which it may desire to recommend for adoption by the Legislature.

6. This joint resolution shall take effect immediately.

Approved January 4, 1963.

SCHOOL LAW DECISIONS  
JULY 1, 1961 - JUNE 30, 1962

I.

BOARD OF EDUCATION MUST PREPARE PREFERRED ELIGIBLE  
LIST WHEN POSITION IS ABOLISHED

THEODORE G. VORK,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,  
HUDSON COUNTY,

*Respondent.*

For the Petitioner: Ruhlman & Ruhlman (C. R. Ruhlman, Jr., Esq. of  
Counsel).

For the Respondent: Joseph V. Cullum, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner asserts he has a right to be reappointed to the position of principal in the North Bergen School System in accordance with the seniority statute (R. S. 18:13-19).

The case is presented to the Commissioner by a Stipulation of Facts and by a hearing before the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Hudson County Superintendent of Schools in Jersey City on Tuesday, October 25, 1960.

The facts as revealed by the stipulation and testimony show that petitioner served as a teacher in the North Bergen schools from September 1926 to October 1, 1956, when he assumed duties as principal of the Washington School, pursuant to a resolution adopted by the Board of Education, for which employment he was properly qualified. He continued as principal until February 1, 1958, when respondent took action to abolish his position as principal for reasons of economy. On February 16, 1958, petitioner sent a letter of protest to respondent, requesting reconsideration of the action dismissing him as principal. In this communication he asserted his rights under the tenure statutes to reassignment as a teacher and to be "placed on a preferential list of principals should another vacancy for the position occur." Subsequently, petitioner was "reinstated" as a teacher and assigned to the Office of the Superintendent of Schools.

On December 11, 1958, the Board of Education received and accepted the resignation of one of its principals, John E. Cullum, effective January 1, 1959. Four days later, respondent received a letter from petitioner, calling attention to the prospective vacancy, stating his availability and requesting restoration to the principal's position. On October 15, 1959, the Commissioner of

Education received the petition of appeal herein, praying that an order be issued directing respondent to appoint petitioner to the position of principal.

Petitioner contends that he had tenure of employment as a principal on February 1, 1958, when the position was abolished, and the respondent is required by statute to reappoint him to a subsequent vacancy in that position. He denies any failure or delay in asserting his rights or that he ever, in any way, waived those rights.

Respondent counters by asserting that in the absence of a preferred eligibility list pursuant to *R. S. 18:13-19*, the relief sought by petitioner cannot be granted. It contends that it was the duty of the petitioner to make a demand on the Board of Education in existence at the time of dismissal, to formulate a preferred eligibility list and to inform him of his position thereon. It further contends that because of his failure to exercise due diligence in the protection of his rights, a situation now exists where there is no such preferred eligibility list as is required by *R. S. 18:13-19*. Consequently, respondent argues, the Commissioner is powerless to order reinstatement because such reinstatement can only be made in accordance with the statutory list and before any relief can be granted to petitioner, it is a *sine qua non* that a preferred eligibility list be in existence.

Respondent also advances as defenses the claim that petitioner waived his rights by failing to take action when John Egan resigned as Superintendent of Schools and was reassigned as a principal, that petitioner's delay in filing his appeal to the Commissioner with no explanation therefor constitutes laches or abandonment, and that necessary parties to the petition have not been joined and it should, therefore, be dismissed.

There can be no question that petitioner had tenure as a principal in the North Bergen Schools. Having been employed in the district since 1926, his tenure acquired as a teacher attached to his position as principal immediately upon his appointment on October 1, 1956. *Nichols v. Jersey City Board of Education*, 9 *N. J.* 241 (*Sup. Ct.* 1952); *MacNeal v. Ocean City Board of Education*, 1938 *S. L. D.* 374, affirmed *per curiam*, 377 (*Sup. Ct.* 1928). Since the principalship was abolished "for reasons of economy, a reduction in the number of pupils and a change in the administrative organization of the school district" petitioner was entitled according to *R. S. 18:13-19* to be placed on a preferred eligibility list to be prepared by the Board of Education and to be re-employed in order of seniority as determined by the Board of Education whenever a vacancy occurred for which he was qualified.

The pertinent sections of *R. S. 18:13-19* read as follows:

"Nothing contained in sections 18:13-16 to 18:13-18 of this Title or any other provision of law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of superintendents of schools, assistant superintendents, principals or teachers employed in the school district whenever, in the judgment of the board of education it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization of the district, or other good cause. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion or political affiliation.

Any dismissals occurring because of the reduction of the number of persons under the terms of this section shall be made on the basis of seniority according to standards to be established by the Commissioner of Education with the approval of the State Board of Education. In establishing such standards, the Commissioner shall classify, in so far as practicable, the fields or categories of administrative, supervisory, teaching of other educational services which are being performed in the school districts of this State and may, at his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole. Whenever it is necessary to reduce the number of persons covered by this section, the board of education shall determine the seniority of such persons according to the standards established by the Commissioner of Education with the approval of the State Board of Education and shall notify each person as to his seniority status. . . . All persons dismissed *shall be placed on a preferred eligible list to be prepared by the board of education of the school district*, and shall be re-employed by the board of education of the school district in order of seniority as determined by the said board of education. . . . Should any superintendent of schools, assistant superintendent, principal or teacher under tenure be dismissed as a result of such reduction *such person shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal* in such order when and if a vacancy in a position for which such superintendent, assistant superintendent, principal or teacher shall be qualified. Such re-employment shall give full recognition to previous years of service. . . ." (Emphasis supplied.)

In the Commissioner's opinion this statute places a clear duty on the Board of Education to establish and maintain a preferred eligibility list for re-employment whenever reductions in staff are made such as occurred here. It was also the duty of respondent, in compliance with the statute, to notify petitioner of his seniority status. It is the opinion of the Commissioner that the Board of Education cannot use its failure to perform a mandatory duty as a defense in this case. Respondent could have formulated a preferred eligibility list. If it found some other person senior to petitioner, it could have used such seniority as a defense in this case. It is the opinion of the Commissioner that petitioner cannot be deprived of his rights because of respondent's non-performance under the statute.

Respondent also argues that petitioner failed to take action when John Egan resigned as Superintendent of Schools and was assigned to one of the principalships. There is nothing in the transcript or stipulation concerning the principalship of John Egan and, therefore, the Commissioner cannot consider this contention of respondent.

From his study of the record, the Commissioner has reached the conclusion that petitioner never voluntarily and intentionally relinquished a known right. He denied that he ever waived his right to be appointed to fill the vacancy in question. Any conversations petitioner may have had with board members outside a board meeting cannot be held to be relevant in this matter.

"An act assented to by everyone of them (individual members) is not a corporate act, unless, at the time of assent, they are convened in organized

form. . . . It reposes no authority in them, save when regularly assembled, nor holds them out as charged with any power or duty on its behalf.” *Sooy v. State*, 41 *N. J. L.* 394 (*E. & A.* 1879)

Petitioner had a clear right to a position as teacher. He did not need to waive any future rights to a principalship to secure an assignment as a teacher to which he was entitled anyway. Thus, there would be no consideration for a waiver. *West Jersey Title v. Industrial Trust Co.*, 27 *N. J.* 144, 152 (*Sup. Ct.* 1958)

The next question to be considered is laches. Respondent contends that petitioner delayed his appeal to the Commissioner too long and thus “slept on his right,” and, furthermore, has made no explanation of his delay.

The State Board of Education and the Commissioner have cautioned school employees to file appeals promptly. No fixed number of days for appeals to the Commissioner is provided by law. Whether there has been undue delay is determined by the Commissioner from the facts surrounding each individual case. It was pointed out in *Marion v. Altman*, 120 *N. J. L.* 16 (*Sup. Ct.* 1938) that in cases involving removal from public employment, the disturbance to the morale of the employees associated with the uncertainty as to who is legally entitled to the position is detrimental to the public interest. Also to be considered is the disadvantage to the school board of being required to pay double compensation in case of reinstatement.

In this case it appears from the record that no other person was assigned to the principalship which petitioner claims. The superintendent and vice-principal administer the school. Nothing in the record indicates any question of the likelihood of double compensation. No person, other than petitioner, claimed the position and there was no uncertainty among possible claimants to the position. The record discloses no hint of any plans or arrangements which would be disturbed by petitioner’s assuming the principalship to which he considers he is entitled. After carefully weighing all the facts, considerations and circumstances in this case, the Commissioner has reached the conclusion that the matter should not be disposed of on the grounds of laches.

Finally, there is respondent’s contention that the petition should be dismissed because there are persons who are necessary parties to this proceeding who have not been joined. Respondent does not name or suggest who these persons may be. Any person with a claim to the position could have petitioned the Commissioner. If respondent had performed its mandatory duty of preparing a seniority list, petitioner would have known what persons to make parties. Here, again, the Commissioner must hold that respondent cannot profit at petitioner’s expense from its own failure to perform its duty under the law.

The Commissioner finds and determines that Theodore G. Vork was entitled (1) to be placed on a preferred eligibility list for the position of principal in the School District of North Bergen following the action of respondent in dismissing him as principal on February 1, 1958; (2) to be notified by respondent of his seniority status; and (3) to be re-employed by the North Bergen Board of Education as a principal when and if a vacancy occurred for which petitioner is qualified. Such a vacancy having occurred and no other claim of seniority having been advanced, the North Bergen

Board of Education is hereby directed to re-employ Theodore G. Vork as a principal in its schools.

COMMISSIONER OF EDUCATION.

July 31, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of the Township of North Bergen, Hudson County, from a decision of the Commissioner of Education directing the Respondent-Appellant to re-employ Theodore G. Vork as a principal in its schools.

We affirm the decision of the Commissioner of Education in all respects on the opinion written by the Commissioner in this matter.

April 4, 1962.

Pending before Superior Court, Appellate Division.

II.

RECITATION OF OLD TESTAMENT VERSE NOT A  
RELIGIOUS EXERCISE

JOHN J. GOULD, *et al.*

*Petitioners,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF FREEHOLD,  
MONMOUTH COUNTY,

*Respondent.*

For the Petitioners: Martin A. Spritzer, *Esq.*

For the Respondent: Arnold Tanner, *Esq.*

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners allege that the respondent Board of Education authorized and permits its teachers to conduct certain religious services or exercises in the public schools under its jurisdiction. They complain that these practices are contrary to the religious convictions which they and their children hold and are a violation of the school laws. Respondent denies that the practices complained of constitute a religious exercise or service or are prohibited by any statute.

The appeal is submitted on a Stipulation of Facts, testimony of expert witnesses, briefs and oral argument of counsel.

The facts, as stipulated, establish that petitioners are residents and taxpayers of the Borough of Freehold and are the natural parents of two daughters, seven and five years of age, who attend the second grade and the kindergarten respectively in the Broad Street Public School in the district. The pupils in these classrooms are served milk daily. Before drinking the milk, the teacher and the children bow their heads, fold their hands, and

say: "O give thanks unto the Lord, for He is good, for His mercy endureth forever." This practice is authorized by a resolution adopted by the respondent Board of Education on October 21, 1957, as follows:

"BE IT RESOLVED in accordance with the opinion submitted to the State Commissioner of Education by Mr. Grover C. Richman, Jr., Attorney General of the State of New Jersey, under date of June 27, 1957, a copy of which is attached to this statement, it is the policy of this Board of Education that the only grace that shall be said in the public schools of the Borough of Freehold shall be the first verse of Psalm 136 'Give Thanks Unto The Lord; For He Is Good: For His Mercy Endureth Forever.'

"It is further the policy of this Board that no child shall be required to learn or to repeat the Grace, but that respectful silence shall be all that shall be required."

Petitioners' children do not join in saying the verse in their classrooms.

It is also stipulated that during the month of December, it is customary for the pupils to sing the songs commonly known as Christmas carols and also certain Chanuka songs as part of the regular school curriculum. Typical Christmas songs are: "Away in a Manger" and "Silent Night." Although the teachers make no prior statement to the pupils relative to their participation, it is generally understood that those who do not wish to sing need not. Petitioners' children generally participated in singing the carols.

Petitioner, John Gould, stipulates his religious faith to be as follows:

"I believe that what is outside of myself is an illusion, not in the sense that it is unreal, but that my perception of it is illusory; that my mind has been ensnared in conceptualisations only vaguely connected to that which is.

"I believe that it is possible to outgrow these snares, and to understand directly all that is in and around me. I believe that this can come to me only from myself, and that I cannot strive for it or seek it. I cannot say that I touch till I grasp it, and when it is grasped it is no longer there.

"There have been moments when I have felt myself to be almost upon the threshold, and as I stepped forward I moved back. Therefore, I wander aimlessly, asleep, and not unwilling to awaken.

"In the light of these beliefs, I do not concern myself with the existence of a personal God, consider it offensive to have anyone forced into religious worship against his wishes, and would not wish to participate in any form of prayer or thanksgiving."

Petitioners say that the practices referred to in the petition are contrary to their religious convictions and to those of their children to the degree that such convictions have been formed in children of their age. They also say that the practices complained of violate R. S. 18:14-78, Article 1, 3, 4 and 5 of the New Jersey State Constitution. They pray "that an order be issued by the Commissioner enjoining the respondent or its employees from leading, or causing to be led any recitation or prayer other than the Lord's Prayer, in whatsoever form such a prayer may take or by whatever name it may be called

and from teaching or causing to be taught, and from leading or causing to be led, any hymn teaching, proselyting in behalf of, or tending to predispose the listeners in favor of, any specific religious attitude, doctrine or practice, or calling upon any force, Deity, or Prophet for aid, intercession, or redemption, whatever this hymn may be called, or in whatever form it may be presented.”

Respondent Board of Education admits the practices complained of but asserts in defense that neither of them effects nor tends to effect the setting up or the establishment of a religion nor do they prohibit the free exercise of any religion, nor is either a religious exercise or service, nor are they prohibited by the laws of the State of New Jersey or the United States of America. Respondent further asserts that the practice of singing religious songs of a universally accepted character is maintained:

- “(a) for the purpose of necessary instruction in the cultural and musical education of American school pupils, and
- (b) that such practice is a necessary part of the school training program required to properly develop the social growth of the individual pupils, maintained in connection with assembly programs for the purpose of providing experience opportunities for the pupils in a public setting.”

It is understood by the petitioners and the respondent that the Commissioner does not decide Constitutional issues and will concern himself only with the question of any violation of the New Jersey school laws. Petitioners, however, reserve the right in case of an appeal to argue the questions arising under the New Jersey and the United States Constitutions.

The first question to be decided is whether the practice of saying: “O give thanks unto the Lord, for He is good, for His mercy endureth forever,” before the drinking of milk daily by the teachers and children in the classrooms of the Freehold Borough Public Schools, constitutes a religious service or exercise in violation of the school law.

Petitioners assert that the saying is a prayer which recognizes a Supreme Being, describes some of His qualities and attributes, and professes to thank Him and is, therefore, an expression of profound religious significance. That the majority participate with folded hands and bowed heads, they argue, is a position consistent only with the observance of religious worship and not with that of instruction in the public schools. Although the statute permits the reading of the Bible and the saying of the Lord’s Prayer, this practice is neither one, they contend, because what is repeated is a verse from the Old Testament, it is said, not read, and to permit a distinct religious practice because it is almost like reading or tantamount to Bible reading is to defeat the policy expressed in the statute. Nor can it be argued, in the petitioners’ opinion, that the verse is nonsectarian and, therefore, permissible under the decision of the Supreme Court in *Doremus v. Hawthorne Board of Education*, 7 N. J. Super. 442 (*Law Div.* 1950), 5 N. J. 435 (1950), appeal dismissed 342 U. S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952). While the Court upheld the constitutionality of the reading of the Bible and the repeating of the Lord’s Prayer for the reason, among others, that they were non-sectarian, nowhere, argue petitioners, does the Court’s opinion justify the engrafting of non-sectarian additions onto the Bible reading exception contained in *R. S.*

18:14-78. Finally, they reject any argument that voluntary participation legalizes the practice. While not compelled to say the verse, their children are compelled to attend school and their presence, they say, is equivalent to participation in a religious activity which interferes with their religious principles and the rights of the parents in the religious training of their children.

Respondent submits that the recitation of the first verse of Psalm 136 of the Old Testament by the pupils in its schools constitutes neither sectarian nor religious worship. It argues that there is no religious service or exercise unless it can be identified with a distinct sect, and the verse in question is taken from a source declared to be nonsectarian by the Supreme Court in *Doremus v. Hawthorne, supra*. Respondent sees no difference of substance between reciting from memory or reading from a printed page when the words are already familiar. Under the holdings in both *Doremus v. Hawthorne Board of Education, supra*, and *Tudor v. Rutherford Board of Education, 14 N. J. 31 (Sup. Ct. 1953)*, the practice of recognizing a Supreme Being in the public schools or any branch of State government is permissible, it is asserted, so long as such practice does not tend to effect the establishment of a religion nor prohibit the free exercise of any religion.

Respondent says further that the issue is not one of sectarianism as meant by the Court for the reason that petitioners espouse no religion and, therefore, their objection is to the recognition of God in the public schools of the Borough of Freehold and not that the manner of recognition is offensive to a form of worship approved by them. Respondent argues that petitioners' appeal ignores the heritage of the United States of America and an analysis of their argument reduces itself not to an objection that one sect is being preferred over another in the public school system but rather that God is being recognized when they would not have Him recognized. The rights of the minority, says respondent, are to be protected but not to the extent that, thereby, the rights of the majority are abused.

Both parties cite Memorandum Opinion P-24 of the Attorney General of New Jersey rendered June 27, 1957, on "whether it is lawful for a Board of Education to sanction the oral and collective saying of Grace by the school children before lunch," and find support therein. The pertinent portions of the opinion are:

"Grace invokes the Divine Blessing before a meal. As a religious exercise, it is barred in the public schools of this State under R. S. 18:14-78. There can be no legal or constitutional objection, however, to the reading of passages from the Old Testament or the repeating of the Lord's Prayer immediately prior to the noon meal. We point out that the sample Graces which you have supplied are not drawn from the Bible."

R. S. 18:14-78 first appeared in Section 65 of the School Act Revision of 1867, Chapter 179, P. L. 1867, as follows:

"It shall not be lawful for any teacher, trustee or trustees, to introduce into or have performed in any school receiving its proportion of the public money, any religious service, ceremony or forms whatsoever, except the reading of the Bible and the repeating of the Lord's Prayer."

It was subsequently enacted in its present form as part of the school law revision enacted at the second special session of the Legislature in 1903, and reads as follows:

“No religious service or exercise, except the reading of the Bible and the repeating of the Lord’s Prayer, shall be held in any school receiving any portion of the moneys appropriated for the support of public schools.”

R. S. 18:14–77 was enacted in Section 77 of Chapter 263 of the Laws of 1916:

“At least five verses taken from that portion of the Holy Bible known as the Old Testament shall be read, or caused to be read, without comment, in each public school classroom, in the presence of the pupils therein assembled, by the teacher in charge, at the opening of school upon every school day, unless there is a general assemblage of the classes at the opening of the school on any school day, in which event the reading shall be done, or caused to be done, by the principal or teacher in charge of the assemblage and in the presence of the classes so assembled.”

The decision in this case turns on the meaning of the words “religious service or exercise” as used in the statute. In his search for the meaning of these words, the Commissioner found that there are many definitions of religion and many types of religious service. Religion means different things to different people. The testimony of the expert witnesses who were examined gave emphasis to the lack of agreement and diverse interpretations that exist in this area.

In construing the meaning of long-existing statutes, it is sound practice to examine the climate of the times of their enactment in order to find clues as to their purpose and necessity. Thus, in *Reynolds v. U. S.*, 98 U. S. 149, 162, Mr. Justice Waite said:

“The word ‘religion’ is not defined in the Constitution. We must go elsewhere, therefore, to ascertain, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.”

In *Commonwealth v. Emerick*, 96 A. 2d 370, 371 (1953) the Supreme Court of Pennsylvania said:

“\* \* \* the object of judicial interpretation and construction of a statute is to ascertain and effectuate the intention of the Legislature. Such intention, when the words are not explicit, the Court may ascertain, *inter alia*, from (a) the occasion and necessity for the law, (b) the mischief to be remedied; and (c) the object to be attained.”

And in *Doremus v. Hawthorne Board of Education*, *supra*, the New Jersey Supreme Court said:

“It is a cardinal rule in the construction of constitutional and statutory enactments that the provision made by way of remedy shall be studied in the light of the evil against which the remedy was erected.” (5 N. J. at p. 453)

In accordance with the foregoing, the Commissioner has looked to the history of the times in which *R. S. 18:14-78* was enacted to ascertain the intent of the Legislature. A reading of the history of education in the period preceding the enactment of *R. S. 18:14-78* reveals that the leaders of public education of the day were not deliberately hostile to religion. *Cubberly in Public Education in the United States, Revised and Enlarged*, Houghton Mifflin Co., says:

“The secularization of education with us must not be regarded either as a deliberate or a wanton violation of the rights of the church, but rather as an unavoidable incident connected with the coming of consciousness and self-government of a great people. (p. 231)

“As necessity gradually compelled the State to provide education for its children, sectarian differences made it increasingly evident that the education provided must be nonsectarian in character. As Brown (S. W.) has so well stated it:

‘Differences of religious belief and a sound regard on the part of the State for individual freedom in religious matters, coupled with the necessity for centralization and uniformity, rather than hostility to religion lie at the bottom of the movement toward the secular school.’” (p. 234)

The following is quoted from Brown, *Education in New Jersey, 1630-1871*, Princeton University Press, at pages 216 and 217:

“The campaign for nonsectarian free schools was not animated by enmity to religion, except among a few fanatics, but by respect for religious freedom and the belief in a uniform system. Diversity of religion seemed to make that the only solution of the problem.”

The Commissioner is satisfied that the leaders at the time of the enactment of the statutes at issue were not opposed to religion but were opposed to sectarianism in the public schools as a practical necessity if public education were to survive. It is apparent that the legislative purpose in adopting the two statutes was to make it clear that the fundamental doctrine of the separation of church and state applied to the public schools and to indicate, as petitioners say in their brief, “the furthestmost intrusion that religion can make in the public schools.” The Commissioner thinks it is significant that in doing so they not only sanctioned the saying of the Lord’s Prayer but required daily reading of the Old Testament, both of which would fall within many definitions of religious exercise. The constitutionality of these statutes, subsequently challenged, was upheld by the New Jersey Supreme Court in *Doremus v. Hawthorne Board of Education, supra*. The Commissioner is convinced that the Legislature had no intention of excluding from the public schools every vestige of religious thought to the point where even the existence of a Supreme Being was to be unrecognized and unacknowledged but acted rather to set restraints and limits on such acknowledgment so as to bar any infiltration of sectarian practices leading to divisiveness and discord. In the Commissioner’s judgment the practice being examined herein falls well within the limits intended by the Legislature in its enactment of the statutes.

The Commissioner finds no decision of a New Jersey court in which the words “religious exercise or service” have been construed. He has examined

carefully, however, decisions of the courts of New Jersey and other states and of the United States Supreme Court which bear on the question of religion and the public schools. He notes and finds it significant to the issues herein, that in all these decisions there is recognition of the fact that we are a theistic country in which the acknowledgment of God is not only a tradition but is woven into the very fabric of our national existence. Thus, the United States Supreme Court in *Zorach v. Clauson*, 343 U. S. 306, 314 (1952) emphasized the religious nature of our people and said that to refuse to accommodate the public service to their spiritual needs would be to prefer nonbelievers over believers:

“We are a religious people whose institutions presuppose a Supreme Being.” (p. 313)

“The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union of dependency one on the other. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; ‘so help me God’ in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: ‘God save the United States and this Honorable Court.’” (p. 312, 313)

Of particular importance also are the pronouncements of the New Jersey Supreme Court on this issue. In *Doremus v. Hawthorne Board of Education*, *supra*, in which it was held that under the applicable statute reading the Bible and repeating the Lord’s Prayer were not compulsory for the pupils and did not constitute sectarian instruction or worship or set up religious instruction or worship in aid of one or more religions, the following statements of the Court have particular relevance herein:

“Was it the intent of the First Amendment that the existence of a Supreme Being should be negated and that governmental recognition of God should be suppressed? Not that, surely.” (p. 439)

“\* \* \* the Constitution itself assumes as an unquestioned fact the existence and authority of God and \* \* \* all branches of government followed a course of official conduct which openly accepts the existence of God as Creator and Ruler of the Universe; a course of conduct that has been accepted as not in conflict with the constitutional mandate.” (p. 440)

“\* \* \* ‘while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in

finite and depending beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, of bowing in contrition when visited with the penalties of His broken laws. Cooley (*Constitutional Limitations, Eighth Edition, vol. 2, page 966*)'” (p. 448)

“While it is necessary that there be a separation between church and state, it is not necessary that the state should be stripped of religious sentiment \* \* \*. The American people are and always have been theistic. *Cf. Church of the Holy Trinity v. United States, supra.* The influence which that force contributed to our origins and the direction which it has given to our progress are beyond calculation. It may be of the highest importance to the nation that the people remain theistic, not that one or another sect or denomination may survive, but that belief in God shall abide. It was, we are led to believe, to that end that the statute was enacted; so that at the beginning of the day the children should pause to hear a few words from the wisdom of the ages and to bow the head in humility before the Supreme Power. No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity. *Great results follow from the elements which to human perception are small.* It may be that the true perspective engendered by that recurring short communion with the eternal forces will be effective to keep our people from permitting government to become a man-made robot which will crush even the Constitution itself. Our way of life is on challenge. Organized atheistic society is making a determined drive for supremacy by conquest as well as by infiltration. Recent history has demonstrated that when such a totalitarian power comes into control it exercises a ruthless supremacy over men and ideas, and over such remnants of religious worship as it permits to exist. We are at a crucial hour in which it may behoove our people to conserve all of the elements which have made our land what it is. Faced with this threat to the continuance of elements deeply imbedded in our national life the adoption of a public policy with respect thereto is a reasonable function to be performed by those on whom responsibility lies.” (p. 451, 452)

“\* \* \* take the instance of an atheist:—he has all the protection of the Constitution; he may not be held to any religious function or to the support, financial or otherwise, of a religious establishment; he may entertain his belief or the lack of belief as he will; but he lives in a country where theism is in the warp and woof of the social and governmental fabric and he has no authority to eradicate from governmental activities every vestige of the existence of God.” (p. 449)

The Commissioner notes also that recently the Supreme Court of New York *In the Matter of Engle v. Vitale, Jr.*, (18 Misc. 2d 659) affirmed by the Appellate Division, 206 N. Y. S. 2d 183, held that the Federal and State Constitutions do not prohibit the noncompulsory saying of the following prayer in the public schools as part of daily procedure:

“Almighty God, we acknowledge our dependence upon Thee and we beg Thy blessing upon us, our parents, our teachers, and our country.”

The Court said the prayer cannot be considered sectarian in the sense that it prefers any particular sect and held that a Board of Education may authorize, but not require, saying of such a prayer in that:

“\* \* \* constitutional history confirms a tradition of prayer, including prayer in the schools. Even without the constitutional history, some form of prayer would appear to fall within the realm of permissible accommodation.” 18 *Misc. 2d* 693

“This would appear to be the reverse side of the ‘free exercise’ coin: ‘establishment’ prohibits any compulsion in matters of religion that operates directly on the individual, but prohibits indirect compulsion (as through the use of general tax funds for a religious purpose) only if the nexus between government and religion thus produced is too close. The democratic nature of our Government precludes the imposition of sanctions in the field of religion; the religion nature of the governed sanctions the inclusion of religion in the processes of democratic life; the dividing line between permitted accommodation and proscribed compulsion is a matter of degree, to be determined anew in each new fact situation.” (p. 693)

Considered against the background of the history of the legislative enactments and the pronouncements of our highest courts, the practice questioned herein falls within the limits of the legislative proscriptions against religious services or exercises in the public schools. Whether it is characterized as a “grace” a “prayer,” a “recitation” or an “expression of profound religious significance” is not material. It may be all these things and yet not be a religious exercise within the intentment of the statutes. The Commissioner takes the view that as a single and direct expression of thanksgiving to an acknowledged Supreme Being, which the courts have held to be acceptable in the tradition of this nation, it is not a religious exercise prohibited by the statutes.

The Commissioner also finds that the practice in question falls within the permissible limits indicated in the ruling of the Attorney General cited above. That opinion clearly establishes that material taken from the Old Testament may be said prior to the partaking of food without objection. The respondent Board contends that as the words are a verbatim repetition of a verse of the Old Testament, the practice comes within the statutory sanction. The Commissioner thinks there is force to this contention. It would be indeed an unnecessarily strained and narrow construction of a statute to hold that words which are not objectionable when read become objectionable when repeated from memory. Support for a liberal construction is found in the following excerpts from *Church of the Holy Trinity v. United States*, 143 *U. S.* 457:

“If a liberal construction of the words of a statute be absurd, the act must be so construed as to avoid the absurdity. The court must restrain the words. The object designed to be reached by the act must limit and control the literal import of the terms and phrases employed.” (p. 460)

“Again another guide to the meaning of a statute is found in the evil which it is designed to remedy and for this the court properly looked at contemporaneous events, the situation as it existed, and as it was pressed

upon the attention of the legislative body. *United States v. Union Pacific Railroad*, 91 U. S. 72, 79." (p. 463)

"It is a case where there was presented a definite evil, in view of which the Legislature used general terms with the purpose of reaching all phases of that evil and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be the act, although within the letter, is not within the intention of the Legislature and, therefore, cannot be within the statute." (p. 472)

The Commissioner cannot believe that those who enacted the legislation to permit the reading of the Bible would have intended to prohibit the repeating of the same words from memory. The Commissioner is satisfied that he does not need to reach such a result.

That petitioners' children cannot be compelled to repeat the verse or participate in any way is unquestioned. The Commissioner notes that there is no requirement that all children assume the posture of prayer and it is stipulated that the Gould children do not recite the verse. While the Commissioner decries situations which make individual children conspicuous in ways that may be embarrassing or traumatic for them, a realistic view indicates that children who hold unique ideas and beliefs will probably have to carry a burden of distinctiveness as a consequence. While it is obviously not possible to remove from the public schools every aspect of living which may operate to set children apart, it is possible to seek ways to keep such circumstances at a minimum. The Commissioner directs the Board to take every possible measure to protect from embarrassment those children who do not wish to participate.

Finally, on this question, the Commissioner wishes to make it clear that in determining that the noncompulsory saying of the verse authorized by the Freehold Board of Education does not violate the school law, he is not passing on the saying of "grace" in general. His holding in this case relates only to situations similar in fact to that here where the words repeated are taken from the Old Testament.

The second issue raises similar questions in regard to the singing of the Christmas carols and Chanukah songs.

Petitioners contend that the singing of the carols constitutes an obviously sectarian religious exercise and the inclusion of Chanukah songs only compounds the religious sectarianism. They say that while it may not be the purpose of the schools to create solely a religious atmosphere by the use of these songs, it is not believable to expect that pupils will distinguish between the religious and the so-called cultural aspects of the songs when sung in school. They insist that if the statutes are construed to permit regular pupil participation in sectarian hymn-singing, the schools will be open to almost any sectarian practice or influence.

Respondent contends that the Christmas carols and Chanukah songs are not sung for any religious context but rather because these songs have endured

from the very beginning of our nation and have throughout our history been generally recognized and accepted by all sects as part of our total national heritage. The songs are sung to provide pupils with instruction in our cultural and musical heritage and are a necessary part of the school instruction program to develop social growth of children. Respondent further argues that if the issue were one of promoting one religion to the detriment of another, adherents of the latter religion could legitimately complain, but such is not the case here, where respondent contends the real issue, as borne out by petitioner's stipulated affirmation of faith, is one of nonreligion vs. religion.

The Commissioner finds no evidence in this case that the songs in question are sung as part of the opening exercises in conjunction with the Bible reading and the Lord's Prayer, or in the presence of religious symbols or appendages, or with reference to any religious philosophy or doctrine, or in any different manner or context than other Christmas songs of a nonreligious nature, or at other than the Christmas season. The only evidence herein is that the songs are sung during the month of December and that no comment is made by the teachers. The Commissioner does not find sufficient evidence to hold that these songs are sung as a religious service or exercise. The Commissioner is convinced that it is not possible to remove from the program in the public schools every practice that may in some way offend the religious beliefs of some parent. Over the years he has received numerous requests from various persons to ban some school activity or practice in the name of religious freedom. Thus, he has been asked on religious grounds to make various rulings in respect to foods served in the school lunchrooms, to prohibit the wearing of gym suits (because they expose immodestly both the male and female human body), to ban plays and other dramatic productions (because they are in themselves fictitious and therefore teach falsehood), to proscribe dancing of all kinds; to forbid the use of newspapers, motion pictures or television in teaching; to discontinue the teaching of physiology and the cause and treatment of disease; to eliminate saluting the flag and pledging the oath of allegiance; and to abolish all sports and athletics. It becomes obvious that the removal from all pupils of every aspect of the curriculum which someone finds objectionable on religious grounds is an unrealistic, undesirable and unattainable goal. The rule has been, rather, to excuse from participation or compliance any pupil who advances bona fide religious scruples for these or other matters.

In the Commissioner's judgment, it is impossible to draw a precise line of demarcation and say that the use of subject-matter with religious connotations, associations, or references is in one area patently religious instruction and, therefore, forbidden and in another area it is clearly educational and hence permitted. In his study of the arguments of counsel and the testimony of the witnesses, the Commissioner found some area of agreement on the question whether all subject-matter in the curriculum related to religion must be completely eliminated. It was generally agreed that history and sociology could not be taught properly without reference to religion. If every religious reference is to be eliminated, the writings of Milton, Tennyson, Shakespeare, and music such as Handel's *Messiah*, Bach's chorales, the Negro spirituals, and some of our patriotic and folk songs would have to be prohibited. The Commissioner notes that the fourth stanza of "America" is addressed to "Our fathers' God, to Thee \* \* \* Great God, our King" and the third verse of

our national anthem, "The Star Spangled Banner," contains such words as "may the heaven-rescued land praise the power that hath made and preserved us a nation \* \* \* And this be our motto: 'In God is our trust.'" Such references are also found in "America, the Beautiful," "The Battle Hymn of the Republic," "God Bless America," and in songs usually sung at the Thanksgiving Day season, such as "For the Beauty of the Earth," "Come Ye Faithful People, Come," and "We Gather Together to Ask the Lord's Blessing." The Commissioner notes, too, that counsel for petitioners in his brief, says they do not object to casual references to the Almighty contained in various educational sources used in the school. Nor do they believe that the separation doctrine prevents the use of God's name or occasional reference to sectarian beliefs and practices in the schools.

On this problem of drawing a sharp line between forbidden and permitted teaching involving religion, the words of Justice Jackson in his concurring opinion in *Illinois, ex rel. McCollum v. Board of Education*, 33 U. S. 203, 235 (1948) are relevant:

"While we may and should end such formal and explicit instruction as the Champaign plan and can at all times prohibit teaching of creed and catechism and ceremonial and can forbid forthright proselyting in the schools, I think it remains to be demonstrated whether it is possible, even if desirable, to comply with such demands as plaintiff's completely to isolate and cast out of secular education all that some people may reasonably regard as religious instruction. Perhaps subjects such as mathematics, physics, or chemistry are, or can be completely secularized. But it would not seem practical to teach either practice or appreciation of the arts, if we are to forbid exposure of youth to any religious influences. Music, without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than forthright sermon. Even such a 'science' as biology raises the issue between evolution and creation as an explanation of our presence on this planet. Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I suppose it is a proper, if not an indispensable, part of preparation for a wordly life to know the roles that religion and religious play in the tragic story of mankind. The fact is that, for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's people. One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared." (p. 235)

In the Commissioner's opinion the Christmas carols and Chanukah songs are part of our national culture and heritage. Although they have to do with a religious subject, there is little in music, especially choral literature, that does not relate to religious things. The Commissioner believes that the school music curriculum should include the songs of the season from September to June and that schools have a responsibility to expose children to such songs. Children are usually motivated by the melody being sung rather than by the

words which they may not even know. Children should have the opportunity to sample the total musical content instead of isolated parts. What to include and what to delete becomes extremely difficult to decide when a criterion such as religious overtones is the basis. Under such a test, Wagner, Mendelssohn, Bach, Beethoven, Brahms, and all mysticism in music might be proscribed. In the Commissioner's judgment it is not possible to eliminate all music with religious connotation from the school curriculum and still teach music adequately.

While the Commissioner holds that the singing of the religious music in this case is not repugnant to the statutes cited, he would point out that such music must not be emphasized to such a degree as to evidence a manifestation to inculcate any particular dogma, creed, belief or mode of worship. The Commissioner does not declare by this decision that it is not possible to violate the spirit of the school laws through the use of religious music. The principles underlying the use of such music as set forth in this opinion must be adhered to carefully within the schools in order to maintain the essential restraints and limits of religious thought which would reasonably be said to lead to divisiveness and discord.

The Commissioner finds and determines (1) that the practice sanctioned by the Freehold Borough Board of Education in which the teacher and pupils who wish to do so repeat the first verse of Psalm 136 of the Old Testament prior to the eating of food, is not a religious service or exercise such as is prohibited by statute, and (2) that no evidence has been adduced to show that the practice of singing certain Christmas carols and Chanukah songs in the manner stipulated is a religious service or exercise or other than an appropriate part of the total school curriculum. The petition is dismissed.

COMMISSIONER OF EDUCATION.

September 6, 1961.

III.

PENSION FUND TRUSTEES MAY NOT VOID LOCAL BOARD  
ACTION BY ADMINISTRATIVE RULE

ALEX A. LATRONICA,

*Petitioner,*

v.

BOARD OF TRUSTEES OF THE TEACHERS'  
PENSION AND ANNUITY FUND,

*Respondent.*

PAUL D. O'CONNOR,

*Petitioner,*

v.

BOARD OF TRUSTEES OF THE TEACHERS'  
PENSION AND ANNUITY FUND,

*Respondent.*

HOWARD B. BRUNNER,

*Petitioner,*

V.

BOARD OF TRUSTEES OF THE TEACHERS'  
PENSION AND ANNUITY FUND,

*Respondent.*

For the Petitioners: Cassel R. Ruhlman, Jr., Esq.

For the Respondent: David B. Furman, Attorney General  
(Lee A. Holley, Esq. of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Each of the petitioners in this case is a veteran who has retired from his employment with a local board of education and who contends that the respondent has not allowed the full amount of compensation received during the final year of service in establishing his retirement income. Although there are individual variations in each of these cases, the basic questions are alike and counsel for all parties agreed to litigate them as a single consolidated petition before the Commissioner. There are also a number of similar matters which are being held in abeyance with the expectation that the adjudication of this case will be dispositive of most, if not all, of those in which the filing of petitions is pending.

Facts were stipulated in each case by and between the parties without admitting their materiality or relevancy and reserving the right to object to admission and consideration of any portion but admitting the competency and truth of the facts without the requirement of formal proof. The original records of the Teachers' Pension and Annuity Fund were transferred to the custody of the Commissioner to be available for examination by either party. A brief was filed by the petitioner in the LaTronica case. At a conference before the Commissioner it was agreed to submit a single brief covering the O'Connor and Brunner cases and, where desired, to make reference to the brief filed in the LaTronica case. Respondent submitted a single brief covering the three appeals and a reply brief was submitted covering all three cases.

Petitioner LaTronica, a veteran as defined in Chapter 37 of the Laws of 1955 (*R. S. 18:13-112.3 et seq.*), known as the Teachers' Pension and Annuity Fund-Social Security Integration Act, had acquired tenure as a teacher in the Lyndhurst Township Public Schools and was a member of the Teachers' Pension and Annuity Fund. His salary for the final years of service was as follows:

1953-54.....	\$4,250
1954-55.....	4,550
1955-56.....	5,100
1956-57.....	5,250
1957-58.....	6,300 (assigned duties as High School Dean)

On March 19, 1958, petitioner's salary for 1958-59 was set at \$6,700. Thereafter, on November 19, 1958, the Board of Education voted to increase

Mr. LaTronica's salary to \$7,950 retroactive to September 1, 1958. Electing to retire at the end of that school year, he was notified by respondent that his retirement was granted effective July 1, 1959, at an annual allowance of \$3,975 or one-half of the final year's compensation of \$7,950. Subsequently, the respondent notified petitioner that the last increase in salary of \$1,250, from \$6,700 to \$7,950, could not be considered as "compensation" within the meaning of the statutes and his retirement allowance was set at one-half of \$6,700 or \$3,350. Petitioner contests this action and contends that he is entitled to an allowance of \$3,975.

Petitioner O'Connor, also a veteran and a member of the Teachers' Pension and Annuity Fund, was last employed by the Board of Education of the Borough of Allendale as Superintendent of Schools, from which service he elected to retire on April 1, 1960. At the regular April meeting of the Allendale Board of Education each year, the superintendent's salary was set for the ensuing school year as follows:

1957-58 .....	\$ 8,800
1958-59 .....	9,500
1959-60 .....	10,500

On September 8, 1959, Mr. O'Connor announced his intended retirement on April 1, 1960, whereupon the board voted to "reissue a new contract from July 1, 1959, through March 31, 1960, at \$10,500." Respondent notified petitioner that "the action taken by the Allendale Board of Education to pay you your full 1959-60 school year salary of \$10,500 by March 31, 1960, prompted by your retirement April 1, 1960, cannot be recognized for pension and insurance." The final year's compensation was determined by respondent to be \$10,250 permitting a retirement allowance of \$5,125. This figure was arrived at by taking the last quarter's salary in 1958-59 (\$2,375) plus three-quarters of the 1959-60 salary of \$10,500 (\$7,875). Petitioner contends that this is incorrect and that the full compensation of \$10,500 paid from July 1, 1959, to March 31, 1960, should be considered as three-fourths of the final year's compensation and to it should be added the salary of the last quarter of the previous year to establish a final twelve months' compensation of \$12,875, one-half of which would yield a retirement allowance of \$6,437.50.

Petitioner Brunner, a veteran who enrolled in the Teachers' Pension and Annuity Fund in 1923, retired from his position as Superintendent of the Scotch Plains Schools on April 1, 1960. His salary for the years immediately prior was as follows:

1957-58 .....	\$12,300
1958-59 .....	13,530

On June 18, 1959, the Board of Education adopted a motion fixing the salary of petitioner at \$14,250 for the period from July 1, 1959 to March 31, 1960. To arrive at the final year's compensation, respondent took three-quarters of the \$14,250 received in 1959-60 (\$10,687.50) plus one-quarter of the salary paid in 1958-59 (\$3,382), amounting to a total of \$14,070 and providing a retirement allowance of \$7,000.56. Petitioner contends that the full amount of \$14,250 paid him in the first nine months of 1959-60 should be added to one-quarter of his 1958-59 salary (\$3,382), making the final year's compensation \$17,632, which would yield an allowance for retirement of \$8,816.

Respondent takes the position that in each of these cases, the final salary paid to petitioners represents an abnormal increase made in contemplation of retirement and as such, it constitutes a bonus, extra compensation or retirement increment and is, therefore, illegal. It says that a practice is developing whereby the local employer provides an additional pay raise for those contemplating retirement and only to such employees. The Board of Trustees of the Teachers' Pension and Annuity Fund has refused to allow these additional sums in consideration of final compensation for computation of retirement allowance and has adopted rules, regulations, and standards covering individually bestowed salary increases during the last year of public employment. By these rules, compensation payments coming within the following categories are not recognized as part of creditable compensation for pension and insurance coverage:

- “(3) Retroactive salary adjustment or an inter-school year pay adjustment made in a member's final year of service, unless such adjustment was made as a result of an across-the-board pay adjustment program for all personnel in the school district.
- “(4) Individual pay adjustment made, within or at the conclusion of a member's final year of service.
- “(5) Increment granted for retirement credit.
- “(6) Increment granted in final year of service in recognition of member's service.
- “(8) Individual adjustment made in member's last year of service to place him at maximum on salary guide.”

Prior to the enactment of Chapter 37 of the Laws of 1955, the pensions of school employees who are veterans were paid by the local school district. Upon the adoption of this legislation, the duty of paying pensions of school employees who are veterans was transferred to the Teachers' Pension and Annuity Fund. By the terms of this statute the pension of a nonveteran retirant is based upon the average compensation for his last five years of service, while the pension of a veteran retirant is based upon his compensation for his last year of service only. The question before the Commissioner is, can the Board of Trustees of the Teachers' Pension and Annuity Fund adopt a rule which denies consideration of a salary increase in the computation of a retirement allowance unless and until the member can satisfy the Board that it is an ordinary nondiscriminating salary increment and not extra compensation in contemplation of retirement?

Petitioners contend that the local board of education alone has the authority to fix the salary or compensation of a teacher and there is no room for discretionary action by the Board of Trustees of the Teachers' Pension and Annuity Fund in determining the amount of compensation. They argue that the rules, regulations, and actions of the Trustees cannot subvert or enlarge upon the statutory policy and their refusal to recognize all or any part of the compensation constitutes an attempt to attach a material qualification to the mandate of the statute, which in effect amounts to an attempt to change the law itself by basing the retirement allowance upon the compensation received during the penultimate year of employment rather than

the last year as directed by the statute. Finally, it is the contention of petitioners that the Board of Trustees has no power and authority to look behind the action of the Board of Education to determine whether or not compensation or increases thereto awarded and paid were necessary. Petitioners argue that if respondent's position were allowed to stand, it would establish itself as a super-Board of Education supervising and directing practically all actions of a board of education by the simple expedient of determining what salaries could be paid to all employees. They assert that respondent has no such boundless authority.

Respondent contends that illegal salary increases may not be considered in determining a retirement allowance and that a bonus or extra compensation in contemplation of retirement, by whatever name called, is illegal and void. No statutory authority exists, it is claimed, for a board of education to increase in an *ex parte* manner the amount of an employee's salary in his final year of employment. Regardless of what it may be called, respondent argues that any payment for the purpose of rendering a gratuity in contemplation of retirement, whether the payment be called salary, be incorporated in a last year's contract, or be accomplished under any subtle guise or artistic form, is contrary to New Jersey public policy.

It is also contended by respondent that the actions of the Boards of Education are incompatible with the operation of the State pension system. To permit the granting of retirement bonuses under the guise of an increase in the last year's compensation would wipe out the present structure of the pension system in the State of New Jersey, it is claimed. It follows then, according to respondent, that it must look behind the form of any payment and ascertain the essence thereof in determining the contractual salary at retirement. If the Board of Trustees finds a payment to be illegal, it claims the express and implied power to make the necessary adjustment so that the retirement allowance conforms to law.

The relevant statute herein is *R. S. 18:13-112.73(a)* as follows:

“a. Any veteran member in office, position or employment of this State or of a county, municipality, or school district, board of education or other employer on January 1, 1955, who remains in such service thereafter and who has or shall have attained the age of 60 years and who has or shall have been for 20 years in the aggregate in office, position or employment of this State or of a county, municipality or school district, board of education or other employer, satisfactory evidence of which service has been presented to the board of trustees, shall have the privilege of retiring and of receiving a retirement allowance of  $\frac{1}{2}$  of the compensation received during the last year of employment upon which contributions to the annuity savings fund or contingent reserve fund are made with the optional privileges provided for in section 47 of this act.”

The word “compensation” is defined in *R. S. 18:13-112.4(d)* as follows:

“d. “Compensation” means the contractual salary for services as a teacher as defined in this act.”

It is clear that the power to fix the compensation of superintendents and teachers is given to the district board of education by the provisions of *R. S.*

18:7-56, 18:7-58, 18:7-70, 18:7-71, 18:13-7, 18:13-13.1 *et seq.* and 18:13-16 *et seq.* The Commissioner finds no statute by which the Board of Trustees of the Pension Fund is given the authority, either express or implied, to pass on actions of local boards of education in the employment, dismissal, or compensation of employees. The Trustees have a responsibility to administer the Pension Fund in accordance with the law, but that duty cannot be stretched, in the Commissioner's opinion, to include the power to declare illegal and set aside the actions of a local board of education in fixing the salary of an employee. The actions of a board of education in determining compensation pursuant to the statutes cited above, must be presumed to be valid and proper unless proven otherwise.

It may not be presumed, in the Commissioner's opinion, that all actions of boards of education in fixing final compensation such as those in litigation, are illegal. Respondent's rule makes this presumption. The Commissioner would point out that not all large increases in an employee's final years of service are without adequate consideration. There are instances where such an increase represents only delayed justice. A rule which arbitrarily categorizes a merited recognition for services performed as an illegal bonus cannot be held valid. It is easy to conceive of other instances in which a board of education in the exercise of its discretionary authority may see fit, for any one of a number of valid reasons, to increase the compensation of an employee. To declare such an increase because it occurs in the final year of service to be a gratuity, a bonus, or illegal compensation executed in an *ex parte* manner, whether by rule or otherwise, is not justified nor is it within the scope of respondent's statutory authority, in the Commissioner's opinion.

It is also well established that the Board of Trustees of the Pension Fund does not have the power, by rule, to attach a material qualification to the mandate of a statute even for a commendable purpose. "An administrative rule is not necessarily valid because it is useful." *Frigiola v. State Board of Education*, 25 N. J. Super. 75, 81 (*App. Div.* 1953). "Administrative implementation cannot deviate from the principle and policy of the statute." *Abelson's Inc. v. N. J. State Board of Optometrists*, 5 N. J. 412, 424 (1950).

No evidence other than respondent's assertion has been offered to support the claim that the Pension Fund is being rendered financially unsound because of actions of local boards of education such as those herein and that allowing them to continue unchecked "will wipe out" the present structure of the pensions in the State of New Jersey. Nothing has been presented to the Commissioner which would establish or refute this assertion. In any case the Commissioner must hold that the Pension Fund must look to the Legislature for the remedy, if one is needed.

In behalf of respondent's position, the Commissioner would point out that it is also well established that transactions of a public body which are contrary to the public policy and illegal may be set aside by proper proceedings. *Driscoll v. Bristol Bridge Co.*, 8 N. J. 433, 475 (1952). Accordingly, while the Board of Trustees may not, by its own action, fix the amount of final compensation for retirement purposes, it does have the right and duty to institute proceedings to have the final compensation fixed by the Board of Education set aside if, after due investigation, it believes that such compensation has been fixed illegally.

The Commissioner suggests that any such action be initiated as early as possible. It can be assumed that most school employees reach the decision to retire only after careful thought and with particular attention to the amount of income that can be counted upon, including the retirement allowance. To have this allowance reduced after the act of retirement is irrevocable, as in petitioner LaTronica's case, may create financial hardship as well as feelings of insecurity and other concomitants which should be prevented. In order to avoid such consequences the Commissioner suggests that the Board of Trustees devise means to identify promptly, suspected cases of what it considers illegally fixed compensation for retirement purposes. If, after investigation, the Board of Trustees is satisfied that the final compensation does not form a legal basis for retirement allowances, it may institute proceedings to have the final compensation set aside, if it is deemed advisable, with the board of education and any person affected made parties to the proceedings.

In the instant cases, no evidence has been advanced of any inquiry into the circumstances of these increases which would provide a basis for belief that they were fixed illegally and no proceedings have been instituted to set aside the boards of education actions setting the final compensation of petitioners. The Commissioner, therefore, finds and determines (1) that the district board of education has the sole right to fix and determine the compensation to be paid to its employees, (2) that the salary as set by the district board of education provides the basis on which the retirement allowance is made unless by appropriate and effective proceedings such action of the district board of education is found to be illegal and is voided and (3) that there is no statutory authority under which the Board of Trustees of the Teachers' Pension and Annuity Fund can make such a determination and void the action of the district board of education by rule. The fixing of the retirement allowances of the petitioners herein is remanded to the respondent Teachers' Pension and Annuity Fund for determination in accordance with the opinions expressed in this decision.

COMMISSIONER OF EDUCATION.

September 14, 1961.

#### DECISION OF THE STATE BOARD OF EDUCATION

Each of the respondents is a veteran and member of the Teachers' Pension and Annuity Fund. Each has retired from his employment with a local board of education and thereby became entitled to a pension from appellant. The appellant, in determining the amount of retirement income payable to the respondents has, in each case, disallowed a portion of the salary paid during the last year of service, thereby reducing the amount of retirement income. The rulings of the appellant were based upon its finding that the disallowed salary constituted "extra monies" paid in contemplation of or upon retirement.

The appeals of the three respondents were consolidated for hearing before the Commissioner. The Commissioner decided in favor of respondents and remanded the cases to appellant Teachers' Pension and Annuity Fund for the purpose of redetermining the retirement allowances due to respondents, giving full credit for salaries paid during the last year of the employments. Appellant appealed to the State Board of Education and the Commissioner granted a stay of his decision pending the determination of the appeal.

We are informed that following the decision of the Commissioner, appellant made a motion to the Appellant Division of the Superior Court requesting leave to appeal and for other relief. The motion was denied without prejudice to the right of appellant to argue the question of jurisdiction in the event of a further appeal from the decision of the State Board of Education.

Prior to the hearing before the State Board of Education appellant moved that the Board “exercise original jurisdiction to hear (1) the question of the jurisdiction of the Commissioner of Education to render his decision in these cases; (2) additional evidence in the form of statistical and actuarial reports which depict the financial effect upon the Teachers’ Pension and Annuity Fund as a result of the actions taken herein by the local boards of education.”

We shall first consider the question of the jurisdiction of the Commissioner over the subject matter of the dispute. Although the question is not discussed in the decision of the Commissioner, the issue was raised in the pleadings below and has, in fact, been in the background during the entire course of the litigation. We therefore turn to the merits of question raised by the motion.

*R. S. 18:3–14* entitled “Hearing and decision of disputes” provides:

“The Commissioner shall decide without cost to the parties all controversies arising under the school laws, or under the rules and regulations of the state board or of the commissioner.”

Appellant argues that since *R. S. 18:13–112.58* established a Board of Trustees of the Teachers’ Pension and Annuity Fund clothed with the “general administration and responsibility for the proper operation of the Teachers’ Pension and Annuity Fund and for making effective the provisions of this act” and since P. L. 1955, Chapter 70 established a Division of Pensions within the Department of the Treasury and transferred the Board of Trustees of the Teachers’ Pension and Annuity Fund to the Division of Pensions, the appellant is an agency within the Department of the Treasury and not within the Department of Education. Thus, says appellant, determinations of the pension Board are not reviewable by the Commissioner under *R. S. 18:3–14*.

Prior to the enactment of P. L. 1955, Chapter 70, the courts clearly considered pension matters to be part of the structure of the school laws of the state. See *Board of Education of Beach Haven v. State Board of Education*, 115 *N. J. L.* 364, 367 (*Sup. Ct.* 1935); *Teachers’ Pension and Annuity Fund v. Board of Education of the Township of Boonton*, 1939-49 *S. L. D.* 3 (1945). The cases of *Fox v. Board of Education of Newark*, 129 *N. J. L.* 349 (*Sup. Ct.* 1943) and *Reilly v. Board of Education of Camden*, 127 *N. J. L.* 490 (*Sup. Ct.* 1941), relied on by Appellant, are not in point. *Fox* involved the Veterans’ Tenure Act and *Reilly* the Veterans’ Pension Act. Although school employees were involved in both cases, in neither was a right under the school law asserted.

The question remains as to whether the enactment of P. L. 1955, Chapter 70 changed this situation. The statement of purpose appended to this act reads:

“The purpose of this legislation is to create in the Department of the Treasury, a Division of Pensions, to which will be transferred all of the existing State Pension Agencies.”

Section 7 of Chapter 70 (*R. S. 52:18A-101*) reads:

“Nothing in this act shall be construed to deprive any person of any tenure rights or of any right or protection provided him or her by Title 11 of the Revised Statutes, or any pension law or retirement system.”

There is nowhere to be found any express indication that the historical statutory right to appeal to the Commissioner and the State Board of Education has been abrogated. As we read the legislative enactments, they were grounded in a desire to centralize the bookkeeping and actuarial activities of pension funds and not intended to disturb the remedies of dissatisfied pensioners.

The Commissioner has continued to exercise his appellate jurisdiction in pension cases since the enactment of P. L. 1955, Chapter 70. See unreported Appellate Division opinion in *Harenberg v. State Board of Education* Docket No. A-426-60 Consolidated with Docket A-323-58 cert. denied 36 *N. J.* 135 (1961).

Appellant also argues that the failure of the legislature to reenact *R. S. 18:13-58* as part of the revision accomplished by P. L. 1955, Chapter 37 indicated the end of the power of the Commissioner to hear pension appeals. *R. S. 18:13-58* provided:

“An applicant for disability retirement who is dissatisfied with the decision of the board of trustees, may appeal to the state board of education. The decision of the latter shall be final and binding upon all parties.”

Quite obviously this provision dealt with the narrow area of disability retirements. The failure to reenact the statute is most logically read as a manifestation of an intention to do away with the distinction between appeals involving disability pensions and those concerned with retirement under other provisions of the pension act. We cannot conclude that the end of *R. S. 18:32-58* signified the end of the Commissioner’s power of review in pension cases.

We conclude that this appeal was properly brought before the Commissioner and appellant’s motion addressed to jurisdiction is denied.

We now turn to the Appellant’s motion that we exercise our original jurisdiction to hear additional evidence. We are advised that this evidence will demonstrate that the Commissioner’s decision will have an adverse effect upon the Teachers’ Pension and Annuity Fund.

In the light of our determination on the merits of the case, the evidence offered becomes irrelevant. Since we find that Appellant has no statutory rights to interfere with salary determinations made by local boards of education, there is nothing in the proffered evidence that could change the result. We do not pass on the question of whether we have the power to hear additional evidence on appeal from a decision of the Commissioner. We note that we are unable to find any case in which the State Board of Education heard new evidence, on appeal. The motion is denied.

On the merits of the case we affirm the decision of the Commissioner on his well reasoned opinion and adopt as our own his statement of facts, exposition of the law and conclusions.

January 9, 1963.

Pending before Superior Court, Appellate Division.

IV.

COMMISSIONER WILL DISMISS PETITION WHEN ISSUES ARE  
MOOT OR WHEN HE CANNOT GRANT RELIEF SOUGHT

DEMAREST TAXPAYERS' ASSOCIATION,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF DEMAREST,  
BERGEN COUNTY,

*Respondent.*

For the Petitioner, Pro Se.

For the Respondent, Christian Bollermann.

DECISION OF THE COMMISSIONER OF EDUCATION  
ON MOTION TO DISMISS

This is a decision of the Commissioner of Education on a motion of respondent to dismiss the petition of appeal.

The petition of appeal is in two parts. In Part I petitioner says that respondent Board, following the defeat of the annual budget on February 14, 1961, met on February 15 in what petitioner alleges was an improperly convened special meeting, by reason of the fact that no public notice of the meeting was afforded, and voted to resubmit the same budget at a second election on February 28. The petition complains that the manner in which the meeting was convened deprived the public of its right to be heard. Petitioner asserts that it does not contemplate rescindment of the action taken at the meeting, but asks that the Commissioner "order respondent to discontinue any contemplated repetition of the type of unorthodox meeting of which complaint is made here."

Part II of the petition alleges that certain brochures mailed to the electorate between the first and second elections were, by the nature of the statements contained therein, a type of propaganda for which expenditure of public funds is improper. Petitioner seeks to have the Commissioner assess the costs of publishing and circulating these letters individually upon the members of the Board, with three exceptions.

Argument on the motion to dismiss was heard by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the State Department of Education Building, Trenton, New Jersey, on July 18, 1961.

The Commissioner finds that decision on the motion can be confined to two of the grounds advanced by respondent. The first is that the issues raised in Part I of the petition are admittedly moot. The petition concedes: "An election had to be held, and it is now past history" and seeks no action on the part of the Commissioner to set aside the resolution of the Board at the special meeting. In such case there is no necessity to rule on the merits of the issue raised. *Rodgers v. Orange Board of Education*, 1956-1957 S. L. D. 50; *Worthy, et al. v. Berkeley Township Board of Education*, 1938 S. L. D.

686, 691. As for the conduct of the Board on future occasions, the Commissioner must assume that boards of education will act according to law.

Respondent also argues for dismissal on the ground that the relief sought in Part II of the petition is not within the power of the Commissioner to grant. No authority is given to the Commissioner to assess the costs of preparing and distributing the disputed letters upon the individual members of the Board. Since he cannot grant the relief sought, and since this decision is not upon the merits of petitioner's complaint, the Commissioner is not called upon here to determine the legality of the Board's action in issuing the letters.

Having determined that the issues raised in Part I of the petition are moot, and that he cannot grant the relief sought in Part II, the Commissioner finds it unnecessary to consider other questions raised or argued.

The motion is granted and the petition is dismissed.

COMMISSIONER OF EDUCATION.

October 13, 1961.

V.

PART-TIME BOARD SECRETARY CANNOT ACQUIRE TENURE

DOMINICK J. MASTRANGELO,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF PALISADES PARK,  
BERGEN COUNTY,

*Respondent.*

For the Petitioner, Mr. Saul R. Alexander, Esq.

For the Respondent, Mrs. Sidney Cohn, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

In this case the petitioner prays that the action taken by the respondent Board of Education to rescind a resolution appointing him as Secretary of the Board be declared a nullity, that his tenure status as Secretary be declared and affirmed, and that he be reinstated with full salary payment from July 1, 1960.

The case was presented to the Commissioner on briefs and on stipulation of facts as represented in pertinent minutes and records of the Board of Education, as follows:

Petitioner was originally appointed District Clerk by the Palisades Park Board of Education beginning April 6, 1937, and served continuously in a series of annual appointments until June 30, 1960. On July 1, 1953, the title was changed by statute to Secretary of the Board of Education.

On April 14, 1960, by a unanimous vote of the members present, petitioner was appointed Secretary "for the school year 1960-61 beginning July 1, 1960,

and ending June 30, 1961, at the contractual salary of \$3,000 per annum and \$200 for car expenses.”

At a special meeting of the Board on June 30, 1960, the Board passed a series of motions, each by a majority vote of all the members of the Board:

1. rescinding the resolution of appointment of April 14, 1960,
2. suspending that portion of the Board's by-laws pertaining to the election of a Secretary,
3. appointing Mr. Mastrangelo as Secretary of the Board of Education for the month commencing July 1, 1960 and terminating July 31, 1960, at a salary of \$250, plus \$16.68 for car expenses,
4. empowering the Personnel and Supplies Committee of the Board to receive applications and interviews applicants for the office of full-time Secretary of the Board.

Subsequently, petitioner was reappointed for monthly terms for the months of August, September, and October, 1960.

Petitioner alleges that the action taken at the special meeting of June 30 was illegal because the statement of purpose for the meeting did not provide for such action. He further alleges that the resolution rescinding his appointment violated his rights to the office of Secretary, and that the Board violated its own by-laws in removing him. Respondent, on the other hand, maintains that petitioner served on a part-time basis and thereby failed to acquire the protection of tenure afforded by statute to full-time secretaries; further, that the resolution of appointment gave petitioner no vested or contractual rights; that the notice of and action taken at the special meeting were entirely proper and valid; and finally, that the by-law allegedly protecting him from removal except for cause is without force and effect since it is in conflict with statute.

The issues to be decided by the Commissioner, in order, are:

1. Did the respondent Board of Education have the power to remove petitioner from the office of Secretary of the Board?
2. If so, were proper procedures employed in the exercise of this power?

The pertinent statutes governing the appointment and tenure of the secretary of a board of education are *R. S. 18:5-51*, which reads:

“No secretary, assistant secretary, or business manager of any board of education in any municipality devoting his full time to the duties of his office, after 3 years' service, shall be discharged, dismissed, or suspended from office, nor shall his compensation be decreased, except for neglect, misbehavior, or other offense and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not.”

and the first paragraph of *R. S. 18:7-68*, which reads:

“Every board shall by a majority vote of all its members appoint a secretary, who may be elected from among such members, and shall fix his compensation and term of employment. The secretary, as such, may be removed by a majority vote of all the members of the board subject, however, to the provisions of section 18:5-51 of this Title. \* \* \*”

Petitioner prays that his tenure status as Secretary be declared and affirmed. In order for him to have achieved such tenure status, it would be necessary for him to have devoted “his full time to the duties of his office” for a period of three years. It is stipulated that petitioner has been employed and holds a position in industry, foreign to and unconnected with the office of Secretary of the Board of Education, at which he worked daily from 9 A. M. to 5 P. M. Petitioner’s argument that he should have the protection afforded a full-time secretary rests largely on the words of the Commissioner in *Grimm v. Board of Education of the Township of Hamilton, Mercer County* (unpublished decision 1945):

“It is the opinion of the Commissioner that a full-time district clerk is not required to devote every minute of the day to his duties, and that he is not precluded from holding another office as long as the duties of the two offices are not inconsistent and as long as the duties of the other office do not interfere with the faithful discharge of the duties of the office of district clerk.”

It should be noted that in this case Grimm held tenure as a full-time district clerk but served also as Recorder of Hamilton Township, a duty which at most required but a few hours of each week. The matter did not depend upon whether Grimm held one office or two, but rather on whether he was able to discharge the duties of a second, admittedly part-time, office without interference to the faithful discharge of the duties of his full-time office of district clerk. In the case of *Johnson v. Stoughton Wagon Co.*, 95 N. W. 394, at 397, 118 *Wis.* 438 (*Sup. Ct.* 1903), the Court observed, concerning a “full-time” provision in a contract of employment:

“It certainly does not require 24 hours of a day of an employee’s time, nor, indeed, every moment of his waking hours. \* \* \* On the other hand, it undoubtedly does require that he shall make that employment his business to the exclusion of the conduct of another business such as usually calls for the substantial part of a manager’s time or attention.”

It seems clear, and the Commissioner so finds, that the petitioner’s position in industry, occupying him during the normal business hours of the week, must be regarded as his full-time job, and that his employment as Secretary of the Board can only be regarded as part-time.

“One who works less than the usual number of hours per day is said to have a part-time job.” *Cote v. Batchelder-Worcester Co.*, 160 A. 101 (*Sup. Ct.* New Hampshire, 1932).

“One who works only part of a day, or only two or three days out of a week, or only a few weeks out of the year, cannot be said to be working at full time.” *Beaver Dam Coal Co. v. Hocker*, 259 S.W. 1010 (*Ct. of Appeals*, Ky. 1924).

“Words in a statute are to be construed according to the common and approved usage of the language unless they have acquired a peculiar and appropriate meaning in the law.” *Colston v. Boston and Maine R.R.*, 99 A. 649 (*Sup. Ct. New Hampshire*, 1916).

It follows, therefore, that petitioner could not have acquired tenure under R. S. 18:5-51 and hence cannot avail himself of the protection afforded by that statute.

The sequence of the first three resolutions adopted at the special meeting of the Board on June 30, 1960, above, had the effect of revising the term of employment of petitioner from an appointment for a full year to an appointment for one month (July). Subsequent re-employment on a month-to-month basis took place for three additional months (August, September, October); petitioner was not re-employed thereafter. Petitioner contends that he could not be “removed” on June 30 from an office which he would not take up until July 1. This contention becomes immaterial when it is noted that in addition to the power of “removal” granted by R. S. 18:7-68 *supra*, the statute also authorizes the Board to fix the secretary’s “term of employment.” Thus, while it is illogical that the same Board should be barred from accomplishing on June 30 what it could unquestionably accomplish a few hours later on July 1, it could also be maintained that there was no act of removal as such, but that petitioner’s “term of employment” was by these resolutions changed. The Commissioner must find, therefore, that the acts embodied within the resolutions were legal and valid within the meaning of the statute.

The remaining matters have to do with the Board’s procedures leading to the adoption of the resolutions. Petitioner contends that the notice of the special meeting of June 30, 1960, did not provide for the action taken with regard to his appointment as Secretary. Following the original notice, dated June 24, 1960, a supplementary notice was given under date of June 26, as follows:

“President Harry Karis has directed me to inform you that the Special Meeting of June 30th, 1960, will include on the agenda the question of the employment of the Secretary of the Board.”

In determining whether in this supplementary notice “the question of the employment of the Secretary of the Board” could validly comprehend the action taken with respect to petitioner, it is necessary to review the minutes of the Board. At the Board meetings of February 17, 1958, and February 16, 1959, the question of appointing a Secretary on a full-time or part-time basis was discussed. At the meeting of the Board on February 15, 1960, the by-law calling for the appointment of a Secretary at the organization meeting was suspended, and unanimous approval was given to a motion “to hold off the appointment of the Board Secretary until the regular meeting in May 1960, in order that the Board made [sic] a study of the position of Board Secretary.”

It is thus clear that the “question of employment” of the Secretary of the Board had been in the minds of the members over a period of more than two years. Its inclusion, by way of a supplementary notice, on the agenda of the special meeting seems ample notification for action on motions which relate to the statutory powers of the Board concerning the employment of the Secretary.

Petitioner contends that even if the Board could act at the special meeting, it was barred by its own by-laws from removing him.

Section 3 of the by-laws of the respondent Board reads:

“The Secretary shall be elected by a majority vote of the members of the Board, for one year from the date of appointment. His compensation shall be fixed by the Board of Education. He may be removed from office during the term for which he was appointed, after due hearing on written charges, proved, by a majority vote of all members of the Board.”

Respondent properly points out that the expression “during the term for which he was appointed after due hearing on written charges, proved,” contravenes the statute (*R. S. 18:7-68*) by limiting the powers of the Board beyond the limitations imposed by the statute.

In the case of *Skladzien v. Board of Education of the City of Bayonne*, 1938 *S. L. D.* 120; affirmed, State Board of Education, *Id.* 123; affirmed by *Supreme Court*, 12 *Misc.* 602 (1934); affirmed by *Court of Errors and Appeals*, 115 *N. J. L.* 203 (1935), the State Board said, at page 125:

“Where an administrative board appoints an officer by authority of a statute, rules of such board limiting and restricting such power are invalid, if they are inconsistent with the statute.”

It is the Commissioner’s opinion that the action taken by the Board in exercising a statutory right is not invalid because of its own rules, which would limit such a right.

“A municipal council has inherent power to make rules of procedure for its own government, provided such rules are not inconsistent with the Constitution or with any statute of the State. Such rules cannot have the effect of limiting the powers of the municipal council as established by statute, and an enactment which is actually adopted by a municipal assembly in accordance with its statutory powers is not invalid because its own rules of procedure were not complied with, where they were in terms suspended or waived, or merely tacitly ignored.” 19 *R. C. L.* § 189, at 889.

The Commissioner finds and determines (1) that petitioner was not a full-time Secretary of the Board of Education and, therefore, enjoyed no protection of tenure of his office, and (2) that the procedures used by the respondent Board of Education with respect to the terms of his employment were valid and within the authority conferred by statute.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

November 9, 1961.

Affirmed by State Board of Education without written opinion April 3, 1963.

VI.

APPLICATION FOR WITHDRAWAL OF PENSION FUND CONTRIBUTIONS DOES NOT CONSTITUTE RESIGNATION OF EMPLOYMENT

KATHRYN TRIPLETT, WIDOW OF BUDDY TRIPLETT, *Petitioner,*

v.

BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND AND BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, *Respondents.*

For the Petitioner: Sol Hoberman, Esq.

For the Board of Trustees of the Teachers' Pension and Annuity Fund: Attorney General of the State of New Jersey.

For the Board of Education: Clyde Christie, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, as the wife and beneficiary of Buddy Triplett, deceased, seeks the payment of benefits claimed to be due her from the Teachers' Pension and Annuity Fund as a result of the death of her husband, who was employed as a janitor in the Bergenfield Public Schools. The respondent Teachers' Pension and Annuity Fund says that petitioner is entitled only to the return of the accumulated salary deductions credited to his account.

The Bergenfield Board of Education employed Buddy Triplett as a janitor for the school year 1956-57 under a contract providing for termination at any time by either party upon 30 days' written notice, and he was assigned as head custodian of the Lincoln Elementary School. On December 18, 1956, he became ill, left his work and was unable to return after that date. Salary payments were made to him until April 16, 1957, and then ceased, and on May 22, 1957, he was notified that he would not be re-employed for the 1957-58 school year.

On May 27, 1957, Mr. Triplett applied for a return of the accumulated salary deductions credited to his account in the Teachers' Pension and Annuity Fund by signing the Application for Withdrawal form used for that purpose. The Secretary of the Board of Education helped Mr. Triplett to complete the application and also executed the certification required on the same form that "Buddy Triplett has resigned his position as a janitor in the district, was paid his final salary for the month of March, 1957, and is no longer under contract for further service in this district."

On June 21, 1957, Mr. Triplett died. A letter addressed to him, dated July 22, 1957, was received by his widow from the Teachers' Pension and Annuity Fund, enclosing a check for \$693.43, the aggregate amount of his contributions to the Fund, plus interest. Petitioner then consulted counsel in regard to obtaining the death benefits she believed due her and, after some correspondence, a formal application was made for a hearing before respondent Board of Education.

The Procedures and Policies Committee of the Board of Trustees of the Teachers' Pension and Annuity Fund afforded petitioner a hearing on March 15, 1959. The Committee then recommended that petitioner should request a hearing before the Commissioner of Education and the Bergenfield Board of Education to seek a determination of the deceased's employment status at the time of his death and the Committee reserved decision until receipt of such a determination. The petition herein was then filed on November 9, 1958, requesting the Commissioner to take the procedures to determine the benefits due her and to issue the necessary orders therefor.

At a conference of counsel with the Assistant Commissioner of Education in Charge of Controversies and Disputes on October 6, 1959, agreement was reached that the respondent, Bergenfield Board of Education, would certify to the Teachers' Pension and Annuity Fund the employment status of Buddy Triplett at the time of his death according to its records. The Board of Education complied on December 8, 1959, by mailing the following certification:

"This is to certify that according to our records the late Buddy Triplett was on leave of absence, without pay, at the time of his death, which occurred on the 21st day of June, 1957.

"This determination is based upon the following records:

'1. On September 13, 1956, the Bergenfield Board of Education entered into a written contract with Buddy Triplett employing him as a school custodian for the period from September 16, 1956, to June 30, 1957.

'2. Buddy Triplett became ill on December 17, 1956, and never worked for the Board of Education thereafter.

'3. On April 10, 1957, the Board of Education notified Buddy Triplett by letter that due to his illness his salary would be discontinued effective as of April 16, 1957.

'4. On May 22, 1957, the Board of Education notified Buddy Triplett by letter that after reviewing the report on his physical condition it had decided not to renew his contract for the 1957-58 school year.' "

The Secretary of the respondent Pension Fund thereafter notified petitioner's counsel that "the Board of Trustees, Teachers' Pension and Annuity Fund, at its April 14, 1960, meeting, following a complete review of Mr. Triplett's case, ruled that as a matter of law, Mr. Triplett had terminated his membership in the Teachers' Pension and Annuity Fund prior to his demise, thus making Mrs. Triplett ineligible for death benefits." Petitioner then pressed this appeal and, in order to complete the record, a further hearing was held before the Assistant Commissioner at Hackensack on September 9 and October 28, 1960.

Petitioner contends that her husband was still employed by the Bergenfield Board of Education at the time of his death and that he was on leave of absence without pay. No resignation was submitted to or accepted by the Board of Education and, she argues, an application for withdrawal from the Teachers' Pension and Annuity Fund does not constitute a resignation. She contends also that membership in the Pension Fund continues until accum-

ulated deductions are withdrawn, not on the date they are applied for, and her husband's death had already occurred before the application for withdrawal was processed. Finally, she says that if the Secretary of the Board of Education had understood and followed the provisions of the statutes and the instructions of the Teachers' Pension and Annuity Fund, he would not have improperly prepared and forwarded the application for withdrawal.

Respondent Board of Trustees takes the position that Mr. Triplett was under no contract of employment with the Bergenfield Board of Education at the time of his death and was, therefore, not "in service" on June 21, 1957. His membership ended on May 27, 1957, when he applied for withdrawal, it contends, and his beneficiary is not eligible, therefore, for any survivorship benefits other than payment to his estate of his accumulated deductions with interest.

The applicable statute is *R. S. 18:13-112.49*, the relevant excerpts of which are:

"\* \* \* upon the receipt of proper proof of the death of a member in service on account of which no accidental death benefit is payable under section 46, there shall be paid to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate:

- (a) His accumulated deductions at the time of death together with interest after January 1, 1956; and
- (b) An amount equal to  $1\frac{1}{2}$  times the compensation upon which his contributions are based or received by the member in the last year of creditable service; provided, however, that if such death shall occur on or after July 1, 1956, and after the member shall have attained age 70, the amount payable shall equal  $\frac{3}{16}$  of the compensation received by the member in the last year of creditable service instead of  $1\frac{1}{2}$  times such compensation.

"\* \* \* For the purpose of this section \* \* \* a member shall be deemed to be in service for a period of no more than 2 years while on official leave of absence without pay; provided, that satisfactory evidence is presented to the board of trustees that such leave of absence without pay is due to illness. \* \* \*"

The pivotal question in this matter is the employment status of Buddy Triplett on the date of his death.

The term of Mr. Triplett's employment was fixed by contract. It was to end on June 30, 1957, unless either party gave the other thirty days' notice in writing of his intention to terminate the contract. Such notice was not given. The Board withdrew an offer to Mr. Triplett for employment for the subsequent year, but at no time did the Board give any notice of its intention to terminate the contract of employment ending June 30, 1957. There is no record that Mr. Triplett resigned. Nor is there any record that the Board of Education acted upon a resignation. It is well established that a resignation is not complete until it is accepted by the authority having the power to fill the vacancy. *Freyer v. Norton*, 67 *N. J. L.* 23 and 537 (*Sup. Ct.* 1901, *E. & A.* 1902).

A school district employee does not submit his resignation to the Secretary, who has no power to act on it, but to the Board of Education. The Secretary's function of transmitting a resignation or notice of termination between an employee and the employing board of education is ministerial and involves no exercise of discretion or authority on his part.

The Application for Withdrawal form furnished by the Teachers' Pension and Annuity Fund to the Secretary of the Board of Education, and which he supplied for Mr. Triplett's use, contained the following instructions:

"No withdrawal claim will be honored unless the member has resigned his position and is no longer under contract for service in the public schools of New Jersey. Withdrawal is not permissible while a member is on a leave of absence granted by his employer or permitted by any law of this State."

Since Mr. Triplett had not resigned and neither he nor the Board of Education had given the required written notice to terminate the contract, the Secretary erred and exceeded his authority in certifying that Mr. Triplett had resigned and was no longer under contract. Accordingly, the Application for Withdrawal which the Teachers' Pension and Annuity Fund received and processed was a false statement and, therefore, there was no valid application for withdrawal before the Board of Trustees. That being so, it should be set aside and treated as though it had never occurred.

Mr. Triplett died before the application was processed. Respondent argues that the application for withdrawal is effective upon receipt of the application. Petitioner argues it is not effective until payment is received. Having found that the application was a nullity, the Commissioner considers it unnecessary to decide this question.

The Secretary of the Board of Education testified that janitors frequently terminate their employment without giving the required notice; *i. e.*, by merely walking off the job. Mr. Triplett did not walk off the job. He was ill. He wanted to return. He could have presented himself for work on any day up until June 30, 1957, if his health permitted, and would have been entitled to be paid. The Board never made any claim or determination that he had abandoned his job but took the position that he was absent on leave. For the reasons that (1) neither Mr. Triplett nor the Board ever invoked the termination clause in the contract, (2) no resignation was offered or accepted, (3) the Board of Education considered him to be on leave of absence, (4) there is no clear proof of abandonment, and (5) his application for withdrawal was not valid and a nullity, the Commissioner concludes that Mr. Triplett was in the employment of the Board of Education at the time of his death.

There remains the question whether Mr. Triplett was "in service" at the time of his death, within the meaning of the statute which provides that:

"\* \* \* a member shall be deemed to be in service for a period of no more than 2 years while on official leave of absence without pay \* \* \*."

While the Board of Education considered Mr. Triplett to be on leave of absence, there is no record of any official action granting him such a leave. That this was not unusual is evidenced by the testimony of the Secretary, who said:

“But in ordinary sickness it hasn’t been the practice for anybody to ask for a leave of absence or for the Board to grant a leave or make an issue of it. They just stay out; \* \* \*”

The Commissioner does not consider this significant. In his judgment, the statute is not intended to deny death benefits in instances where a member died during the course of an illness which was not covered by an official leave of absence. If the statutes were so interpreted, death benefits would be denied where a member was ill for a few days and died before an official leave could be granted. Or a member, not realizing he was seriously ill, might die without applying for a leave. The Commissioner cannot think the Legislature so intended. A statute will not be construed so as to reach an absurd or an anomalous result. *New Capitol Bar and Grill Corp. v. Division of Employment, Department of Labor and Industry*, 25 N. J. 155 (Sup. Ct. 1957), *Robson v. Rodriguez*, 26 N. J. 517 (Sup. Ct. 1958).

The Commissioner concludes that the inclusion of a provision recognizing the “in service” status of a member while on official leave of absence was not intended to exclude those without a formal leave who died during employment while absent from work because of illness.

“\* \* \* great caution is necessary in the use of the legal axiom *expressio unius est exclusio alterius*, for it is not of universal application, but ‘depends upon the intention of the party as it can be discovered upon the face of the instrument or upon the transaction.’ *Saunders v. Evans*, 8 H. L. Cas. 721 (1861), Lord Campbell. See *Broom’s Legal Maxims (9th ed) 420 et seq.* The maxim that the express mention of one thing implies the exclusion of another is purely interpretive in aid of intention, and not a rule of law; and it is not to have an arbitrary application at variance with its true purpose.” *Gangemi v. Berry*, 25 N. J. 1, 11. (1957)

In the Commissioner’s judgment, this section of R. S. 18:13–112.40 was not enacted to establish categories of persons to be included in and excluded from the death benefits—it was enacted to protect the rights to death benefits of those persons who are on an official leave of absence. When an employee requests and is granted a leave of absence, service during that period of the leave is suspended. The State Board so held in *Briefstein v. Board of Education of the City of Garfield*, 1939-1949 S. L. D. 193, 196. Therefore, without the provisions of R. S. 18:13–112.40, an employee on official leave of absence would not be “in service” and if he died during the period of the leave, his designated beneficiary would not be entitled to death benefits.

Leaves of absence are usually granted to employees under tenure who expect to be absent for an extended period of time. Such leaves are mutually advantageous. The board of education benefits because the leave fixes the date on which the employee may return. This enables the board to provide, in cases of employees who are teachers, more attractive employment for substitute teachers and protects the pupils from a change of teachers in mid-term. The employee benefits from an official leave because he is protected from any possible claim that he may have abandoned his position because of his protracted absence.

While official leaves are occasionally granted to employees appointed for a fixed term under contract, circumstances make such leaves relatively infre-

quent. With the exception of superintendents of schools, employees not under tenure may not be appointed for terms beyond the life of the appointing board of education and, therefore, the terms of such employees will not exceed one year. Furthermore, contracts usually include a provision permitting the board of education to terminate the employment upon giving a certain number of days' notice. An official leave of absence, if requested and granted, could not exceed the period of the contract. Under these circumstances, such a leave is not likely to be protracted. The board with a termination clause in a contract is always in a position to terminate the employment of a disabled employee in a short period of time, if it desires to do so. For these reasons, an official leave of absence is not often requested and granted for persons with a fixed period of employment.

This review of the different circumstances of absence in the case of employees under indefinite tenure and those under a fixed period of employment gives additional support to the Commissioner's conclusion that the beneficiary of a member who died while absent because of illness is entitled to death benefits even if the employee was not granted an official leave of absence. It would be unthinkable that the Legislature would intend to exclude from benefits all employees with fixed periods of employment who, for the reasons already stated, ordinarily do not go through the formality of securing an official leave of absence. The Commissioner holds that an employee may be in the service of a school district even if he is absent because of illness. His service is not terminated until his employment ends.

In the view which the Commissioner takes of this case, the salient element is the fact that the document from which the actions stemmed, giving rise to the issues herein, contained incorrect statements and a false certification. The Commissioner has also considered the relationship of each of the principals in respect to this defective document.

It is a reasonable assumption that the decedent was unfamiliar with the rules and procedures of the Teachers' Pension and Annuity Fund. It is also probable that he did not know what the exact statement was to which he was directed to affix his signature. The testimony reveals that the form was completed in its entirety by the Secretary, who admitted making all the entries called for, including the statements ascribed to the decedent. All Mr. Triplett did was to sign his name in the proper space as directed by the Secretary. He told the Secretary he needed money to pay bills, and saw the withdrawal of his pension deductions as a way to accomplish it. In such case, the Secretary should have advised him of the necessity to sever his contractual relations with his employer as a condition precedent. The Commissioner holds that the Secretary had a duty to instruct decedent in the proper procedure, use of the form, its meaning and effect.

No fault in respect to the document can be ascribed to the Board of Education. The act of its Secretary in completing the withdrawal document was performed without any knowledge of the Board of Education which believed and later found as a fact that the decedent was "on leave of absence, without pay, at the time of his death."

Nor can any failure be assigned to the Teachers' Pension and Annuity Fund. There was no way in which it could know that the withdrawal applica-

tion was falsely executed, and it was processed according to usual procedure. Not until after it was acted upon did the question of its validity arise.

The fact that the Secretary of the Board erred and failed to discharge the duties of his office properly, cannot be avoided. He was in the best position to know the employment status of Mr. Triplett and it was his responsibility also to know the procedures of the Teachers' Pension and Annuity Fund and to execute them according to rule. While his excuse was that he wanted to help Mr. Triplett, knew he was not going to return to work, and did not foresee the intervention of death and these consequences, the fact remains that he executed a false document upon which the Teachers' Pension and Annuity Fund acted in good faith and which now deprives decedent's beneficiary of benefits otherwise due her.

It is the judgment of the Commissioner that the fault of the Secretary should not be permitted to bar the petitioner from the benefits which would accrue to her had he discharged his responsibilities properly. The Commissioner finds that the Application for Withdrawal herein contained false statements which were improperly certified and it is, therefore, invalid and any action taken as a result thereof is a nullity.

The Commissioner finds and determines (1) that Buddy Triplett was in the employment of the Bergenfield Board of Education at the time of his death, (2) that he was "in service" within the intendment of R. S. 18:13-112.40 at the time of his death, (3) that the Application for Withdrawal in issue here was invalid and is of no effect. Accordingly, there is due to the beneficiary of Buddy Triplett such payments as are provided by statute upon the in service death of a member of the Teachers' Pension and Annuity Fund.

COMMISSIONER OF EDUCATION.

November 13, 1961.

VII.

VALID WAIVER OF SALARY CLAIMS WILL NOT BE DISTURBED

WILLIAM SUGRUE,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE,  
HUDSON COUNTY,

*Respondent.*

For the Petitioner: Kohrs & Rubin (Edwin S. Rubin, Esq. of Counsel)

For the Respondent: John J. Pagano, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was appointed to the position of Chief Bookkeeper in the office of the Secretary of the Board of Education of the City of Bayonne on September 16, 1948. A controversy exists because petitioner believes (1) that he has not been paid the salary to which he was entitled, (2) that payment is due

him for services rendered during summer vacation periods, and (3) that no maximum salary has been fixed for his position as Chief Bookkeeper.

Petitioner complained to his superior several times with regard to his salary and as a result, on December 10, 1953, the Secretary of the Board of Education made the following recommendation to the Board:

“I respectfully recommend that the maximum salary of William M. Sugrue, Chief Bookkeeper in my office, be adjusted.”

The Board at its meeting on December 10, 1953, adopted this resolution:

“Resolved, that the salary of William M. Sugrue, Chief Bookkeeper in the office of the Secretary of the Board of Education, be fixed at \$4,500 per annum, retroactive to July 1, 1953.”

For the year July 1, 1953 to 1954, petitioner received a salary of \$4,000. As a result, instead of settling the original controversy, a new dispute arose over the salary to which petitioner was entitled by the above resolution of December 10, 1953. Petitioner contends that the \$4,500 fixed by the resolution was *current* salary—the respondent contends that it was a *maximum* salary to be reached by a series of increments.

Petitioner requested assistance from a professional education association which directed one of its staff members to appear before the Board of Education in his behalf. At the suggestion of the President of the Board, a conference was arranged to discuss the problem at which petitioner, the Superintendent of Schools, and the association representative were present. Following this discussion, petitioner wrote the following letter to the association representative on October 2, 1957:

“Will you please act in my behalf as follows: Notify the Bayonne Board of Education that I, William M. Sugrue, waive the Resolution and its provisions which was adopted relative to me on December 10, 1953.

“This waiver is offered in lieu of my being granted a current salary rate of \$5,200.00 per year effective July 1, 1957.

On October 17, 1957, the Board of Education adopted the following resolution:

“WHEREAS, the Board of Education on December 10, 1953 adopted the following resolution:

‘RESOLVED, that the maximum salary for the position of “Chief Bookkeeper” in the office of the Secretary of the Board of Education be adjusted; and be it further

‘RESOLVED, that the salary of William M. Sugrue, “Chief Bookkeeper” in the office of the Secretary of the Board of Education be fixed at \$4,500.00 per annum, retroactive to July 1, 1953’, and

“WHEREAS, a dispute has existed since the adoption of the aforesaid resolution with respect to the meaning and intent thereof relative to the per annum salary to which the said William M. Sugrue was entitled thereunder, and to the claims for additional compensation made by the said William M. Sugrue by reason thereof, and

“WHEREAS, the said William M. Sugrue has agreed to waive any rights he may have under the resolution aforesaid in consideration for an adjustment of his salary as said ‘Chief Bookkeeper’ to \$5,200.00 per annum, effective as of July 1, 1957, and

“WHEREAS, this Board, being mindful of the uncertainties of litigation and deeming it to be in the best interests of the Board, under the circumstances, to accept the aforesaid proposal of the said William M. Sugrue in settlement of this controversy, now therefore be it

“RESOLVED, that in consideration of the premises aforesaid and the said waiver by William M. Sugrue, which is annexed hereto, the Board does hereby fix the salary of William M. Sugrue as ‘Chief Bookkeeper’ in the office of the Secretary of the Board of Education at \$5,200.00 per annum, effective as of July 1, 1957.”

Petitioner accepted the salary mentioned in the resolution but believes that the salary should have been fixed at \$5,250 instead of \$5,200. He testified that he executed the waiver because he understood from his discussions with the Superintendent and the association representative that the question of the maximum salary and vacation pay would be adjusted once the salary claim was out of the way. (Tr. 72, 88, 103) Another reason he gave for executing the waiver was that he was facing a serious operation and his doctor said that his life was worth more than the money and that he should forget it. (Tr. 72) He felt that his state of health forced him to make the financial sacrifice involved in the waiver.

Petitioner appealed to the Commissioner in a petition received on June 8, 1959, praying that an order be issued by the Commissioner directing the payment to petitioner of back wages and increments and also directing the establishment of a maximum salary for the position of Chief Bookkeeper.

Respondent moved to dismiss the petition on the following grounds:

- “1. The appellant by written waiver relinquished all claims upon being granted a fixed salary of \$5,200 per annum.
- “2. Acceptance of pay and delay in filing appeal for nearly two years and seven years on other claims constitutes abandonment and laches.
- “3. There is no express provision in the statutes, school laws or case laws of the State of New Jersey compelling a Board of Education to establish a maximum salary for the position of Chief Bookkeeper.”

On October 14, 1960, the Commissioner denied the motion to dismiss the petition for the reason that a study of the briefs and exhibits submitted by counsel failed to establish the factual questions in the dispute with sufficient clarity for him to make a fair adjudication. Petitioner was granted leave to proceed with his appeal. A hearing was then held before the Assistant Commissioner in Charge of Controversies and Disputes in Jersey City on February 23, 1961.

The first question to be decided is whether the petitioner relinquished his claims to back salary when he accepted a salary of \$5,200 fixed in the resolution of October 17, 1957. The answer to his question must be in the affirmative. The resolution was adopted as the result of the letter of October 2, 1957,

wherein petitioner requested the association representative to act for him in offering a waiver in return for a current salary of \$5,200 per year, effective as of July 1, 1957. The Board's resolution constitutes an offer. Petitioner accepted the salary. This constitutes an offer and acceptance and petitioner is bound thereby.

Petitioner says he signed the waiver because of the advice of the Superintendent of Schools and the association representative that the waiver would be to his best advantage at the time. He hoped this would settle the big problem with the Board of Education and the other problems of setting a maximum wage and the vacation pay due would be settled in due course. (Tr. 72) The Commissioner would point out that it was established in *Seidel v. Ventnor*, 110 N. J. L. 31 (Sup. Ct. 1932) that a board of education is bound only by the part of the negotiations between school officials and school employees which are embodied in the contract. If petitioner intended to make the payment of vacation pay and the setting of a maximum salary a condition for a settlement, he should have insisted that it be embodied in the resolution of October 17, 1957.

The next question to be decided is whether petitioner may collect the amount which he contends is due him for services rendered during the summer or vacation period of 1949 and 1950. The Secretary of the Board of Education testified that he asked petitioner to work during the summer but told him he had no authority to pay him extra money without the consent of the Board of Education. He promised to try to secure extra pay for petitioner but told him he was not certain he could do so. If he could not be paid, he was to be given time off. He had time off from December 15, 1956, to February 15, 1957, and seven weeks in 1958 with full salary. The Secretary testified that petitioner does not have any time coming to him. (Tr. 109, 111)

The Commissioner finds nothing to indicate that the Board of Education authorized directly or by ratification any payment for service during the vacation periods under consideration. Furthermore, petitioner's claim is for payment for work during vacation periods more than six years prior to the filing of his petition. His demand for payment is barred by the statute of limitations. N. J. S. 2A:14-1. See State Board of Education Decision, *Biddle v. Jersey City*, 1939-1949 S. L. D. 51, 52.

Finally, there is the question whether the Board of Education must establish a maximum salary for the position of Chief Bookkeeper. There is no statute or rule requiring the fixing of such a maximum, and the Commissioner knows of no authority by which a Board can be required to fix a maximum salary.

The Commissioner finds that petitioner waived all claims for salary previous to 1957-1958 by executing a waiver in consideration for an adjustment of his salary to \$5,200 for that year. He also finds that petitioner is not entitled to salary for services performed during the vacation periods and that the respondent Board is not required to fix a maximum salary for the position of Chief Bookkeeper.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

November 21, 1961.

VIII.

WHERE BIDS ARE ASKED BUT NOT REQUIRED BY LAW,  
BOARD IS NOT BOUND TO ACCEPT LOWEST BID

HIGH FIDELITY SOUND CENTER,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE CITY OF LONG BRANCH,  
MONMOUTH COUNTY,

*Respondent.*

For the Petitioner: Harry Green, Esq.

For the Respondent: Louis A. Aikins, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

At a special meeting on February 27, 1960, the Board of Education of the City of Long Branch awarded a contract to Magnetic Recording Industries for a 35-position language laboratory to be installed in the Long Branch High School Building.

Petitioner asks that the Commissioner declare the award of the contract to be null and void and direct respondent to make the award to petitioner as the lowest responsible bidder, or grant such relief in the premises as may be proper.

Testimony was taken and exhibits were received in evidence at a hearing before the Assistant Commissioner of Education in Charge of Controversies and Disputes on November 22, 1960, at the office of the Monmouth County Superintendent of Schools, Freehold, New Jersey.

The question to be determined here is whether the Board's award of the contract was legal and proper.

The Long Branch Board of Education advertised for bids as follows:

*"BIDS WANTED*

"Item #1—Proposals will be received for 35 position language laboratory—33 No. 33 listening and repeating stations with head sets and microphones; two (2) No. 66 synchromagneticon stations with recording units and a two unit master console as made by Magnetic Recording Industries of New York, N. Y. or equal tape or record stations (with complete wiring and installation)

"Item #2—One complete Instructor's Demonstration Desk Combination with #S3094 Top-Colorlith green and one top-green Acid Resistant Finish #S3096 as sold by Royal Mfg. Co. Inc., Richmond, Va. or equal.

"Proposals will be received by the Board of Education, Long Branch, N. J. on February 26, 1960 not later than 11:30 A. M. in the Administrative Building, 422 Westwood Avenue, Long Branch, New Jersey.

“All proposals must be sealed and addressed to the Board of Education, City of Long Branch, N. J. c/o Harold N. West, Secretary and Business Manager, Administration Building, 422 Westwood Avenue, Long Branch, N. J. and designated on envelope ‘Bids for Language Laboratories and Demonstration Desks.’

“Specifications may be obtained by applying at the Business Office of the Board of Education, Administration Building, 422 Westwood Avenue, Long Branch, N. J. on weekdays between the hours of 9:00 A. M. to 5:00 P. M. excepting Saturdays and holidays.

“The Board of Education reserves the right to reject any or all bids if deemed in its best judgment so to do and to waive immaterial informalities.”

The Specifications and Instructions to Bidders (Ex. P-R-1) required:

“Bids must be firm price for twenty-five or more stations and is to be given on a per station basis installed, including provisions of all power requirements, station units, wiring, controls and Master Units, all materials and labor included therein with installation.”

Bids were received and opened at a special meeting of the Board on February 26, 1960. Because of the lack of a quorum, the meeting was adjourned to one o'clock in the afternoon of the following day, February 27. The following excerpt is from the minutes of the latter meeting (Ex. R-8) :

“Mr. Anastasia stated that the purpose of the meeting was to go over the bids for the Language Laboratories and the Instructor's Demonstration Desk.

“The Secretary reported that after going over the bids with Mr. Meskill, Principal; and Mr. Bradford, Superintendent, and figuring them on a base figure the following bids are arrived at:

“Magnetic Recording Industries  
126 Fifth Avenue  
New York 11, New York

23—#33 language laboratories complete @ \$194 .....	\$4,462
2—#66 language laboratories complete @ \$439* .....	878
1—Console as per specs 2/15/60* .....	1,312
<b>Total Base Bid .....</b>	<b>\$6,652</b>

\* Furnished by Bidder in order to make a fair comparison for base bids between bidders.

“High Fidelity Sound Center  
Eatontown, New Jersey

23—#AS 75 language laboratories complete @ \$194 .....	\$4,462
2—#CS 75 language laboratories complete @ \$414 .....	828
**1—Console as per specs 2/15/60 .....	1,665
<b>Total Base Bid .....</b>	<b>\$6,955</b>

\*\* Entered under Item #2 in error.

“Principal Meskill and Superintendent Bradford recommended ordering the following complete units when ordering thus extending the bids to read as follows:

“Magnetic Recording Industries  
126 Fifth Avenue  
New York 11, New York

27—#33 Language laboratories complete @ \$194 .....	\$5,238
8—#66 Magneticon Syncrotone Stations complete @ \$439 .....	3,512
1—Console as per specs 2/15/60 .....	1,312
Total Bid Cost .....	\$10,062

“High Fidelity Sound Center  
Eatontown, New Jersey

27—#AS75 Language laboratories complete @ \$194 .....	\$5,238
8—#CS75 Language laboratories complete @ \$414 .....	3,312
1—Console as per specs 2/15/60 .....	1,665
Total Bid Cost .....	\$10,215”

The Board adopted unanimously (one member absent) a motion “that the 35 Language Laboratories (as specified) complete and console be awarded to the lowest responsible bidder, Magnetic Recording Industries \* \* \* at a price of \$10,062.”

Petitioner complains that he alone of the bidders, of whom there were three, complied with the specifications by bidding on a per station basis, and that Magnetic Recording Industries’ bid offered a base price for a 25-station laboratory, with a unit price for additional #33 listening and repeating stations. He alleges that subsequent to the opening of bids, Magnetic Recording Industries was permitted to supply a per station price on the #66 listening and recording station and a unit price on the master console, thereby gaining a competitive advantage not available to petitioner. He further argues that the adjourned special meeting of February 27 was illegal because no public announcement of the meeting was given.

Respondent bases its defense on the contention that the language laboratory was not required to be purchased through bidding, that the bids were for the guidance of the Board, and that the Board in its advertisement expressly reserved “the right to reject any or all bids it deemed in its best judgment so to do and to waive immaterial informalities.” Respondent further argues that the total base bid of Magnetic Recording Industries was \$303.00 lower than the petitioner’s base bid for a similar laboratory, and that the Board acted in the exercise of its discretion in utilizing information furnished independently of the bid to obtain more than 2 of the Type 66 stations.

It is necessary first to dispose of the allegation that the special meeting of February 27 was illegal because it was not publicly announced. R. S. 18:5-47 requires that “the meetings of every board of education shall be public.” Nowhere do the statutes or rules of the State Board of Education require that public notice be given. The evidence adduced at the hearing in the instant

case makes it clear that the public was not barred from the meeting. The Commissioner must hold, therefore, that the meeting was not illegal because of the absence of public notice.

The pertinent statute relating to advertising for bids is *R. S. 18:6-25*, which reads as follows:

“The board shall, prior to the beginning of each school year, cause advertisements to be made for proposals for furnishing supplies required in the schools and by the board during the ensuing year. If other and further supplies are required during the year, they shall be purchased in like manner; but the board may at any time authorize the purchase of supplies to an amount not exceeding \$1,000.00 without advertisement.

“Textbooks and kindergarten supplies may be purchased without advertisement.

“No contract for the building of a new schoolhouse or for the enlargement of an existing schoolhouse shall be entered into without first advertising for proposals therefor. No contract for the repairing of an existing schoolhouse at a cost of more than \$2,000.00 shall be entered into without first advertising for proposals therefor.

“The advertisements required by this section shall be made under such regulations as the board may prescribe.”

Much of the testimony and argument at the hearing centered upon the nature of the work and materials involved in the installation of the language laboratory. Petitioner presented evidence to show that labor and material costs for installation constituted approximately 20% of the total cost. Other testimony showed that the installation, very simply described, required the installation of three power circuits in a conduit from a central power source to the point of entry in the floor or wall of the classroom, the installation of the individual student booths and the master console and the wired interconnections between the booths and the console housed in a protective device known as wiremold, which was fastened to the floor of the classroom.

For guidance in determining whether the language laboratory contracted for by the Long Branch Board of Education constituted an enlargement or repair of school building, subject to bidding under *R. S. 18:6-25*, or equipment not required to be advertised for bid, the Commissioner has referred to *Financial Accounting for New Jersey Schools: Supplies and Equipment*, published by the New Jersey Department of Education, Division of Business and Finance, for the use of local school districts in accounting procedures. On page 1 of this manual, criteria for equipment items are given as follows:

“An equipment item is a movable or fixed unit of furniture or furnishings, an instrument, a machine, an apparatus, or a set articles which meets all of the following conditions:

“1. It retains its original shape and appearance with use.

“2. It is non-expendable, that is, if the article is damaged or some of its parts are lost or worn out, it is usually more feasible to repair it rather than replace it with an entirely new unit.

“3. It represents an investment of money which makes it feasible and advisable to capitalize the item.

“4. It does not lose its identity through incorporation into a different or more complex unit or substance.”

and on page 2 of the manual:

“Equipment which is built into buildings consists of equipment items that are integral parts of buildings. That is, the equipment is permanently fastened to the building, functions as a part of the building, has a useful life approximately equal to that of the building, and causes appreciable damage to the building if removed.”

In *The Chart of Accounts*, another manual of the same series, instructional equipment is defined (p. 27) as “that which is used by pupils and instructional staff in the instructional program and is not a built-in item.”

It is clear to the Commissioner that the language laboratory as described in the specifications of the Long Branch Board of Education and installed as described by petitioners at the hearing is instructional equipment.

It is well established that in the absence of any statute requiring preliminary bidding, a board of education may purchase equipment or contract for services without such bidding. See *Mendham Garage Company v. Mendham Township Board of Education*, 1938 S. L. D. 782; *Fochi v. Board of Education of the Borough of Lodi*, 1951-52 S. L. D. 37; *Halpern v. Board of Education of Passaic Township*, 1938 S. L. D. 257. See also *Peters' Garage, Inc. v. City of Burlington*, 121 N. J. L. 523 (Sup. Ct. 1939), 123 N. J. L. 227 (E. & A. 1939); *Automatic Voting Machine Company v. Board of Chosen Freeholders of Bergen County*, 120 N. J. L. 264 (Sup. Ct. 1938). The Commissioner, therefore, finds that respondent was not required to resort to competitive bidding procedures in order to purchase the instructional equipment in question.

As to petitioner's allegation of bad faith in the fact that respondent did advertise and then failed to follow the formalities of bidding by accepting supplementary information from one of the bidders after the bids had been opened, the courts have held that, in the absence of a statutory requirement for bidding, a municipal body may invite bids and use the information so gained merely for its guidance. In *Kraft v. Board of Education of Weehawken*, 67 N. J. L. 512 (Sup. Ct. 1902), the Court said:

“A municipal body may award a contract independently of the proposals it may have invited, provided the power to do so is exercised *bona fide* and with reasonable discretion, having regard to the public good.”

In *Coward v. The Mayor and Council of Bayonne*, 67 N. J. L. 470 (Sup. Ct. 1902), concerning the award of a contract by the board of education to other than the lowest bidder, the Court said:

“The board of education of Bayonne is not required by the charter of that city or by any general law of the state to advertise for proposals for doing any of the work which they are authorized to do. \* \* \* and, although the board did actually advertise for proposals, they were not required to award the contract to the lowest bidder, and the award of the

contract to a higher or the highest bidder, or to someone who did not bid at all, would not, in the absence of bad faith or corruption, be regarded as such an abuse of that discretion conferred upon them by law as to justify interference by this court. \* \* \* the soliciting of bids may have been a proper method of ascertaining the most favorable contract that could be obtained for the city. It is the method which a private person would pursue as to his own affairs; and after the bids had been received there was nothing to prevent the board from so modifying the specifications that a better contract might be made for the city."

In the instant matter, the Commissioner finds no evidence that the Board of Education in its award of the contract abused its discretion or acted in bad faith.

The action of the Board of Education of Long Branch in awarding the contract for a language laboratory to Magnetic Recording Industries is sustained.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

November 22, 1961.

#### DECISION OF THE STATE BOARD OF EDUCATION

Petitioner-appellant High Fidelity Sound Center (hereinafter called "High Fidelity"), an unsuccessful bidder, attacks the award of a contract for a 35-position language laboratory by the Board of Education of the City of Long Branch (hereinafter called the "Board") on February 27, 1960. The contract was awarded to Magnetic Recording Industries (hereinafter called "Magnetic").

The Board had advertised for bids to be submitted at a meeting on February 26, 1960. On that date, bids were received and opened, but since a quorum was not present, the meeting was adjourned until the following day, February 27. The specifications and instructions to bidders had stated that the bid was to be a firm price for twenty-five or more stations and was to be given on a per station basis installed. At the adjourned meeting, the Board decided to purchase twenty-seven No. 33 stations and eight No. 66 stations, a total of thirty-five. Since the bids had been made pursuant to the specifications upon twenty-three No. 33 stations and two No. 66 stations, it was necessary for the Board to extend the total bid by the application of the unit price, as stated in each bid and according to the information available to the Board, to the thirty-five stations required. High Fidelity had, in its written bid, given the unit price of both types of station. However, Magnetic, while giving the unit price of the No. 33 type at \$194., did not specify the unit price for the No. 66 type. Later, Magnetic furnished the Board with the specific information that \$439. was the unit price for the No. 66 type station, though it had not specifically done so in its written bid.

Magnetic's bid for twenty-three No. 33 stations, two No. 66 stations and one console totalled \$6,652., while High Fidelity's was in the amount of \$6,955. The Board, extending the bid for twenty-seven No. 33 stations and eight No. 66 stations, calculated the bid of Magnetic in the total sum of \$10,062. and High

Fidelity's in the amount of \$10,215. Thus, Magnetic's bid as thus calculated was \$153. lower than that of High Fidelity, petitioner-appellant herein.

High Fidelity complains that the award of the contract to Magnetic was improper for the following reasons:

1. Magnetic had not, in its bid, inserted the specific unit price for the No. 66 units, while High Fidelity's own bid did specifically state the unit price. It is also claimed that Magnetic was permitted to supply the unit price after the opening of the bids and thereby gained a competitive advantage over High Fidelity. It is claimed that the competitive advantage was obtained because the supplying of such unit price information subsequent to the opening of the bids was after all parties knew the unit price to be charged by High Fidelity.

2. It is contended that the adjourned special meeting of February 27, when the contract was awarded, was illegal because no public announcement of the meeting was given.

The Commissioner, in a decision dated November 22, 1961, dismissed the petition of appeal for the reasons stated in his decision. In substance, he held that the adjourned meeting of February 27 was in fact a public hearing and that no notice of it was necessary. He further held that the language laboratory was "equipment", as to which, under the cases, the Board is not required to resort to competitive bidding procedures; that merely because the Board called for bids does not deprive it of the right and power to use such bids for informational guidance, and that under such circumstances the Board would have had the right to award the contract to a higher bidder provided it did not act in bad faith. The Commissioner held that there was no evidence of a lack of good faith in the instant case.

This Committee recommends that the Commissioner's decision be affirmed for the reasons stated in his decision dated November 22, 1961, except that we would supplement said decision by a reference to the case of *Board of Education of Asbury Park v. Hoek* (App. Div. 1961), 66 N. J. Super. 231, 244-245. The opinion in that case throws some light upon the meaning of "repairing" contained in *N. J. S. A. 18:6-25* and serves as further support for the proposition that the purchase and installation of this language laboratory does not come within the meaning of said bidding statute.

June 20, 1962.

IX.

BOARD OF EDUCATION MUST PREPARE PREFERRED ELIGIBLE LIST WHEN POSITION IS ABOLISHED

CHARLES LAUTENSCHLAGER, LAWRENCE J. CAMISA, VINCENT J. JORDAN,  
JOHN J. BARRY, AUGUST JOSEPH MEYER,

*Petitioners,*

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

*Respondent.*

For the Petitioners: Cassel R. Ruhlman, Jr., Esq.

For the Respondent: John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The five petitioners in this case are members of the instructional staff in the Jersey City Public School System to whom tenure has accrued. Prior to July 1, 1959, they held administrative and supervisory positions. On that date, by resolution of the respondent Board of Education, the positions of four of the petitioners were abolished and their duties were assigned to the Superintendent of Schools. On September 1, 1959, the fifth petitioner was removed from the position of high school vice-principal and assigned to a teaching position in order that the former Associate Superintendent of Schools, whose position also was abolished by respondent on July 1, 1959, might be assigned to the vice-principalship.

Respondent has not notified petitioners of their seniority status and has not placed them upon a preferred eligible list. Its position is that the statute does not make such action mandatory upon the Board of Education. Petitioners disagree and have brought this action to compel respondent to fix their seniority rights and to place them upon preferred eligible lists in accordance with the provisions of the seniority act (*R. S. 18:13-19*).

This case is presented to the Commissioner on a Stipulation of Facts and briefs of counsel. The stipulation includes copies of the rules and regulations of the Board of Education pertaining to the positions held by the petitioners on July 1, 1959. It appears from the stipulation that:

“The petitioner, Charles Lautenschlager, held the position of Assistant Director of Industrial Education from January 1, 1951, to July 1, 1955, and the position of Director of Industrial Education from July 1, 1955, to July 1, 1959.

“The petitioner, Lawrence J. Camisa, held the position of Supervisor of Commercial Subjects from May of 1952, and the position of Assistant Director of Commercial Education from May of 1956, to July 1, 1959.

“Petitioner, Vincent J. Jordan, held the position of Assistant Director of Advisors from December 1, 1951, to April 1, 1956, the position of Director of Advisors from April 1, 1956, to July 1, 1956, and the position of Director of Guidance and Research from July 1, 1956, to July 1, 1959.

“Petitioner, John J. Barry, held the position of Assistant Supervisor of Industrial Arts from December of 1950 to July 1, 1951; the position of Supervisor of Industrial Arts from July 1, 1951, to July 1, 1955; and Assistant Director of Industrial Arts from July 1, 1955, to July 1, 1959.

“Petitioner, August Joseph Meyer, held the position of Vice-Principal of the Dickinson High School from March 17, 1958, to September 1, 1959, at which time one, Richard J. O'Brien, formerly Associate Superintendent of Schools, which position was abolished on July 1, 1959, was Assigned to said position of Vice-Principal of Dickinson High School and the said August Joseph Meyer was assigned to the position of Latin Teacher in Snyder High School.”

The applicable statute is R. S. 18:13-19, which reads as follows:

“Nothing contained in sections 18:13-16 to 18:13-18 of this Title or any other provision of law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of superintendents of schools, assistant superintendents, principals or teachers employed in the school district, whenever in the judgment of the board of education it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization of the district, or other good cause. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion or political affiliation. Any dismissals occurring because of the reduction of the number of persons under the terms of this section shall be made on the basis of seniority according to standards to be established by the Commissioner of Education with the approval of the State Board of Education. In establishing such standards, the commissioner shall classify, in so far as practicable, the fields or categories of administrative, supervisory, teaching or other educational services which are being performed in the school districts of this State and may, at his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole. Whenever it is necessary to reduce the number of persons covered by this section, the board of education shall determine the seniority of such persons according to the standards established by the Commissioner of Education with the approval of the State Board of Education and shall notify each person as to his seniority status. A board of education may request the Commissioner of Education for an advisory opinion with respect to the applicability of the standards to particular situations and all such requests shall be referred to a panel to consist of the county superintendent of schools of the county in which the school district is situate, the secretary of the State Board of Examiners, and one Assistant Commissioner of Education to be designated by the Commissioner of Education. No determination of any panel shall be binding upon the board of education or any other party in interest, nor upon the Commissioner of Education and the State Board of Education in the event of an appeal pursuant to sections 18:3-14 and 18:3-15 of the Revised Statutes. All persons dismissed shall be placed on a preferred eligible list to be prepared by the board of education of the school district, and shall be re-employed by the board of education of the school district in order of seniority as determined by the said board of education. \* \* \* Should any superintendent of schools, assistant superintendent, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal in such order when and if a vacancy in a position for which such superintendent, assistant superintendent, principal or teacher shall be qualified. Such re-employment shall give full recognition to previous years of service.

\* \* \*

Pursuant to this statute, the Commissioner prepared and the State Board of Education approved *Standards Established to Determine Seniority*. In pre-

paring the standards, the Commissioner had a two-fold purpose: (1) to give a reasonable protection to the professional staff members, and (2) to protect the school system by preventing seniority from operating in such a manner as to displace a qualified person with an unqualified one.

Respondent cites rulings in *Werlock v. Woodbridge*, 5 N. J. Super. 140 (App. Div. 1949), and *Lange v. Audubon*, 26 N. J. Super. 83 (App. Div. 1953), in support of its contention that petitioners are not entitled to seniority rights because their positions are not specifically mentioned in the tenure statute (R. S. 18:13-16). Only superintendents, assistant superintendents, principals and teachers are specifically mentioned in that statute. It should be pointed out that these cases were decided on the basis of the law as it existed prior to the enactment of the statute providing for seniority standards. It was, indeed, such rulings that made seniority standards necessary. The effect of the rulings in these cases is to include all personnel who administer, direct, or supervise the teaching, instruction or educational guidance of pupils in the public schools in the comprehensive classification of "teacher" except for those whose positions are mentioned specifically in the tenure statute.

It is well known that teaching has become specialized over the years as evidenced by the variety of certificates issued by the State Board of Examiners. Teachers may be eligible for certification in a number of fields without having had actual experience in each of them. For example, a teacher may have had the required training to be eligible for appointment to a supervisory position but never have held such a position. Prior to the establishment of seniority standards, as required by Chapter 292 of the Laws of 1951, such a teacher in a district which found it necessary to abolish positions, might have been able to displace an experienced supervisor with less total years of experience in the district because the latter, according to previous rulings, was only a teacher. This would obviously not be efficient and in the best interests of the school pupils. For this reason, the Commissioner was given the authority to establish fields and categories within the administrative, supervisory, teaching and other educational services and to determine seniority upon the basis of service and experience *within such fields or categories of service as well as in the school system as a whole*. Thus, to return to the hypothetical case mentioned above, a supervisor with fewer years of service than a teacher who had never been a supervisor, could not be displaced as a supervisor by such a teacher. He could only be displaced by another supervisor with more years of service within the category of "supervisor." By the same token, an art teacher could not displace a general teacher, or vice versa.

Respondent argues in its brief that it has not determined the seniority of the petitioners according to the standards established by the Commissioner of Education and the State Board of Education, because the statute is not mandatory upon the respondent. The positions of the petitioners have been abolished by a previous board of education in good faith or for reasons of economy and have not been re-created or re-established.

The Commissioner cannot agree with this contention. As was said in *Vork v. North Bergen Board of Education*, decided by the Commissioner of Education on July 31, 1961, the statute places a clear duty on the Board of

Education to establish and maintain a preferred eligible list for re-employment whenever reductions in staff are made such as occurred here. It is the further duty of the Board of Education to notify each petitioner of his seniority status and to re-employ him in the order of seniority if and when the abolished positions are re-established. It seems to the Commissioner that if abolition of a position in good faith removes the duty of the Board of Education to determine seniority pursuant to statute, there was no reason for its enactment. It may not, of course, be presumed that the Legislature has done a futile thing.

In the case of *Moresch v. Bayonne*, 52 *N. J. Super.* 105 (*App. Div.* 1958) the Appellate Division of the Superior Court, while affirming the judgment of the lower court on other grounds, said:

“*R. S. 18:13-16 to 20, inclusive, dealt generally with tenure of service of local instructional and supervisory school personnel. Judge McGeehan held in the trial court that, as now amended, these statutes effectuate two broad legislative purposes: (a) to fix the tenure of persons in certain specific positions in the local educational systems, viz. ‘teachers, principals, superintendents and assistant superintendents,’ and (b) to govern the procedure for fixing seniority in case of the dismissal or reduction in salary of persons holding any kind of position in the teaching, administrative or supervisory organization of the school district, whether or not encompassed by the specific positions enumerated in (a). As held in *Lascari v. Board of Education of Lodi*, 36 *N. J. Super.* 426 (*App. Div.* 1955), and *Lange v. Board of Education of Audubon*, 26 *N. J. Super.* 83 (*App. Div.* 1953), the only positions accorded tenure are those specified in the foregoing quotation. Persons in any other categories, such as vice-principals, supervisors, etc. do not obtain tenure as such but only in the status of the incumbent as a teacher. But the language of *N. J. S. A. 18:13-19*, although not a model of legislative clarity, appears to be broad enough, as held by Judge McGeehan, to extend the coverage of the provisions of the section controlling dismissals in case of *bona fide* reductions of employees by standards of seniority to be established by the State Commissioner of Education, to every position in ‘the fields or categories of administrative, supervisory, teaching or other educational services which are being performed in the school districts of this state’ (to use the statutory language.)”*

The Commissioner finds and determines that it is the mandatory duty of the Jersey City Board of Education to determine the seniority of each of the petitioners according to the standards established pursuant to *R. S. 18:13-19*, to place the petitioners on preferred eligible lists in order of such seniority, and to notify each petitioner as to his seniority status. The Commissioner so directs.

COMMISSIONER OF EDUCATION.

December 14, 1961.

X.

BOARD MAY MAKE RULES AND REGULATIONS GOVERNING  
EMPLOYMENT OF TEACHERS

JOSEPH VICARI AND RUPERT MEIER,

*Petitioners,*

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

*Respondent.*

For the Petitioners: Harold H. Fisher, Esq.

For the Respondent: John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioners in this case are teachers now under tenure in the Jersey City Public Schools, who contend that for a number of years prior to 1947, while they were actually performing the duties of regular teachers, they were improperly classified as substitute teachers and, as a result, they have been deprived of benefits to which otherwise they would have been entitled. The lost benefits claimed are:

1. Years of service credit in the Teachers' Pension and Annuity Fund, including credit for service while on active military duty,
2. Salary which would have been received if they had been properly classified on the salary schedule, and
3. In the case of petitioner Vicari, payment of the difference between his army pay and his salary as a teacher.

Petitioners contend that they were unlawfully discriminated against in being classified as other than "permanent" teachers, and that failure so to classify them was arbitrary and a subterfuge for the purpose of evading their statutory rights.

In response to a motion for dismissal of the petition and judgment on the pleadings submitted by respondent, the Commissioner, on October 14, 1960, dismissed those counts having to do with service credit in the Pension Fund, insofar as the enactment of Chapter 37 of the Laws of 1955, and particularly that section known as *R. S. 18:13-112.72*, entitled petitioners, as veteran members, to credit for past service rendered to respondent. The Commissioner reserved decision on the question of salary benefits, the claim of petitioner Vicari to military service pay, and the claim of petitioner Meier to five years' military service credit in the Pension Fund beyond that which the Trustees of the Fund allowed under *R. S. 18:13-112.72*.

The case is presented to the Commissioner on a stipulation of facts, minutes and records of the Board of Education of Jersey City, and on briefs and memoranda of counsel.

Although the cases relied upon by counsel for both sides are related to problems of tenure, the question of tenure, as such, is not an issue in this case. In the case of *Wall v. Board of Education of Jersey City*, 1938 S. L. D. 614, reversed by State Board of Education, 618, affirmed by the Supreme Court, 119 N. J. L. 308 (1938), it was clearly established that the petitioner, although classified by the Jersey City Board of Education as a substitute teacher and paid on a *per diem* basis, could not be deprived of tenure merely because of such classification and method of compensation. In the present case, the Commissioner is not called upon to determine when petitioners achieved tenure status. Rather, he is asked to determine whether the respondent Board of Education may properly classify teachers as other than "permanent" teachers.

For many years it has been the practice of the Jersey City Board of Education to employ teachers in a probationary status, variously designated as "substitute" teachers, "teachers-in-training" or "assistant teachers." According to the rules of the Board adopted September 3, 1936, persons placed on the list of high school substitutes, after obtaining "three years' experience in teaching or supervision, or substitution in a Jersey City high school," must submit to examination to obtain a certificate issued by the Jersey City Board of Examiners. Appointments as "regular" teachers to positions which may become vacant, or to positions which are created, are given to persons "first on the list of those eligible to appointment" to such positions.

According to employment records supplied by the respondent, petitioner Vicari was employed as a "substitute" in the sense described above for 37 days in the 1932-1933 school year, for 417 hours in the 1933-1934 school year, then for the entire school years from September 1934 to June 1937. He was not employed during the school year 1937-1938. From September 1938 to April 1, 1942, he was assigned to Accredited Evening High School, where he was employed for 180, 176, 178, and 124 evenings, respectively. On April 1, 1942, he entered active military service, from which he was honorably discharged on November 30, 1945. He resumed teaching in January 1946, working at various assignments in six different schools for a total of 149 sessions (day and evening) through July 1946. Still a "substitute," he was assigned to Accredited Evening High School in September 1946, where he worked until January 1, 1947, when he received appointment to a "permanent" or "regular" position there at a salary of \$2,000. A month later he was transferred to a position in Dickinson High School, at an annual salary of \$2,200. He holds a permanent New Jersey Teacher's Certificate issued January 2, 1938, a Jersey City High School Teacher's Certificate to teach biology, issued July 13, 1938, and a similar certificate to teach general science and physiology, issued April 17, 1940.

Petitioner Meier's employment record, as supplied by the respondent Board, differs from petitioner Vicari's in that he appears to have been employed in a variety of different assignments for short periods of time. Between September 1937 and June 1938 he taught 91 days in Snyder High School. In the same period he taught 148 evenings at Accredited Evening High School. In the following year, 1938-1939, he taught 180 evenings at Accredited, and 76 days in four different high schools. Between September 1939 and March 1940 he taught 115 evenings in two evening schools and 24 days in four high schools and one elementary school. From November

1941 to January 1942, he taught 34 evenings at Accredited and 15 days in four high schools. The record shows that he was in military service from August 1942 to January 1946. In the remainder of the school year 1945-46 he taught 10 different subjects in four high schools in 55 days of employment, as well as 85 evenings at Evening High School. In September 1946 he was assigned to Dickinson High School, where he worked until January 1, 1947, when he received an appointment to a "permanent" or "regular" position at Accredited, at a salary of \$2,000, which was increased to \$2,500 two months later. His Jersey City High School Certificate, authorizing him to teach book-keeping and accounting, and commercial arithmetic, was issued on June 27, 1941. While it does not appear on the record supplied by respondent, petitioner asserts that he was in military service from October 14, 1940, to November 18, 1941.

Petitioners attack the form of their employment under the designation as "substitute" teachers, claiming such practices to be discriminatory and a subterfuge, depriving them of salary and other rights to which they would have been entitled as regular employed teachers.

The Board of Education of Jersey City derives its authority to make rules and regulations governing employment of teachers from *R. S. 18:13-5*, which reads:

"A board of education may make rules and regulations not inconsistent with the provisions of this title governing the engagement and employment of teachers and principals, the terms and tenure of the employment, the promotion and dismissal of teachers and principals, and the salaries and the time and mode of payment thereof. A board may from time to time change, amend, or repeal such rules and regulations.

"The employment of any teacher by a board, and the rights and duties of the teacher with respect to his employment, shall be dependent upon and governed by the rules and regulations in force with reference thereto."

Although, as was pointed out in the *Wall* case *supra*, the term "substitute" is a misnomer as applied to employees who are assigned to positions in which they do not take the place of another, the right of the respondent Board to maintain such a category of probationary teachers was not disturbed by the decision of the court; Miss Wall was ordered reinstated, but at the salary applicable to her status as a "substitute" teacher, and not at the salary of a "regular" teacher, as she had petitioned. While the decision affirmed Miss Wall's right to tenure status, it was tenure in the "substitute" classification as determined by the rules and regulations of the Board of Education. No evidence is provided by petitioners in the instant case to show that after they had allegedly satisfied the requirements to be placed on the list of those eligible for regular appointment (Vicari in 1938, and Meier in 1941), positions were filled by others with less claim to eligibility.

It must follow, in regard to petitioner Vicari's claim to military service pay that his classification as a "substitute" teacher is critical to his claim. A resolution of the Jersey City Board of Education dated July 1, 1943, which was placed in the record by stipulation, provided:

"\* \* \* that in accordance with the Statutes in such cases made and provided, that all permanent employees of this Board, who now or who

hereafter may be actually engaged in the Military or Naval Service of the United States Government, shall be paid the difference between the amount of compensation received from said Government and this Board, this difference in salary, however, to be paid only in the event that the amount so received by the said employee from the Government is less than such amount so received from this Board \* \* \* .”

It seems clear that the Board intended to pay this differential only to employees classified as “permanent.” No charge was made by petitioner that employees not so classified received this pay differential, or that other teachers classified as “substitute” teachers received this form of compensation. Having found that petitioner Vicari did not enjoy the rights of a teacher classified as a “permanent” teacher by the respondent Board of Education under its rules, the Commissioner must conclude that he was not entitled to payment of differential salary for the period of military service, or any part thereof, by reason of the resolution cited above.

Petitioner Meier asks that the Commissioner direct that he be given military service credit in the Teachers’ Pension and Annuity Fund. Respondent argues that he was not employed at the time of his entry into military service and, therefore, is not entitled to such credit. On the basis of information supplied by the Jersey City Board of Education, the Trustees of the Teachers’ Pension and Annuity Fund have not allowed credit for petitioner’s military service. Examination of petitioner’s employment record for the periods in question shows that he was not employed after March 1940, preceding his claimed entry into military service on October 14, 1940; and that in the two months in the 1941-1942 school year during which he was employed prior to his second entry into military service, he taught 34 evenings and 15 days in four different schools. This is in clear contrast to the record of petitioner Vicari, who taught full-time at Accredited Evening High School from September 1938 to April 1, 1942, when he left to enter military service. Petitioner Vicari’s claim for military service credit was allowed by the Fund’s Trustees pursuant to *R. S. 18:13-112.72*; petitioner Meier’s was not. On the basis of the employment records submitted to the Commissioner, it appears that petitioner Meier had not been employed by respondent for some months prior to his entry into military service and that his prior employment had been in fact as a substitute teacher within the meaning of paragraph p. of *R. S. 18:13-112.4*, which defines “teacher” for the purposes of membership in the Teachers’ Pension and Annuity Fund, as follows:

“p. ‘Teacher’ means any regular teacher, special teacher, helping teacher, teacher clerk, principal, vice-principal, supervisor, supervising principal, director, superintendent, city superintendent, assistant city superintendent, county superintendent, State commissioner or assistant commissioner of education and other members of the teaching or professional staff of any class, public school, high school, normal school, model school, training school, vocational school, truant reformatory school, or parental school, and of any and all classes or schools within the State conducted under the order and superintendence, and wholly or partly at the expense of the State Board of Education, of a duly elected or appointed board of education, board of school directors, or board of trustees of the State or of any school district or normal school district thereof, and any such persons under contract or engagement to perform 1 or more of these

functions. No person shall be deemed a teacher within the meaning of this act who is a substitute teacher or is a teacher not regularly engaged in performing 1 or more of these functions as a full-time occupation outside of vacation periods. In all cases of doubt the board of trustees shall determine whether any person is a teacher as defined in this act. \* \* \* ”

In any event, the determination of petitioner Meier's non-eligibility for Pension Fund credit for his period of military service was made by the Board of Trustees of the Fund who have not been made a party to this action. The Commissioner finds no basis on which he could set aside the finding of the Pension Fund Trustees on this issue.

The Commissioner finds nothing in the facts and records presented to him in this case to sustain the charge that subterfuge or discrimination was employed by the respondent Board of Education to deprive petitioners of salary, military differential pay, or Pension Fund service credit. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

December 18, 1961.

Pending before State Board of Education.

## XI.

### IN THE MATTER OF THE RECHECK OF THE VOTING MACHINES USED AT THE SPECIAL SCHOOL ELECTION IN THE BOROUGH OF WEST PATERSON, PASSAIC COUNTY

For the Board of Education, Edward M. Schotz, Esq.

#### DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education of the School District of the Borough of West Paterson requested the Commissioner of Education to inspect the voting machines used at a referendum held December 19, 1961, and to certify the results of the balloting on three proposals for a school building program submitted to the electorate. At the direction of the Commissioner of Education, Assistant Commissioner Eric Groezinger made the requested inspection and determination of the results of the election at the storage department of the Passaic County Board of Elections on January 5, 1962. Witnessing the inspection were the Passaic County Superintendent of Schools, counsel for the West Paterson Board of Education, and the Superintendent of West Paterson Schools.

The results of the referendum are clear and unmistakable and the election officials who conducted the voting need have had no hesitancy in certifying the results. Whatever question or confusion arose was brought about by the fact that in the printing or the placing of the ballot (which was in 3 sections) in the machine the "yes" and "no" of the second proposal were placed under levers #16 and #17 which are not paired in that manner in the back of the machine where the counters register. For the convenience of election officials there is a pairing of levers in the rear of the machine so that every other lever is marked "yes" and the alternate "no." Thus, lever #1 is

“yes,” lever #2 “no,” #3 is “yes” and #4 “no,” etc. In printing the ballot or fixing it in the machine, the confusion would not have occurred had the “yes” on proposal #2 been placed below lever #17 and the “no” under #18 instead of under levers #16 and #17, as they were. But, regardless of the placement, there can be no argument that to vote “yes” on proposal #2, a voter moved lever #16 and to vote “no” the voter moved lever #17, and it was so recorded on the corresponding counters. Any arrangement of the words “yes” and “no” in connection with the counters in the rear of the machines has no legal significance and affords only a convenient reference for the election board.

The votes recorded on the appropriate counter for each of the choices available to the voters were found to be as follows:

<i>Machine Number and Location</i>	<i>No. Votes Cast</i>	<i>Proposal #1</i>		<i>Proposal #2</i>		<i>Proposal #3</i>	
		<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>	<i>Yes</i>	<i>No</i>
#54,000 School No. 4 .....	140	88	51	41	82	43	80
#53,562 Rifle Camp Fire Hse. ....	87	42	45	26	55	23	58
#53,766 Rescue Squad Bldg. ....	124	76	47	39	76	37	80
#54,047 School No. 1 .....	65	49	14	33	23	30	25
#53,762 Memorial School .....	120	87	33	41	68	48	64
TOTALS .....	536	342	190	180	304	181	307

The Commissioner finds and determines (1) that Proposal #1, as follows:

“RESOLVED, that the Board of Education of the Borough of West Paterson, in the County of Passaic, is hereby authorized:

- (a) To construct a new schoolhouse on the plot of land now owned by the School District situate on Mereline Avenue in the School District for use as an elementary (K-5) school, purchase the school furniture and other equipment necessary therefor and improve the said plot of land; and
- (b) To expend for such purpose a sum not exceeding \$764,000.
- (c) To issue bonds of the School District for said purpose in the principal amount of \$764,000 thus increasing the existing deficit in the borrowing margin of the Borough of West Paterson, in the County of Passaic, previously available for other improvements and raising its net debt to \$939,385.17 beyond such borrowing margin.”

was approved by a vote of Yes—342, No—190; (2) that Proposal #2, as follows:

“RESOLVED, that the Board of Education of the Borough of West Paterson, in the County of Passaic, is hereby authorized:

- (a) To construct additions to the Memorial School situate on Memorial Drive in the School District, consisting of locker rooms, showers and related facilities, and construction of an outside storage room, purchase the school furniture and other equipment necessary for said additions and make the alterations of the existing building necessary for its use with such additions; and

- (b) To expend for such purpose a sum not exceeding \$65,000.
- (c) To issue bonds of the School District for said purpose in the principal amount of \$65,000 thus increasing the existing deficit in the borrowing margin of the Borough of West Paterson, in the County of Passaic, previously available for other improvements and raising its net debt to \$240,385.17 beyond such borrowing margin.”

failed of approval by a vote of Yes—180, No—304; and (3) that Proposal #3, as follows:

“RESOLVED, that the Board of Education of the Borough of West Paterson, in the County of Passaic, is hereby authorized:

- (a) To construct an addition to the Memorial School situate on Memorial Drive in the School District, consisting of a music room, auditorium, toilet and other facilities, purchase the other equipment necessary for said addition and make the alterations of the existing building necessary for its use with such addition; and
- (b) To expend for such purposes a sum not exceeding \$245,000.
- (c) To issue bonds of the School District for said purpose in the principal amount of \$245,000 thus increasing the existing deficit in the borrowing margin of the Borough of West Paterson, in the County of Passaic, previously available for other improvements and raising its net debt to \$420,315.17 beyond such borrowing margin.”

failed of approval by a vote of Yes—181, No—307, and it is so certified.

COMMISSIONER OF EDUCATION.

January 11, 1962.

## XII.

### BOARD MUST PROVIDE SUITABLE EDUCATIONAL FACILITIES FOR EDUCABLE RETARDED CHILD

LOUISE SCORDAMAGLIA,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE CITY OF HACKENSACK,  
BERGEN COUNTY,

*Respondent.*

For the Petitioner: Harry W. Chandless, Jr., Esq.

For the Respondent: John F. Butler, Esq.

#### DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case, the mother of Rosalie Scordamaglia, complains that respondent Board of Education has failed to provide suitable facilities and programs of education or training for her daughter, and has arbitrarily excluded her from the school system of the City of Hackensack. Petitioner

prays that the Commissioner order appropriate action for the education and training of Rosalie Scordamaglia.

A hearing in the matter was held by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the Administrative Building, Hackensack, on October 31, 1961. Testimony was taken and reports and correspondence were received in evidence.

Rosalie was born on January 10, 1952. At the age of four she was enrolled in a parochial home for children where she remained until September, 1958, when her mother withdrew her and enrolled her in the public schools of Hackensack. After a two weeks' trial placement in first grade, the school psychologist classified her as an educable mentally retarded child, and she was placed in a special class for children so classified. She appeared to make a satisfactory adjustment, judging from her teacher's report at the end of the 1958-59 school year which contained this statement:

"Everyone loves Rosalie. Her behavior in school has improved greatly and we are looking forward to seeing her in the fall."

During the next year, it was testified, she evidenced problems of behavior and incontinence to the degree that on June 15, 1960, she was excluded from school. The following report of the principal of the school in which Rosalie was enrolled was received in evidence:

"In the two years that Rosalie spent in our Educable Class no progress was made either emotionally or educationally.

"Emotionally she was a constant disrupting influence in the class, making it at times impossible for the teacher to work with the other children.

"During the school year 1959-60 she began to lose control of her bowel and bladder movements. This increased to the point where on June 15, 1960, it was necessary to exclude her from school."

Rosalie was not readmitted to school in the fall of 1960. For a time during the 1960-61 school year, individual instruction was provided at Rosalie's home, but this instruction was discontinued for reasons which have not been made apparent.

The psychological and psychiatric reports of Rosalie's condition reveal that she is a mentally retarded child with a "severe emotional disturbance." The school system's psychologist classified her as a mentally retarded child whose "level of intellectual functioning suggested that she might profit from special educational provisions geared to meet the needs of educable mentally retarded children." (P-4). Dr. Daniel L. Goldstein, consulting psychiatrist to the Hackensack schools, said in his report dated November 19, 1958:

"\* \* \* She seemed infantile in her attitude and behavior. She did not appear to be truly intellectually retarded, and there were glimpses of intelligence. She responded in almost hypomaniac way to her environment. \* \* \* My impression is that we are dealing with an autistic child."  
(P-4)

Dr. Stanley Macklin, who examined Rosalie at the request of petitioner's counsel, reported on July 17, 1961:

“Diagnosis

- “1. Chronic situational disturbance.
- “2. Schizoid traits.
- “3. Mental deficiency—mild (On psychological testing patient should probably show moderate deficiency with a higher potential).

“Recommendation

“Rosalie’s major difficulties have resulted from extremely poor home environment. Her past history and present behavior indicates that although she is capable of learning she would probably show a marked regression in her behavior in a classroom situation. In order to prevent this it would be necessary for Rosalie’s mother to receive psychiatric counselling in an attempt to provide some sort of emotional stability in Rosalie’s life. It would also be advisable for Rosalie to receive psychiatric help at a future date. If Rosalie’s mother refuses, or is not able to seek help, Rosalie would probably not be able to benefit by classroom situation and arrangements should be made for institutional care. If Rosalie’s mother were willing to seek help, Rosalie probably would profit from going to school and an attempt should be made to enroll her in a special class.”  
(P-7)

The director of a summer day camp for retarded children which Rosalie attended during the summers of 1959, 1960, and 1961, and a housewife and mother who cared for Rosalie during the summer before and after day camp, both testified that Rosalie evidenced no problem of toilet training when under their supervision.

The laws of New Jersey require each school district to provide suitable school facilities and accommodations for all school children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations must include courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years (*R. S.* 18:11-1). The parent of a child between the ages of seven and sixteen is, in turn, required to cause such child to attend the public schools, or equivalent day schools, or receive equivalent instruction elsewhere,

“\* \* \* unless it is shown to the satisfaction of the board of education of the school district that the mental condition of the child is such that he cannot benefit from instruction in the school or that the bodily condition of the child is such as to prevent his attendance at school, but nothing herein shall be construed as permitting the temporary or permanent exclusion from school by the board of education of the district of any child between the ages of 5 and 20, except as explicitly otherwise provided by law.” (*R. S.* 18:14-14)

The statutes provide for exclusion of pupils under the following conditions, *inter alia*:

- (a) by the principal of the school, on recommendation of the school physician or nurse, or on the principal’s own initiative, when there is evidence of departure from normal health. (*R. S.* 18:14-59)

- (b) by the principal, when a child has been exposed to a communicable disease, or on certification to the principal by the school physician or nurse, when the child's presence is detrimental to the health or cleanliness of the pupils in the school. (*R. S. 18:14-60*)
- (c) by temporary exclusion for a reasonable time pending examination and classification under section 2 of chapter 178 of the laws of 1954. (*R. S. 18:14-71.12*)
- (d) by the superintendent of schools when the child's mental retardation is so severe that he has been diagnosed and classified as not trainable under section 2 of chapter 178 of the laws of 1954. (*R. S. 18:14-71.12*)

Provisions (a) and (b) above give the principal the authority necessary to control, immediately, instances in which the continued presence of a pupil is prejudicial to the health or welfare of himself or of other children by suspending the child's right to come to school. Such a suspension, however, can be only temporary until the condition is corrected or some acceptable solution is devised. The temporary nature of this suspension of school attendance is emphasized by the further provision that if the parent fails to take the necessary measures to remove the cause for exclusion, he may be proceeded against as a disorderly person under the compulsory attendance law (*R. S. 18:14-61*). Item (c) above also provides for temporary exclusion pending placement determination. Provision (d) above is the only measure which authorizes more than temporary exclusion. The authority here is given to the superintendent of schools, upon the advice of the medical examiner that the mental retardation is so severe that the child is not trainable. In such event, the name and address of the child must be reported to the secretary of the board of education who, in turn, must file the report with the county superintendent of schools for transmittal to the Commissioner of Education. (*R. S. 18:14-71.13*)

The facts in this case show first, that at the time of exclusion Rosalie had already been classified according to law and that even if reclassification were involved, her exclusion since June 15, 1960, is not "temporary"; second, her classification is that of educable, which is a category for which education and training must be provided (*R. S. 18:14-71.5*); third, that there is no evidence that the school physician or nurse has certified that Rosalie's presence is detrimental to the health and cleanliness of the pupils in the class, or, even if such were the case, that her mother has been directed to return her to school when such condition was corrected; and, finally, if Rosalie's toilet habits constituted a "departure from normal health" warranting her exclusion by the principal, such exclusion would be subject to such review as would be necessary to determine whether the condition was remediable and, if so, whether it had been remedied. Nor has home instruction been provided as is required by law in instances where a pupil is unable to attend school for reasons of physical incapacity.

By what authority did the principal exclude Rosalie? In the principal's report quoted above, reference was made to Rosalie's disrupting influence in the class, but the reason given for excluding her was her lack of control of natural evacuations. No evidence was presented to show that the respondent board of education or the superintendent of schools took any formal action

to ratify the exclusion, or to make any finding of fact as a basis for continuing the exclusion beyond a reasonable temporary period.

While it is well established that a board of education may expel a child from school for good and sufficient reasons, no such authority is given to principals or superintendents whose powers are limited to temporary exclusion. *Spence v. Atlantic City*, 1938 S. L. D. 692. It must also be held that an expulsion from school must rest on a finding of fact establishing the reasons therefor. In this case there is no indication that the Board of Education acted in this matter or made any finding on what must be considered an expulsion of a pupil, and in the absence of such action and finding the Commissioner must hold that the child has been illegally excluded.

Having reached this conclusion, the Commissioner finds no need to comment on other elements of this case. The service of the staff of the State Department of Education will be available to the Hackensack school authorities, on their request, to assist in providing a program of education and training suited to Rosalie's needs and capabilities.

The Commissioner finds and determines that petitioner's child, Rosalie Scordamaglia, has been improperly excluded from school and thereby deprived of her right to a free program of education and training as provided by law. The Commissioner directs that Rosalie Scordamaglia be readmitted to the public school system of the City of Hackensack and that a suitable program of education be provided for her.

COMMISSIONER OF EDUCATION.

January 19, 1962.

XIII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE SPECIAL SCHOOL ELECTION IN THE BOROUGH OF WASHINGTON, WARREN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

A proposal to authorize the Board of Education of the Borough of Washington, Warren County to issue bonds in the amount of \$877,000 submitted at a referendum on January 16, 1962, was rejected by the voters. On January 18, 1962, the Commissioner of Education received a petition from a citizen and voter requesting a recount of the votes cast. At the direction of the Commissioner, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount on January 25, 1962, at the office of the Warren County Superintendent of Schools.

The announced results of the referendum were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes .....	700	8	708
No .....	719	1	720
Void .....	27	---	27
	<hr/>	<hr/>	<hr/>
Total .....	1446	9	1455

At the conclusion of the recount with 43 ballots referred, the tally of the uncontested votes stood as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes .....	692	8	700
No .....	711	1	712
Referred .....	43	---	43
	<hr/>	<hr/>	<hr/>
Total .....	1446	9	1455

An examination of the 43 ballots referred resulted in agreement that 9 (four Yes and five No) should be counted and 25 voided. The tally then became:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes .....	696	8	704
No .....	716	1	717
Void .....	25	---	25
Referred .....	9	---	9
	<hr/>	<hr/>	<hr/>
Total .....	1446	9	1455

With only 9 ballots in question and a margin of 13 votes rejecting the proposal, it becomes unnecessary to make a further determination for the reason that even if the remaining 9 votes are counted as favoring the proposal, the total cannot exceed the number cast against it.

The Commissioner finds and determines that the proposal submitted by the Board of Education to the electorate of the Borough of Washington on January 16, 1962, was rejected.

COMMISSIONER OF EDUCATION.

January 29, 1962.

XIV.

BOARD OF EDUCATION MUST ACCEPT BID OF LOWEST  
RESPONSIBLE BIDDER  
BAILEY FUEL COMPANY,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL,  
CUMBERLAND COUNTY,

*Respondent,*

For the Petitioner: Paul Porreca, Esq.

For the Respondent: Harry R. Adler, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The Bailey Fuel Company prays that the Commissioner issue an order directing respondent to purchase its fuel oil for the 1961-62 school year from it, in accordance with its bid submitted July 12, 1961. Respondent admits that petitioner's bid was the lowest submitted but contends that petitioner is

not a responsible bidder and the contract was, therefore, awarded to the second lowest bidder.

A hearing in the case was held by the Assistant Commissioner in Charge of Controversies and Disputes at the Cumberland County Court House in Bridgeton on January 9, 1962. The bidder to whom the contract was awarded was not made a party respondent to this appeal.

Bids for fuel oil were advertised by respondent Board of Education and were received and opened at a Board meeting on July 12, 1961. It is stipulated by both parties that petitioner's bid for No. 2 fuel oil at \$.1175 per gallon and No. 5 fuel oil at \$.0825 per gallon was the lowest submitted. Respondent awarded the contract for fuel oil to the second lowest bidder on the grounds that petitioner was not a responsible bidder. It was testified that there was extended discussion at the meeting when petitioner's bid was found to be the lowest and it was at that time, petitioner's general manager testified, that he first became aware that the Board was dissatisfied with his performance on the fuel oil contract which he had held for the previous school year, 1960-61.

Respondent contends that on four occasions during the 1960-61 school year, oil burners in the district schools failed to operate because petitioner had allowed the fuel oil storage tanks to run dry. Petitioner admits that in one instance the fuel tank ran dry, but denies knowledge of any other occasion or that he ever received any complaint, either oral or written, from the Board of Education about his performance on the contract.

New Jersey law (*R. S. 18:7-65*) requires that boards of education shall award contracts for supplies to the lowest responsible bidder.

The Commissioner, in the case of *Crater v. Board of Education of the Township of Bedminster*, 1939-49 *S. L. D.* 221, after a study of *Paterson Contracting Company v. City of Hackensack, et al.*, 1 *N. J. Misc.* 171, 99 *N. J. L.* 260 (*E. & A.* 1923) and *Peluso v. Commissioners of the City of Hoboken*, 98 *N. J. L.* 706 (*Sup. Ct.* 1923) laid down the following principles for determining the responsibility of a bidder and review of a board's determination thereon:

- "1. The question for the determination of the board of education, is whether the bidder is so lacking in experience, financial ability, machinery and facilities as to justify the belief upon the part of fair-minded men that he would be unable to carry out the contract if awarded to him.
- "2. To reject the bid of the lowest bidder, there must be such evidence of the irresponsibility of the bidder as would cause fair-minded and reasonable men to believe that it is not for the best interests of the school district and the public at large to award the contract to the lowest bidder.
- "3. The lack of ability to work in harmony or to enforce the terms of a previous contract by the board of education cannot be the controlling factor in determining the bidder's responsibility. Disputes involving controverted questions of fact with reference to the performance of a previous contract do not constitute grounds for declaring a bidder irresponsible if such disputed matters can be

taken care of under a contract properly safeguarding the public interest, with a contractor who is financially responsible.

- “4. To set aside the determination of the board of education that a bidder is irresponsible, it is not necessary to prove corruption or fraud on the part of the board of education. The determination of the board of education must be set aside if the evidence in the record does not justify its determination according to the principles stated above.”

See also *McAllister v. Board of Education of the Borough of Lawnside*, 1951-52 S. L. D. 39.

In the instant case, respondent defends its action solely on the alleged failure of petitioner to perform under the terms of a previous contract. The performance of a contract should be and can be taken care of under a contract properly safeguarding the public interest, with a contractor who is financially responsible. *Peluso v. Hoboken*, *supra*, at 708. The denial of the award of a contract to the lowest bidder on the basis of past performance cannot be sustained without a determination that he is not responsible. *Cf. Peluso v. Hoboken*, *supra*, at 706.

In the case of *Sellito v. Township of Cedar Grove, et al.*, 132 N. J. L. 29 (*Sup. Ct.* 1944), the Court said of the lowest bidder

“ \* \* \* he acquired a *status* which entitled him to a hearing before a valid contract might be awarded to another.”

The Court in *Faist v. Hoboken*, 72 N. J. L. 361 (*Sup. Ct.* 1905) said:

“If there be an allegation that a bidder is not responsible, he has a right to be heard upon that question, and there must be a distinct finding against him, upon proper facts, to justify it.”

No such hearing was granted petitioner. Although petitioner's general manager attended the Board of Education meeting of July 12, 1961, when bids were opened and a contract was awarded, and heard the discussion concerning him, he was there as a spectator, and not upon notice of hearing to determine petitioner's responsibility as a bidder. See *Sellito v. Cedar Grove*, *supra*, at 32.

It would be possible at this juncture to remand this matter to respondent Board of Education for hearing to determine petitioner's responsibility as a bidder. In the interest of justice to both parties, however, and upon agreement of both parties that the central issue was that of responsibility, the Commissioner received testimony at the hearing bearing upon petitioner's responsibility as a bidder. The Commissioner finds authority for this in the Supreme Court's decision in the case of *Masiello v. State Board of Examiners*, 25 N. J. 590 (1958) in which the Court pointed out (at p. 600) :

“It has long been the law of this State that the requirements of due process are satisfied in situations of this kind if at any time before the order becomes effective, a fair hearing is granted by administrative or judicial action.”

and at page 606, concerning a hearing before the Commissioner :

“On the other hand, if, as in this case, the hearing demanded by principles of fair play is had before him for the first time, then the obligation

to 'decide' signifies a complete *de novo* and independent decision on the facts."

In determining whether petitioner is a responsible bidder, the Commissioner is guided by the principles for determining the responsibility of a bidder stated above. Having found that performance under a previous contract cannot be the controlling factor in the determination, he confines his determination to whether petitioner is "\* \* \* so lacking in the experience, financial ability, machinery and facilities necessary to perform the contract as to justify a belief upon the part of fair-minded and reasonable men that it would be unable to perform its contract." *Paterson Contracting Co. v. Hackensack, supra*, at 263.

The testimony reveals that petitioner has been operating as a fuel company in Millville for twenty-five years, for the past ten years under the direction of its present general manager. The Company sells and delivers from eight to ten million gallons of fuel oil annually. It serves, in addition to domestic consumers, some 500 commercial locations, including schools and institutions. It has storage facilities for a million gallons of the lighter fuel oils, including No. 2 oil, and transports its heavier oils, including No. 5 oil, from a terminal plant near Camden, as is customary in the industry. It does most of its business within an area of a 45-mile radius of Millville, and maintains a delivery fleet of 13 units, including trucks, trailers, and tractors, of which two were purchased within the past year. A quarterly financial statement prepared by a firm of certified public accountants was admitted into evidence (P-1), showing, as of September 30, 1961, fixed assets in land, buildings, and equipment of \$68,218.73, and a surplus of assets over current liabilities and reserves in excess of \$150,000. Petitioner's delivery schedule for No. 2 fuel oil is the semi-automatic "degree-day" method which is standard in the industry. The Commissioner determines that petitioner has the experience, financial ability, machinery and facilities necessary to perform the contract to supply fuel oil to respondent for the 1961-62 school year.

The Commissioner believes that the Board of Education can provide suitable safeguards to assure performance under a properly drawn contract. He notes that petitioner has already made an offer to respondent to fill any of the oil tanks without charge on any occasion when the tanks are allowed to run dry.

The Commissioner finds and determines that petitioner was the lowest responsible bidder to supply fuel oil to respondent for the 1961-62 school year, and that respondent failed to award him the contract as required by law. He directs that the award to the second lowest bidder be set aside and the contract be awarded to Bailey Fuel Company.

COMMISSIONER OF EDUCATION.

January 31, 1962.

XV.

EMPLOYMENT OF TEACHER ON PREFERRED ELIGIBLE LIST  
MUST FOLLOW SENIORITY STANDARDS

MAURICE J. O'SULLIVAN,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,  
HUDSON COUNTY,

*Respondent.*

For the Petitioner: Francis X. Hayes, Esq.

For the Respondent: John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This case is the second of two appeals to the Commissioner of Education filed by petitioner. In his brief, counsel for petitioner requested that the Commissioner withhold decision in this case until the first appeal was determined. This matter, therefore, has been held in abeyance pending proceedings in the prior case. Petitioner has, however, taken no action to prosecute his first appeal and counsel now withdraws his priority request and asks that this later appeal be determined without further delay.

This case is presented to the Commissioner on a stipulation of facts and briefs of counsel. It appears from the stipulation that:

- “1. On September 1, 1937, Dr. Maurice J. O'Sullivan was appointed to the position of teacher in the Jersey City Public Schools.
- “2. On December 1, 1950, the petitioner was appointed Director of Personnel for both instructional and noninstructional employees in the Jersey City Public Schools.
- “3. On July 1, 1955, the petitioner was appointed Assistant Superintendent in charge of Personnel and Elementary Education for the Jersey City Public Schools.
- “4. On July 29th, 1957, the petitioner's personnel duties and functions were assigned by Resolution to the Superintendent of Schools and Business Manager.
- “5. On July 1, 1959, the petitioner's position as Assistant Superintendent of Schools was abolished allegedly for economy, and he was assigned to the position of teacher.
- “6. On May 12th, 1960, by Resolution of the Board of Education, the petitioner was placed on a preferred eligibility list for the appointment to the position of Assistant Superintendent of Schools in Charge of Elementary Schools.

- “7. On May 12th, 1960, the Board of Education of the City of Jersey City appointed Constance P. Nichols and Helen Paeglow to the position of Supervisor of Elementary Education.
- “8. The petitioner contends that he should have been appointed to the position of Supervisor of Elementary Education under the terms of R. S. 18:13-19.
- “9. The petitioner is the holder of the following qualification certificates required by the State Board of Education:

Administrator’s Certificate  
General Supervisor’s Certificate  
Secondary Principal’s Certificate  
Elementary Principal’s Certificate \* \*”

The applicable statute in determining this case is *R. S. 18:13-19* and the standards to determine seniority established by the Commissioner and State Board of Education pursuant thereto. *R. S. 18:13-19* reads as follows:

“Nothing contained in sections 18:13-16 to 18:13-18 of this Title or any other provision of law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of superintendents of schools, assistant superintendents, principals or teachers employed in the school district whenever, in the judgment of the board of education it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization of the district, or other good cause. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion, or political affiliation. Any dismissals occurring because of the reduction of the number of persons under the terms of this section shall be made on the basis of seniority according to standards to be established by the Commissioner of Education with the approval of the State Board of Education. In establishing such standards, the Commissioner shall classify, in so far as practicable, the fields or categories of administrative, supervisory, teaching or other educational services which are being performed in the school districts of this State and may, at his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole. Whenever it is necessary to reduce the number of persons covered by this section, the board of education shall determine the seniority of such persons according to the standards established by the Commissioner of Education with the approval of the State Board of Education and shall notify each person as to his seniority status. \* \* \* All persons dismissed shall be placed on a preferred eligible list to be prepared by the board of education of the school district, and shall be re-employed by the board of education of the school district in order of seniority as determined by the said board of education. \* \* \* Should any superintendent of schools, assistant superintendent, principal or teacher under tenure be dismissed as a result of such reduction such person shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever vacancies occur and shall be re-employed by the body causing dismissal in such order

when and if a vacancy in a position for which such superintendent, assistant superintendent, principal or teacher shall be qualified. Such re-employment shall give full recognition to previous years of service. \* \* \*

The Commissioner prepared the seniority standards required by this statute so as to effectuate what he believed to be the intent of the Legislature in enacting this legislation. It has been said that a court in determining legislative intent must "look beyond the literal meaning of the words to the history of the law, its language, considered in all its parts, the mischief the law was designed to remedy, and the policy underlying it." *Giammattei v. Egan*, 68 A. 2d 129 (Sup. Ct. of Errors, Conn. 1949)

"The will of the law giver is to be gathered from the object and nature of the subject matter, the contextual setting, and the mischief felt and the remedy in view. Scholastic strictness is to be avoided in the search for the legislative intention. The particular terms are to be made responsive to the essential principle of the law. It is not the words but the internal sense of the act that controls. Reason is the soul of law." *San-Lan Builders, Inc. v. Baxendale*, 28 N. J. 148, 155 (Sup. Ct. 1958).

"In construing constitutional and statutory provisions, \* \* \* resort may freely be had to the pertinent constitutional and legislative history for aid in ascertaining the true sense and meaning of the language used." *Lloyd v. Vermeulen*, 22 N. J. 206 (1956) "\* \* \* resort may be had to contemporaneous and practical constructions for whatever aid they may fairly afford in ascertaining the true sense and meaning of constitutional and statutory provisions." (p. 210)

"\* \* \* a statute should be interpreted by a mind sympathetic to its aims which recognizes the difficulties inherent in formulating a precise expression of legislative intent in light of the diversity of circumstances to be covered." *Lane v. Holderman*, 23 N. J. 303, 323 (1957)

In accordance with the foregoing authorities, the Commissioner deems it advisable to discuss the circumstances which led to the enactment of the 1942 amendment to R. S. 18:13-19, and the seniority standards adopted pursuant thereto. Prior to the enactment of the amendment, a person whose position was abolished was entitled to some other position, if available, or, if not, to be placed upon a preferred eligible list for future employment.

The original legislation, however, left unanswered questions such as: If the position of an administrator under tenure is abolished, is he entitled to a position on the next lower echelon of responsibility and authority, even if he has never held that position in the school system? If a person is promoted to a higher echelon and his new position is abolished, is he entitled to return to his previous position? If so, can he displace a person who has more years of employment in the particular lower position although the former holder of the position has more total employment in the district? There were instances where a person was promoted to a higher position only to see the position abolished a short time thereafter. There were charges that boards of education had promoted persons to higher positions with the deliberate intention of abolishing the new positions as a means of getting rid of them in the former positions. Persons resisted promotion because of the fear that the new position might be abolished and they would find it necessary

to return to a lower position than they had held prior to promotion. These and other questions made clarifying legislation desirable. Because of the complexity of the numerous issues to be resolved, it was deemed inadvisable, if not impossible, to anticipate and include in a statute every seniority situation which might arise. Therefore, a statute was enacted directing the Commissioner with the approval of the State Board to prepare standards governing seniority. The standards were prepared after a long study of actual situations and instances and after consultation with interested groups.

The following excerpt from Item #7 of the "Standards to Determine Seniority Pursuant to *R. S. 18:13-19*" is applicable to the case under consideration:

"Whenever any person's particular employment shall be abolished in a category, he shall be given that employment in the same category to which he is entitled by seniority. If he shall have insufficient seniority for employment in the same category, he shall revert to the category in which he held employment immediately prior to his employment in the same category, and shall be placed and remain upon the preferred eligible list of the category from which he reverted until a vacancy shall occur in such category to which his seniority entitles him."

Petitioner contends that he should have been appointed to the position of Supervisory of Elementary Education. The record does not show that he ever held this position. Therefore, he is not entitled to it according to Item #7. There is no record that the position of Director of Personnel to which he was appointed on December 1, 1950, now exists. Therefore, the only position to which he is entitled is his former position of teacher, to which he was originally appointed on September 1, 1937.

Neither can it be argued that the duties of Supervisor of Elementary Education and Assistant Superintendent in Charge of Elementary Education are similar, although performed under different titles. The position of Assistant Superintendent is specifically authorized by statute and carries with it powers and responsibilities beyond those of a supervisor. It requires nomination by the Superintendent of Schools (*R. S. 18:6-40*), certification standards exceeding those for elementary supervisor, and is one of the four categories of positions to which tenure accrues. (*R. S. 18:13-16*). The Commissioner holds that the duties required of an Assistant Superintendent in Charge of Elementary Education could not be assigned to or performed by a Supervisor of Elementary Education.

The record further indicates that on May 12, 1960, by resolution of the Board of Education, the petitioner was placed on a preferred eligible list for appointment to the position of Assistant Superintendent of Schools in Charge of Elementary Education. He will, accordingly, be entitled to this appointment if the position is reconstituted. The Commissioner holds that the Board of Education in assigning petitioner to his former position of teacher and in placing him on a preferred eligible list for the abolished position of Assistant Superintendent of Schools in Charge of Elementary Education, has met the requirements of the statute with regard to petitioner. The petition is dismissed.

COMMISSIONER OF EDUCATION.

February 7, 1962.

Pending before State Board of Education.

XVI.

BOARD OF EDUCATION MAY DISMISS OR REASSIGN EMPLOYEES  
NOT UNDER TENURE

CECELIA BARNES, RAYMOND CAVALLI, FRANK CASEY, JACOB CUTHBERT,  
RAYMOND DAVIS, WALTER ECKERT, WILLIAM R. FLANAGAN, WILLIAM  
D. HAYDEN, ALBERT HERBERMAN, JOHN J. HORAN, ELIZABETH  
HOULIHAN, JEREMIAH HURLEY, JOHN LYNCH, THOMAS MEIGH,  
BENJAMIN MOSLEY, WILLIAM O'TOOLE, JOSEPH PANUCCI,  
JAMES REMLER, WILLIAM SADLACK, JOHN WITTER-  
SCHEIN, WILFRED YEO, JOHN COLLERAN,  
THERESA DEMARCO, MARGARET L.  
GORMAN, ELIZABETH MCCOY,

*Petitioners,*

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,  
HUDSON COUNTY,

*Respondent.*

For the Petitioners: Francis X. Hayes, Esq.

For the Respondent: John J. Witkowski, Esq.

WILLIAM GILL, SEBASTIAN D'AMICO, ANTHONY LAMBERTI, ALEXANDER  
MANZO, JAY MARKEY, ANNIE SPENCER MORAN, EDWARD WALL,  
ANTHONY VARACALLI, JOSEPH ENNIS, ALBERT SAUERBIER,  
WILLIAM DUNNE, HAROLD STOEBLING, MICHAEL FIORE,  
HENRY MAJOLA, JOHN TOSCANO, ETTORE VIGNONE

*Petitioners,*

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,  
HUDSON COUNTY,

*Respondent.*

For the Petitioners: Joseph S. E. Verga, Esq.

For the Respondent: John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This case comes before the Commissioner as a consolidation of several petitions of noninstructional employees of the Jersey City Board of Education appealing the action of the Board in abolishing their positions or terminating their services. All of the petitioners complain that they were deprived of their positions or employment by acts of bad faith on the part of the respondent Board of Education and some also claim they had acquired tenure. They seek an order from the Commissioner restoring them to their positions, with appropriate awards of back salary, including any increments to which they might be entitled. The respondent Board denies that it acted improperly or that any of petitioners had acquired tenure of employment.

Since the inception of this case, petitioners Jeremiah Hurley, John Witterschein, and Edward Wall have withdrawn their petitions; petitioner Annie Spencer Moran is deceased and her petition has been discontinued; petitioner William Dunne has been pensioned and his petition has been discontinued; petitioner William D. Hayden is deceased and Mildred D. Hayden, administratrix of his estate, has been substituted as a party for the purpose only of any back salary to which Mr. Hayden would be entitled to the date of his death. Petitioners Anthony Varacalli, Joseph Ennis, Albert Sauerbier, and William Dunne are made parties by virtue of their filing with the Commissioner, for the protection of their rights, a copy of a complaint in lieu of prerogative writ before the Superior Court, Law Division, Hudson County.

A hearing in this matter was conducted by the Assistant Commissioner in Charge of Controversies and Disputes at the County Office Building, Jersey City, on January 21 and 28, March 9, 23 and 29, April 12, May 4, June 17 and 22, 1960, and February 7 and 8, 1961. Briefs of counsel were also submitted.

Petitioners were all employees of the Jersey City Board of Education as of June 30, 1958. At the organization meeting of the Board of Education on July 1, 1958, and at adjourned sessions of this meeting on July 10 and 24 and August 28, by a series of resolutions, petitioners' services were terminated or their positions were abolished. It was made clear in the testimony that where counsel for the Board advised that any of the petitioners held tenure rights under any provision of Title 18 of the Revised Statutes, or under the veterans' tenure laws, such petitioners were reassigned to positions to which the Board felt their tenure rights entitled them. It is necessary first to determine whether the respondent Board of Education had authority to terminate or abolish positions in the interest of economy.

Under *R. S. 18:6-27* boards of education are authorized to appoint a superintendent of schools, a business manager "and other officers, agents, and employees as may be needed, and may fix their compensation and terms of employment \* \* \*." Tenure of employment accrues to certain specific positions: full-time secretaries, assistant secretaries, and business managers of boards of education (*R. S. 18:5-51*); janitors (*R. S. 18:5-67*); those holding secretarial or clerical positions (*R. S. 18:6-27*); and attendance officers in city school districts (*R. S. 18:14-43*). In the absence of any express statutory provisions therefor, tenure of employment does not attach to any other non-instructional position under a school district board of education. The employment and dismissal of such employees is subject, therefore, to the will and rules of the employing board of education. See *Bowen v. Board of Education of Jersey City*, 1954-55 *S. L. D.* 115; *Cimo v. Board of Education of Jersey City*, *Ibid.* 118, and *Corrado v. Board of Education of Hoboken*, 1956-57 *S. L. D.* 59.

It is clear that the respondent Board of Education had authority to terminate the employment of any petitioner whose position was not protected by tenure.

The next question to be decided is whether the action of respondent was taken so arbitrarily or in such bad faith as to constitute an abuse of its discretion which should, therefore, be set aside.

Petitioners press the issue of bad faith on the following allegations:

(1) the abolition and termination of positions were politically motivated,

(2) in the selection of positions to be abolished and persons to be terminated, no careful effort was made to determine the necessity of the positions for the efficient operation of the schools, or the seniority or years of service of the employees involved,

(3) the reasons given for abolishing certain positions or terminating certain others—for economy or “for the best interests of the Board of Education”—were not sincere, in that no economy was effected, or others were employed to do the same work as those whose jobs ended, and

(4) in acting upon the resolutions abolishing the positions or terminating employment, not all the members of the Board were given opportunity in advance of the meeting to know of and consider the resolutions.

Respondent denies the allegations and states in defense that economies had to be effected because of reductions made in the appropriations for schools that year. It says, further, that the decision to reduce expenditures in the noninstructional personnel was made as a result of a study which revealed over-staffing in this group of employees.

The testimony on this issue reveals that the budget adopted by the Board of School Estimate for the 1958-59 school year was just under a million and a half dollars less than the amount of the budget submitted by the Board of Education. The assistant secretary of the Board testified that the budget for 1957-58, the preceding school year, was approximately \$232,000 higher than the 1958-59 budget. It was further testified that to maintain Board functions at the 1957-58 level and to grant salary increments and employ needed additional teachers would have required \$1,100,000 more than the Board was given to operate the schools. It was the testimony of a majority of the Board members serving in July and August of 1958 that the necessity of economy was apparent to them. That a reduction of expenditures in the maintenance services of the school system was effected was shown in the testimony that the combined cost of salaries and contracted services for maintenance totaled \$825,161 in 1957-58, as against \$356,520 in 1958-59.

It was further testified that in comparison with national norms for large city school districts, the noninstructional costs for Jersey City schools were high, and that faced with the necessity for reducing expenses, the reduction should fall largely in this area.

In the selection of those employees whose services were to be terminated, the Board employee assigned to prepare the necessary resolutions testified that he was instructed to abolish whole categories of employees, or where the entire category was not to be abolished, to base the terminations on the tenure rights of those within the category. In the case of food service workers whose services were terminated, it was testified that the school district auditor had recommended that the deficit in the cafeteria operation should be reduced.

Whether the efforts toward economy were the most effective that could have been selected, or whether the employees whose services were terminated

were more or less efficient than others who were not terminated or to whom their duties were assigned, is not for the Commissioner to determine.

“\* \* \* as long as \* \* \* a board of education \* \* \* acts within the authority conferred on \* \* \* it by law, the courts are without power to, or will not, interfere with, control, or review \* \* \* its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error, nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed.” 78 *C. J. S.* 920

In the absence of clear abuse of the discretionary power of the Board, the Commissioner will not interfere. It was held in *Boult v. Board of Education of Passaic*, 136 *N. J. L.* 521 (*E. & A.* 1948), concerning the authority of the Commissioner and State Board of Education under *R. S.* 18:3-14 and 15:

“Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board.”

The wisdom and effectiveness of a board of education’s administrative decisions is a matter for the constituent citizenry to determine.

“It remains to say a word upon that view of the case which assumes that it is within the judicial province to protect constituencies from the ‘recreancy’ of their representatives by undoing legislation that evinces ‘bad faith.’ To which the answer is—first, that the power so to intervene has wisely been withheld from the judiciary; secondly, that if the power existed, its exercise would be most mischievous, and lastly, that the redress of the betrayed constituent is in his own hands, to be sought at the polls and not in the courts.” *Moore v. Haddonfield*, 62 *N. J. L.* 386, 391 (*E. & A.* 1898)

“\* \* \* I desire to make clear that I express no opinion as to the policy employed by the majority in the selection which they made or in the manner in which they made their selection effective. That is their responsibility to those they govern. Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. And to say that governing officials must act in good faith is merely equivalent to saying that they must act honestly.” *Peters Garage, Inc. v. Burlington*, 121 *N. J. L.* 523, 527 (*Sup. Ct.* 1939)

Finally, complaint is made that the manner in which the resolutions of abolition or termination were introduced deprived a minority of the Board’s membership of opportunity to consider them. Petitioners rely on the decision in the case of *Cullum v. Board of Education of North Bergen*, 1952-53 *S. L. D.* 62, affirmed State Board of Education (1953), affirmed Superior Court 27 *N. J. Super.* 243 (1953), affirmed Supreme Court 15 *N. J.* 285 (1954) in which the courts found that at an illegally called special meeting to “consider” the appointment of a superintendent of schools there was no “consideration,” but rather a vote by a majority of the board ratifying a resolution of appointment already signed at a caucus to which the minority had not been invited. The Commissioner does not find in the instant case the elements which the Supreme Court criticized in the *Cullum* case:

“At no time did the majority consider the needs of the local community, or seek to ascertain and evaluate the identities, qualifications and experience of the available candidates, or deliberate on the course best calculated to serve the local school system. On the contrary they seem to have permitted extraneous personal and petty political influences to dictate their action. \* \* \* if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded. This in no wise precludes advance meeting during which there is free and full discussion, wholly tentative in nature; it does, however, justly preclude private final action such as that taken by the majority in the instant matter.”

The evidence is conflicting and it is not clear whether the resolutions affecting petitioners were discussed in caucus or private meetings before the regular Board meetings. In any case, the evidence does not support a finding of the kind of “private, final action” such as the Court found in *Cullum, supra*. The Board employee who had prepared the resolutions testified that he had done so at the direction of the member of the Board who became its president at the organization meeting, and had submitted the resolutions to the Board’s counsel for review. It was not until the August 28 session of the continued Board meeting that the minutes record any protest by a member concerning the manner in which resolutions were presented for Board action. It is clear, on the other hand, that the 1957-58 Board had taken no action to develop a line budget reflecting the reductions that would have to be made as a result of the reduced budget certified by the Board of School Estimate. Thus, the 1958-59 Board, at the time of its organization on July 1, 1958, was faced with the practical necessity of operating the school system within the means available to it. Admittedly mistakes were made; in certain instances it was necessary to rescind resolutions of termination where it was determined that tenure status had been violated; in other instances, services that had been abolished were restored when their continued need was determined; in still other situations, employees at a lower salary level were hired to replace some whose services had been terminated. Whether a different Board would have met the situation in the same or a different manner is academic. What other motives operated in the decisions of the Board, it is not in the Commissioner’s province to question, absent a clear showing of bad faith. In its efforts to effect overall economies consistent with its budget, the Board was within the limits of its legal discretion.

After a careful study of the voluminous testimony on this issue, of the conflicting charges, admissions and denials, the Commissioner must conclude that there is insufficient evidence to sustain a clear finding of bad faith.

With regard to the individual claims of the several petitioners, the Commissioner will consider each on its own merits.

Petitioners Cecelia Barnes, Theresa DeMarco, Margaret Gorman, Elizabeth Houlihan, and Elizabeth McCoy, whose services were terminated, were employed as food service workers. This position is not afforded the protection of tenure under any provision of Title 18 of the Revised Statutes. The Commissioner finds no valid basis on which reinstatement of employment can be claimed and, therefore, their petitions of appeal are dismissed.

Petitioner Jacob Cuthbert was employed as a part-time recreation attendant, a position not covered by any tenure statute. His services were

terminated along with those of others who are not parties to this case. Subsequently, on July 1, 1958, the entire Recreation Department was abolished. The Commissioner finds no basis for his claim to back salary to that date and his petition, therefore, is dismissed.

Petitioner Wilfred Yeo was classified as an administrative clerk, a position in which he had served from 1954 until his services were terminated by resolution on August 28, 1959, when he was reassigned as bookroom attendant, a position which he had held prior to 1954. The testimony clearly indicates that he held a clerical position in fact as well as in title, performing such tasks as maintaining files, recording mail, typing, mimeographing, collating and miscellaneous clerical functions. The Commissioner finds that he held a clerical position within the intent and meaning of R. S. 18:6-27 as amended by Chapter 137 of the Laws of 1960, which states in part:

“All persons holding any secretarial or clerical position under any board of education, or under any officer thereof, in the school system in this state, shall enjoy tenure of office or position during good behavior and efficiency, after the expiration of three consecutive calendar years in that district \* \* \*. No such employee shall be dismissed or subjected to a reduction in salary except for inefficiency, incapacity, unbecoming conduct or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons making the same, and filed with the secretary of the board of education, and after the charge shall have been examined into and found to be true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not.”

Prior to the amendment of 1960, the statute provided for a hearing before the local board of education. While allegations of inefficiency were made about petitioner's work, no charges were preferred against him and no hearing was held as required by the statute. The Commissioner, therefore, finds that petitioner Yeo was illegally dismissed from his position as administrative clerk and directs that he be reinstated in that position, with such back pay, including increments, as he might have been entitled to had he not been reassigned as bookroom attendant.

Petitioner James Remler was employed as a foreman of laborers (utility men) until his services were terminated and he was assigned to his former position as custodian. The position of foreman of utility men is not covered by any tenure statute in Title 18. The Commissioner finds that no statutory rights were violated by the termination of his services and reassignment to a former position. His petition is, therefore, dismissed.

Petitioner John Horan, a chauffeur, was reassigned to his former position as porter when the Board, by resolution, reduced the number of chauffeurs. The resolution termed petitioner the last appointed person in his category and no evidence was introduced to controvert this statement. Since the position of chauffeur is not protected by any tenure law, the Board acted within the scope of its authority and the petition is accordingly dismissed.

Petitioner Raymond G. Davis was employed as Inspector Class I in the maintenance department. His position was abolished for reasons of economy

and he was reassigned to his former position as porter. While it was asserted that his duties involved much paper work in keeping time and payroll records for mechanics, in his own testimony he said that he inspected maintenance work as assigned. The Commissioner cannot agree that his position was clerical within the intent and meaning of *R. S. 18:6-27, supra*, and, therefore, finds that he had no tenure protection under Title 18. His petition is accordingly dismissed.

Petitioner Raymond Cavalli testified that he was first employed as a porter in 1951. In 1953 he was promoted to Supervisor Class III, as supervisor of grounds. By resolution on July 10, 1958, this position was abolished for reasons of economy. Since this position does not come within the tenure protection of any law in Title 18, the Commissioner finds that respondent's act was within the scope of its legal discretion and the petition is accordingly dismissed.

Petitioners Frank Casey, storekeeper, John Colleran, assistant storekeeper, William P. Flanagan, receiving (stock) clerk, and Alfred Herberman, stock clerk, may be considered together because all claim tenure protection as clerical employees under the terms of *R. S. 18:6-27, supra*. Petitioner Colleran's position was abolished and the services of the other three petitioners were terminated. The essential nature of the work of these petitioners was to receive, store, handle, and issue certain materials and supplies used in the schools of Jersey City. Such duties included the preparation and maintenance of inventory lists, receipt and delivery records, assignments to delivery trucks, and related documents, files and records. The Commissioner does not believe that these related record-keeping functions bring petitioners within the purview of clerical positions entitled to tenure protection under *R. S. 18:6-27, supra*, where the words "any secretarial or clerical position" must be read together to denote office workers with varying skills and responsibilities.

"The terms 'clerk' and 'secretary' as applied to subordinate and ministerial functionaries are by popular usage synonymous terms and are frequently used interchangeably." *Words and Phrases*, vol. 7, page 485.

The Commissioner finds that the respondent acted within its legal discretion in abolishing the position of one and terminating the services of the other three petitioners.

Petitioner Walter Eckert was employed as supervisor of maintenance, having supervisory responsibility over all mechanical repairmen in the maintenance department. His services as supervisor were terminated and he was reassigned as custodian, a position which he had previously held. In the light of the decision of the Board that maintenance work could be done more economically through individual contracts than by its own maintenance staff, the Commissioner does not see bad faith in the subsequent employment of another person in another position, some part of whose duties were those of petitioner. Since the position of supervisor of maintenance is not protected by any tenure statute in Title 18, the Commissioner finds that the respondent was within the limits of its discretionary power in terminating petitioner's services. The petition is accordingly dismissed.

Petitioner William D. Hayden, deceased, (Mildred D. Hayden, administratrix, substituted as party petitioner) was employed as Supervisor Class 1C

at the time that his position was abolished. Counsel for petitioner read into the record (Tr. Feb. 8, 1961, p. 93) that petitioner was first appointed in 1949 as a checker; he was appointed assistant storekeeper in 1951; Supervisor Class II, in 1954; Supervisor Class 1B, in 1956; and Supervisor Class 1C on April 1, 1957. At no time does this record show that he held a position which entitled him to tenure protection. The Commissioner finds that the Board was within its authority in abolishing his position. The petition is therefore dismissed.

Petitioner Joseph Panucci was employed in the classification of Supervisor III-E at the time his services were terminated. He testified that his work was as a supervisor of janitorial services, under the direction of petitioner Hayden. Petitioner Panucci was originally appointed as a fireman in 1930, later worked on a truck, and from 1951 to 1957 was assigned as truck chauffeur. The Commissioner finds that no tenure rights attach to his position as supervisor, and that the Board was within its rights in reassigning him to his earlier position as fireman. His petition is therefore dismissed.

Petitioners Thomas Meigh and William O'Toole were employed as utility men until July 24, 1958, when by resolution their services were terminated. While it was testified that the duties of these men included, on occasion, general cleaning work, they served also as groundsmen and in other general labor activities. No evidence was introduced to show that these men were enrolled in the Teachers' Pension and Annuity Fund, as they would have been had they been classified in a janitorial status under the definition in paragraph (p) of R. S. 18:13-112.4. See *Bowen v. Jersey City Board of Education* and *Cimo v. Jersey City Board of Education*, *supra*. The Commissioner, therefore, finds that the termination of petitioners' services was an act within the Board's discretion and accordingly dismisses their petitions.

Petitioner John A. Lynch was employed as a watchman until his services were terminated. He claims protection of his employment under the terms of the janitors' tenure statute, R. S. 18:5-66.1, on the grounds that his work as a watchman should be included under the generic term "janitorial employee" and by virtue of the fact that for several months prior to his termination he had been doing custodian work at the direction of Mr. Panucci, Supervisor of Janitors. Again, as in the case of petitioners Meigh and O'Toole, the Commissioner finds no clear evidence that the position of watchman is in fact a janitorial position entitled to tenure protection. The petition is therefore dismissed.

Petitioner Benjamin Mosley was employed as a fireman. On July 1, 1958, his services as fireman were terminated and he was assigned as a porter. On July 10, his assignment as porter was rescinded and he was assigned as watchman, the position in which he had originally been employed in January, 1957. He testified that he had been promoted to fireman in March 1958, but did porter work. The position of fireman is protected under the terms of R. S. 18:5-66.1, which requires that when the number of janitors or janitorial employees is reduced, those who are dismissed shall be placed on a preferred eligible list in order of years of service for re-employment whenever vacancies occur. The minutes of the Board indicate that on September 10, 1959, petitioner was reassigned as fireman. Petitioner testified that he had been placed on an eligibility list and that he knew of no firemen who were hired

ahead of him. The Commissioner finds that petitioner's rights under *R. S. 18:5-66.1* were observed and finds no basis for granting the relief sought in his petition. The petition is therefore dismissed.

Petitioner William Sadlack was employed as supervisor of attendance department. On August 28, 1958, his position was abolished for reasons of economy and he was reassigned as an attendance officer. The position of attendance officer in a city school district is protected by tenure after employment for one year (*R. S. 18:14-43*); there is no tenure protection for supervisory positions as such. Where a supervisory position in the instructional staff is abolished, the supervisor reverts to the position of teacher in which he holds tenure. See *Werlock v. Board of Education of Woodbridge*, 1939-49 *S. L. D.* 107, 112, affirmed State Board of Education 1949, Superior Court, 5 *N. J. Super.* 140 (1949); *Lange v. Board of Education of Audubon*, 1951-52 *S. L. D.* 49, affirmed State Board of Education, 1952-53 *S. L. D.* 83, affirmed Superior Court, 26 *N. J. Super.* 83 (1953). Thus, by the same reasoning, petitioner was properly reassigned as attendance officer when his supervisory position was abolished. The petition is accordingly dismissed.

The petitions of William Gill, Joseph Ennis, and Anthony Lamberti, carpenters; Sebastian D'Amico and Anthony Varacelli, hod carriers; and Henry Majola and Harold J. Stoebling, steamfitters, may be considered together. Their services were terminated by resolution on July 24, 1958. It was held in the cases of *Bowen* and *Cimo*, *supra*, that the positions of carpenter and sheetmetal worker are not protected by tenure statutes in Title 18. The reasoning followed in the decisions in these cases is dispositive of the petitions in the instant case. The petitions are accordingly dismissed.

Petitioners Alexander Manzo and Jay Marker were employed as managers in the recreation departments. Their services were terminated by resolution on July 10, 1958. Since these positions are not protected by any tenure statute (*Cf. Baratelli v. Board of Education of Jersey City*, 1956-57 *S. L. D.* 80), the Board was within its authority in terminating their services. Their petitions are dismissed.

Petitioner John Toscano was classified as Clerk Class 11A. The resolution of July 24, 1958, which terminated his services, states that he never actually served in that capacity but as a matter of fact served as utility man in the physical education department (1958-59 minutes, p. 125). Since no testimony was introduced to controvert this assertion or to clarify the exact nature of his duties, the Commissioner finds that the duties, not the title are determinative. See *Phelps v. State Board of Education, et al.*, 115 *N. J. L.* 310 at 315 (*Sup. Ct.* 1925); *DeBros v. West New York Board of Education*, 1939-49 *S. L. D.* 167 at 169, affirmed State Board of Education 1946. The position of utility man is not protected by tenure statutes. The petition is therefore dismissed.

Petitioner Ettore Vignone was employed as Supervisor Class IB in the maintenance department. His services were terminated by resolution on July 1, 1958. Despite his testimony that ninety percent of his time was occupied with paper work, his further testimony that his duties were, in general, to cooperate with the supervisor of maintenance in the supervision of the entire maintenance department (Tr. Feb. 7, 1961, p. 51) is controlling in the Commissioner's finding that petitioner was not protected by tenure either as a janitor or as one holding a clerical position. The Commissioner must hold,

therefore, that the Board acted within the scope of its authority when it terminated his services. The petition is dismissed.

Petitioner Michael A. Fiore was employed by respondent as a teacher until 1953, when he vested his rights as a teacher in the pension fund. On July 15, 1957, he was appointed Business Manager; on October 10, 1957, his title was changed to Business Manager and Custodial Director to permit his reinstatement in the pension fund. This change of title, by petitioner's own testimony, involved no change of duties. On July 1, 1958, by a majority vote of all the members of the Board, the position of custodial director was abolished and petitioner's services as Business Manager were terminated. Petitioner claims tenure as a custodial worker under *R. S. 18:5-66.1* and *67*. The Commissioner cannot agree with this contention. Not only had petitioner not served in a capacity that would entitle him to tenure as a janitor or janitorial employee, but petitioner in his own testimony made no separation between his duties as Custodial Director and those as Business Manager. A business manager acquires tenure after three years of service (*R. S. 18:5-51*); prior to acquiring tenure he may be removed by a majority vote of all the members of the board (*R. S. 18:5-45*). The Commissioner finds that the respondent acted within the scope of its authority. The petition is accordingly dismissed.

Petitioner Albert Sauerbier was employed as foreman of electricians in the maintenance department which position was abolished for reasons of economy on July 1, 1958. This position is not protected by any tenure statute in Title 18; the Commissioner has no jurisdiction to decide the tenure rights of veterans. *Lascari v. Board of Education of Lodi*, 1954-55 *S. L. D.* 83, at 85, affirmed State Board of Education 1955, affirmed Superior Court 36 *N. J. Super.* 426 (1955). Despite his long years of service and the fact that he would soon have been eligible for pension had his position not been abolished, the Commissioner will not substitute his judgment for that of the Board in the legal exercise of its discretionary powers. *Mackler v. Board of Education of Camden*, 1953-54 *S. L. D.* 53 at 65, affirmed State Board of Education 1953, affirmed Supreme Court, 16 *N. J.* 362 (1954). The petition is accordingly dismissed.

After a careful study of the extensive testimony, exhibits, and briefs in this case, the Commissioner finds no such clear showing of improper or dishonest motives, bad faith, or arbitrary actions with regard to petitioners as would be sufficient for him to intervene to set those actions aside. He determines, therefore, that the allegations of bad faith in the abolition of positions or termination of employment of the petitioners have not been sustained. He determines, further, that, with the exception of petitioner Yeo, the protection of tenure afforded by statutes in Title 18 was not violated in the case of any other petitioner. He directs that the Jersey City Board of Education reinstate petitioner Wilfred Yeo in his former position in accordance with the terms of this decision, *supra*. In all other respects, the petitions are dismissed.

COMMISSIONER OF EDUCATION.

February 28, 1962.

Pending before State Board of Education.

XVII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE ANDOVER CONSOLIDATED SCHOOL DISTRICT ON FEBRUARY 13, 1962

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for the election of three members to the Board of Education of the Andover Consolidated School District for full terms of three years at the annual school election held February 13, 1962, were as follows:

Number of votes cast .....	255
Number of votes counted .....	255
Edwin VanHise .....	137
H. Alexander Roney .....	172
Marie P. Taylor .....	137
Vernon D. Siple, Jr. ....	139
George Wilson .....	130
Mrs. George Burd .....	1

Pursuant to a request from candidate Marie P. Taylor, a recount of the ballots was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Sussex County Superintendent of Schools on March 2, 1962.

At the conclusion of the recount, no votes had been challenged and the tally agreed in every respect with the announced results above.

The Commissioner of Education finds and determines that H. Alexander Roney and Vernon D. Siple, Jr., were elected to the Andover Consolidated School District Board of Education for full terms of three years. He further finds and determines that there was a failure to elect a candidate to the third seat on the Board as no other candidate received a plurality of the votes cast. (R. S. 18:7-41) The Sussex County Superintendent of Schools is directed, therefore, under the authority of R. S. 18:4-7d, to appoint a qualified citizen and resident of the district to membership on the Board of Education, who shall hold office until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION.

March 7, 1962.

XVIII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual school election in the School District of the Township of Washington, Gloucester County, on February 13, 1962,

for the election of three members to the Board of Education for full three-year terms were as follows:

Robert B. McClave .....	223
Frank P. Elwood, Jr. ....	317
Charles H. Zimmerman .....	303
Samuel L. Ayling .....	223
Frank J. Thoma .....	62
Jorge A. Buendia, Jr. ....	111

Votes were cast also for three additional write-in candidates but not in significant amounts.

Pursuant to a request made to the Commissioner of Education by Mr. McClave and Mr. Ayling, the Assistant Commissioner of Education in Charge of Controversies and Disputes conducted a recount of the ballots on March 5, 1962, at the office of the Gloucester County Superintendent of Schools. It was agreed that the recount would be confined to a determination of the votes cast for Mr. McClave and Mr. Ayling. At the conclusion of the recount, with seven ballots referred, the tally of the uncontested ballots stood as follows:

Robert B. McClave .....	222
Samuel L. Ayling .....	219

After further examination of the seven referred ballots, it was agreed by both candidates and the Assistant Commissioner in charge of the recount that all seven were valid and should be added to the tally. The final count then became:

	<i>Uncontested</i>	<i>Referred</i>	<i>Total</i>
Robert B. McClave .....	222	1	223
Samuel L. Ayling .....	219	6	225

The Commissioner finds and determines that Samuel L. Ayling was elected to a seat on the Board of Education of the Township of Washington, Gloucester County, at the annual school election on February 13, 1962.

COMMISSIONER OF EDUCATION.

March 6, 1962.

XIX.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF FAIRFIELD, CUMBERLAND COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting on the items of appropriation for the ensuing school year at the annual school election held February 13, 1962, in the School District of the Township of Fairfield, Cumberland County, were as follows:

TOTAL VOTES CAST .....	630	
		<i>Yes</i> <i>No</i>
Current Expenses (\$178,642.50) .....	237	247
Authorization to issue bonds (\$110,000) .....	224	253

Pursuant to a request from the Board of Education, a recount of the votes cast was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Cumberland County Superintendent of Schools on February 16, 1962.

At the conclusion of the recount, the tally stood as follows:

	<i>Yes</i>	<i>No</i>	<i>Referred</i>	<i>Total</i>
Current Expense .....	220	229	181	630
Bond Issue .....	212	237	181	630

Of the 181 ballots referred, 115 had failed to vote for either question, leaving 66 ballots to be determined. Fifty-one of these were determined to be proper votes which should be added to the tally, and 4 were voided by agreement. The count then stood as follows:

<i>Current Expense</i>	<i>Yes</i>	<i>No</i>	<i>Void</i>	<i>Total</i>
Uncontested .....	220	229	-----	449
Counted by agreement .....	13	17	-----	30
No vote on either question .....	-----	-----	115	115
No vote on this question .....	-----	-----	21	21
Voided by agreement .....	-----	-----	4	4
	<hr/>	<hr/>	<hr/>	<hr/>
	233	246	140	619
 <i>Bond Issue</i>				
Uncontested .....	212	237	-----	449
Counted by agreement .....	14	10	-----	24
No vote on either question .....	-----	-----	115	115
No vote on this question .....	-----	-----	27	27
Voided by agreement .....	-----	-----	4	4
	<hr/>	<hr/>	<hr/>	<hr/>
	226	247	146	619

With a plurality of 13 and 21 respectively on each of the questions, there was no need to determine the remaining 11 ballots because, even if all of them were counted as "yes", the "no" votes still prevail.

The Commissioner finds and determines that both the current expense appropriation item and the authorization to issue bonds failed of approval by the voters.

COMMISSIONER OF EDUCATION.

March 7, 1962.

XX.

BOARD OF EDUCATION MAY DISMISS JANITOR  
FOR INEFFICIENCY

IN THE MATTER OF THE TENURE HEARING IN THE CASE OF ALBERT BAILEY  
(EGG HARBOR TOWNSHIP, ATLANTIC COUNTY)

For the Board of Education: Louis D. Champion, Esq.

For Albert Bailey: David R. Brone, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This case comes before the Commissioner as the result of a certification of charges to the Commissioner by the Board of Education of the Township of Egg Harbor, pursuant to the provisions of *R. S. 18:3-23, et seq.*

The charges were preferred by Richard Sutton, supervisor of janitors of the Egg Harbor Township School District, against Albert Bailey, a janitor at Farmington School, alleging inefficiency in that he violated certain rules of the Board for the conduct of the janitors in their work. In accordance with the procedures established by *R. S. 18:3-26*, when charges of inefficiency are made, the Board on April 6, 1961, gave Mr. Bailey written notice of the alleged inefficiency, with such particulars as to give him an opportunity to correct and overcome the same. On July 7, 1961, at the expiration of a 90-day period, Richard Sutton filed the written charges of inefficiency, and on July 13, 1961, the Board found that the alleged violation of its rules had not been corrected. Having determined that the charges and the evidence in support thereof would be sufficient, if true in fact, to warrant dismissal or a reduction in salary, the Board suspended Albert Bailey without pay and certified the charges to the Commissioner for hearing and determination.

A hearing was held on December 8, 1961, by the Assistant Commissioner in Charge of Controversies and Disputes, in the Court House at Mays Landing. Briefs of counsel were received.

The written charges allege the following violations of rules:

"1. That he has since the beginning of the school term on September 12, 1960, and up until the present time, failed to dust the school rooms in said school daily, in violation of Rule No. 2.

"2. That he has failed since the beginning of the school as aforesaid, to keep clean at all times and scrub when necessary—all rooms, halls and stairs in said school, in violation of Rule No. 12.

"3. That he has failed since said September 12, 1960, to scrub and wax or strip, seal and wax, all asphalt tile floors in the building, in violation of Rule No. 13.

"4. That he has failed and neglected since the said September 12, 1960, to keep all windows in the school building cleaned both inside and outside at all times, in violation of Rule No. 16.

"5. Since September 12, 1960, he has failed and neglected to clean the Urinals, Toilet Bowls and Sinks, in the school, remove stains and keep the toilet rooms clean and in good condition daily, in violation of Rule No. 27.

"6. He has failed and neglected to keep the heater rooms clean and clear of inflammable materials, since the said September 12, 1960, in violation of Rule No. 32.

"7. Since September 12, 1960, he has failed to sweep at least once a day all steps and walks, in violation of Rule No. 39.

"8. That he failed and neglected since September 12, 1960, to check the school for electric power failure, heating failure, broken or leaking pipes, or

refrigerator trouble, ventilator trouble, over-heated electric motors, breaking or entering, water pump failure and vandalism, in violation of Rule No. 40.

“9. That he has failed and neglected to replace fuses, burned-out electric bulbs or fluorescent tubes and starters, since September 12, 1960, in violation of Rule No. 42.”

Respondent Bailey denies that he has been inefficient and neglectful of his duties as janitor at Farmington School, and specifically denies violation of rules as charged.

Testimony was heard from the Secretary of the Board, who serves as superintendent of buildings and grounds, the supervisor of janitors, the principal and one teacher at Farmington School, the superintendent of schools, the librarian of the Audio-Visual Aids Commission of Atlantic County, which maintains a film library in the school, and from respondent Bailey himself.

While it appeared that there was some reticence on the part of certain witnesses to testify, and there was general agreement that the respondent was courteous, friendly, and obliging, the weight of the testimony by those directly responsible for the supervision of respondent's work sustains charges numbered 1 through 7, and number 9, *supra*. The testimony on charge No. 8 appears to relate to respondent's failure to report to the school for three days when the schools were closed because of a heavy snowstorm in December, 1960. While rule No. 40 of the Board's rules for janitors requires a daily check of the utilities systems in the building, rule 41 provides:

“All school holidays from September through June may be taken off provided all work heretofore specified is completed and that the schools are in proper condition for reopening after the holiday.”

Respondent explains his absence under this rule, which may be regarded as ambiguous when read with rule 40.

Respondent admitted full knowledge of the Board's rules. He made no claim that the school was too large to be cared for by one man. The testimony shows that he was provided with such cleaning equipment and supplies as were needed for his work. His frequent reply, when asked to perform a particular task, was that “he'd do the best he could and he only had one pair of hands.” (Tr. p. 23), or that “he would get at it” (Tr. p. 45), or “I will do it” (Tr. p. 75); but, in the words of the principal: “And sometimes it was carried out and sometimes it wasn't carried out.” (Tr. p. 75). On direct examination, respondent testified as follows: (Tr. p. 105)

“Q. Did Mr. Sutton ever ask you to do some things, as your supervisor, some things with relation to janitor duties?

“A. Yes.

“Q. Did you do what he told you to do?

“A. Whenever I could, if I wasn't doing something else or something didn't come ahead of it.

“Q. Well, if something did come ahead of it, did you get around to doing it?

“A. I tried to pick the most important things first.”

The testimony further shows that after being notified of the charges against him, respondent did not correct the conditions charged. Respondent testified (Tr. p. 121) that after receiving notice he "kept on just the way I always did and the reason was because I thought I was doing a respectable job."

Some effort was made to introduce testimony showing that Farmington School was not less clean than other schools in the district. The Commissioner does not find this relevant. The sole question is whether respondent was inefficient in his neglect of or violation of the rules of the Board governing the work of janitors.

The Commissioner finds that respondent failed to carry out the requirements of his employment as set forth in rules numbered 2, 12, 13, 16, 17, 32, and 42 of the "Rules for Janitors of Egg Harbor Township Public Schools." He finds further that, having been given due notice of his inefficiency as required by law, respondent failed to overcome or correct the causes of complaint against him. He, therefore, determines that the charges against respondent are sufficient to warrant his dismissal.

COMMISSIONER OF EDUCATION.

March 22, 1962.

XXI.

CHARGES OF ILLEGAL ACTIONS OF BOARD OF EDUCATION  
MUST BE SUSTAINED BY EVIDENCE

MICHAEL J. NOLAN,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF MAYWOOD, BERGEN COUNTY,

*Respondent.*

For the Petitioner, Pro Se

For the Respondent, G. Tapley Taylor, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This case comes before the Commissioner as the result of a petition in which the petitioner, a citizen of the Borough of Maywood, alleges certain irregularities in connection with bond issue referendums, the awarding of contracts and payment of bills, and the use of the public schools.

Prior to the filing of its answer, respondent offered a motion to strike the petition, contending that the charges were purely argumentative, or lacking in such definiteness as would afford opportunity for defense, or referred to actions of others than the Maywood Board of Education.

After hearing argument, the Commissioner on November 22, 1961, denied the motion, saying that "petitioner has made certain charges which, if proven true, would constitute violations of school laws." He concluded that petitioner was entitled to be heard and to submit proof of his charges.

A hearing on the merits of the charges was held before the Assistant Commissioner in Charge of Controversies and Disputes at the County Administration Building in Hackensack on January 18, 1962.

The petition may be summarized as follows:

1. That the Maywood Board of Education illegally published and distributed brochures urging passage of bond issue referendums on October 10, 1960, and July 22, 1961. (Charges numbers 1 and 2 in the petition of appeal.)

2. That the Maywood Board of Education misinformed the public with regard to essential facts about the school building program for which the bond issue referendum of July 22, 1961, was held. (Charge number 3 in the petition of appeal.)

3. That the failure of the Board to hold a public hearing prior to the special election of July 27, 1961, constituted a violation of law. (Charge number 4 in the petition of appeal.)

4. That contracts have been awarded and bills paid without Board approval in the form required by law. (Charge number 6 in the petition of appeal.)

5. That, in violation of the terms of the pertinent statute, the Board illegally permitted the use of a school building as a polling place. (Charge number 7 in the petition of appeal.)

6. That the Board authorized construction work and payment of architect's fees before contracts were signed and before approval of bond issue referendum proceedings by the Attorney General.

In the course of the hearing, on motion of counsel for respondent, that part of the first charge which relates to actions of the respondent with regard to the bond issue referendum of October 10, 1960, was dismissed by order of the Commissioner as being out of time on the authority of *R. S. 18:7-89* which states:

“No action to contest the validity of any election ordering the issue of bonds or election or district meeting held pursuant to section 18:7-94 of this Title shall be commenced after the expiration of 15 days from the date of such election or meeting.”

Charge number 7 in the petition of appeal, stated as item No. 5 above, was dismissed at the conclusion of presentation of petitioner's testimony on the grounds that no evidence had been presented to substantiate a charge of any illegal act by respondent.

In addition to the charges as stated above which allege illegal acts by respondent Board, petitioner made other charges (numbers 5, 9 and 10 in the petition) which either in the charges themselves or in testimony offered to sustain them, relate to actions or opinions of others, including the Commissioner, the Bergen County Superintendent of Schools, the Director of Business Services, and the State Department of Education generally, and present no substantial proof of illegal action by respondent upon which the Commissioner can decide. The Commissioner, therefore, dismisses these charges.

There remain five charges on which testimony was heard which the Commissioner will consider. In so doing, he is constrained to point out that throughout the proceedings he recognized that petitioner, unskilled in legal proceedings, should be afforded the widest possible latitude in preparing his pleadings and arguing his case without infringing upon the rights of respondent.

Petitioner charges violation of *R. S. 18:14-78.1*, which prohibits the use of school children as such to participate in or distribute materials promoting, favoring, or opposing candidates, bond issue proposals, or any public question in a general or municipal or school election. He alleges that the publication by the Maywood Board of Education of "A Letter to the Residents of Maywood from Your Board of Education," circulated prior to the bond issue referendum of July 27, 1961, violated this prohibition. The testimony clearly showed that the "Letter" was circulated by mail, and in no way involved school children as contemplated in *R. S. 18:14-78.1*. The Commissioner, therefore, dismisses this charge.

Petitioner further charges that in the "Letter" mentioned above, facts concerning the building program were misrepresented. It is clear that the original bids received on the authorization of the 1960 referendum exceeded the architect's estimate by \$130,000. It is further clear that by rebidding, selection of bid alternates, and deferment of items in the building program, the Board determined that approval of an additional \$75,345 bond issue would provide the means to proceed with the planned building addition. The Commissioner notes that differences between architects' estimates and bid prices are not uncommon in school construction, for a variety of reasons which are not pertinent here. He can find no basis for petitioner's attack upon the architect's fee of 7 percent, which was testified to be normal for building addition projects, or the terms of the Board's agreement with the architect. Neither can he find merit in the characterization of respondent's consultation with municipal officials regarding the building program as "political intrusion." The Commissioner is aware of the high degree of responsibility of any board of education to acquaint the public with the full body of information needed to form an opinion on a question as vital as a bond issue for school construction. See *Halligan v. Board of Education of the Borough of Rutherford*, 1959-60 *S. L. D.* 198 at 199. In the instant case, as is noted further below, respondent attempted such an information program. The Commissioner finds that the evidence does not sustain the charge of misinformation.

Petitioner argues next that the failure of respondent Board to hold a public hearing prior to the 1961 bond issue referendum constitutes a violation of law. He relies upon *R. S. 18:7-46*, which deals with the calling and conduct of special elections, and says:

" \* \* \* The qualification of voters, conduct of the election \* \* \* shall be governed in all respects by the provisions of the law regulating the annual school election \* \* \* ."

The law respecting the conduct of annual school elections is set out in *R. S. 18:7-14* through *18:7-47.13*. Nowhere in these statutes is there provision for public hearing. As noted above, the Commissioner is already on record regarding the necessity for full information to the voters. In the case of

*Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*, 13 N. J. 172 (1953) the Supreme Court said:

“The need for full disclosure of all relevant facts is obvious, and the board of education is well qualified to supply the facts.”

and elsewhere:

“We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters. Indeed, as in the instant case, when the program represents the body’s judgment of what is required in the effective discharge of its responsibility, it is not only the right but perhaps the duty of the body to endeavor to secure the assent of the voters thereto.”

In the instant case, the “Letter” previously referred to contained the expression: “We urge your support in authorizing the additional funds.” The letter bore the names and telephone numbers of all Board members, the secretary of the Board, and the superintendent of schools, of whom recipients of the letter, apparently including Maywood citizens generally, were invited to ask questions. In addition, it appears that members of the Board attended “cottage parties” to answer questions and explain the building program. The Commissioner does not find that the “Letter” constituted an abuse of the Board’s right to seek voter approval within the meaning of the *Parsippany-Troy Hills* case, *supra*. Neither does he find that the absence of a formal public hearing, which the statutes do not require in such a case, deprived the public of fair opportunity to be informed about the building program.

Petitioner’s charge that the Board awarded contracts and paid bills in a manner contrary to the provisions of *R. S. 18:7-63* is seriously lacking in definiteness. The statute mentioned reads in part as follows:

“ \* \* \* The board shall neither enter into a contract nor pay a bill or demand for money against it, until the same has been presented and passed upon at a regularly called meeting of the board.”

Petitioner introduced into evidence the minutes of the meetings of the Board of Education held on August 14 and 21 and October 9, 1961. He contended that these minutes would show that bills were paid and contracts authorized without proper Board action. The Commissioner cannot find in these minutes evidence to support these allegations. All bills were presented for payment after review by the finance committee, and the necessary majority vote of the members was given to authorize payment. The motion authorizing award of the general construction contract for a building addition was passed unanimously by the members present. Similarly, other contracts for the employment of teachers and a construction clerk of the works were authorized by majority votes. While petitioner charged no violation of *R. S. 18:7-64*, which requires that bids be taken for “the repairing of an existing schoolhouse at a cost of more than \$2,000.00,” petitioner endeavored to show that contracts totaling more than \$2,000.00 for various types of repair work, such as carpentry, painting, and tile work, were issued without bids. In the absence of any evidence to establish that these contracts, or any combination of them totaling more than \$2,000.00, were for the repair “of an existing schoolhouse” the Commissioner must find that the charge has not been sustained.

Finally, petitioner charges that respondent illegally authorized payment of architect's fees and the beginning of construction work. He bases his charge upon the following sequence of events:

1. On October 10, 1960, approval was given by the voters to a bond issue for \$511,655 for a building addition.

2. Prior to the signing of a contract with the architect on November 23, 1960, the Board authorized payment to the architect of some \$6,000 for preliminary services.

3. On July 27, 1961, approval was given by the voters to a supplementary bond issue for \$75,345.00.

4. On August 1, 1961, ground-breaking exercises for the building were conducted.

5. On August 2, 1961, it is alleged, construction work was begun.

6. On August 3, 1961, formal approval was given by the Attorney General, as provided in R. S. 18:7-104, to the October 10, 1960, proceedings authorizing the issuance of bonds in the amount of \$511,655.00.

7. On August 14, 1961, it was reported to the Board that construction work had begun.

8. On August 23, 1961, a general construction contract for \$303,630.00 was signed.

9. On September 19, 1961, formal approval was given by the Attorney General to the July 27, 1961, proceedings authorizing the issuance of \$75,345.00 of bonds "with the reservation that bonds should not be issued until this matter with Nolan can be cleared." (Tr. pages 137, 138)

10. On October 4, 1961, contracts were signed for steel work, \$45,350.00; heating and ventilating, \$89,223.00; plumbing, \$35,100.00; and electrical work, \$65,535.00.

Petitioner contends that payment for services of the architect before a contract was entered into, and authorization to begin construction before the Attorney General's approval of the bond issue proceedings were in violation of R. S. 18:7-104, which reads:

"If the Attorney General has approved the legality of the proceedings authorizing the issuance of bonds as provided in section 18:7-87 of the Revised Statutes, the board may make contracts, within the authority conferred by the legal voters, notwithstanding the moneys to be raised therefor by the issuance of notes or temporary loan bonds or permanent bonds are not in hand."

With regard to the payment of fees to the architect for services before there was a contract, the State Board of Education in the case of *Mahoney and Fifer v. Lyndhurst Board of Education*, 1938 S. L. D. 246 (1921) reversed by State Board of Education, 249, said:

"In our opinion, Boards of Education have the power to employ architects to prepare preliminary plans or sketches upon which the Boards

may estimate the cost of school buildings for submission to the voters of their districts, and to pay for such services out of their general funds. They may, by contract with the architect, provide for payment out of the funds provided for the building when voted, but such a contract did not exist with respect to the plans involved in the present case.”

See also *Sleight v. Board of Education of Paterson*, 112 N. J. L. 422 (E. & A. 1934). It is clear, therefore, that even before a contract is entered into, payment for preliminary services prior to the contract is legal and valid.

With regard to the Board's authorization for construction work prior to the signing of contracts, there may have been an unwise eagerness to get the building under way, but in terms of R. S. 18:7-104, *supra*, there was no violation of law. Approval of the Attorney General of the proceedings for a bond issue of \$511,655.00 was dated August 3, 1961; a contract for general construction in the amount of \$303,630.00 was signed on August 23, 1961. Approval of bond issue proceedings for \$75,345.00 was dated September 19, 1961; contracts for the remaining phases of the building addition were signed on October 4, 1961. The risk here involved not the taxpayers but the contractor who undertook work on August 2 without the protection of a contract. The Commissioner cannot find evidence of violation of the statutes as charged.

The Commissioner finds and determines that the evidence submitted does not sustain the allegations of illegal actions by the respondent Board of Education.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

March 28, 1962.

Affirmed by State Board of Education without written opinion, September 5, 1962.

XXII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF WEST DEPTFORD, GLOUCESTER COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual school election held February 13, 1962, in the School district of the Township of West Deptford, for three seats on the Board of Education for the full term of three years, were as follows:

	<i>At Polls</i>	<i>Absentee Ballots</i>	<i>Total</i>
Maurice D. Michael .....	276	3	279
James C. Totten .....	287	2	289
Francis J. Altersitz, Jr. ....	278	0	278
Theodore J. Bauer .....	215	0	215
John M. Keller, Jr. ....	406	2	408

Pursuant to a request from Francis J. Altersitz, Jr., a recount of the votes cast was ordered by the Commissioner of Education and conducted by

the Assistant Commissioner in Charge of Controversies and Disputes at the office of the Gloucester County Superintendent of Schools on March 5, 1962. At the conclusion of the recount, the tally was found to be in all respects in agreement with the previously announced results.

The Commissioner finds and determines that John M. Keller, Jr., James C. Totten, and Maurice D. Michael were elected for full terms of three years to the Board of Education of the Township of West Deptford.

COMMISSIONER OF EDUCATION.

April 5, 1962.

XXIII.

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF HADDON, CAMDEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three members for full three year terms on the Board of Education of Haddon Township at the annual school election held February 13, 1962, were as follows:

	<i>At Polls</i>	<i>Absentee Ballots</i>	<i>Total</i>
Franklin P. Jackson, 3d ..	1035	4	1039
Morton C. Jacobs .....	952	2	954
Marvin L. Roberts .....	1178	4	1182
Harvey P. Hoy .....	687	1	688
James B. Durand .....	1401	5	1406

Pursuant to a request made by Morton Jacobs, a recount of the votes was ordered by the Commissioner of Education and conducted by the Assistant Commissioner in Charge of Controversies and Disputes at the office of the Camden County Superintendent of Schools on March 26, 1962. By consent of the petitioner, the recount was limited to a determination of the tally of votes for Morton Jacobs and Franklin P. Jackson, 3d. At the conclusion of the recount, the tally was as follows:

	<i>At Polls</i>	<i>Absentee Ballots</i>	<i>Total</i>
Franklin P. Jackson, 3d ..	1029	4	1033
Morton C. Jacobs .....	938	2	940
Referred ballots .....		51	

With a margin of 93 votes and only 51 ballots under question, there was no need to make a further determination as, even if all 51 of the referred ballots were counted for petitioner, he could not prevail.

The Commissioner finds and determines that James B. Durand, Marvin L. Roberts and Franklin P. Jackson, 3d were elected to seats on the Haddon Township Board of Education for full terms of three years.

COMMISSIONER OF EDUCATION.

April 5, 1962.

XXIV.

COMMISSIONER MAY TERMINATE BUT NOT MODIFY TERMS OF  
TEN-YEAR SENDING-RECEIVING CONTRACT

IN THE MATTER OF THE TERMINATION OR MODIFICATION OF THE SENDING-  
RECEIVING RELATIONSHIP BETWEEN THE BOARDS OF EDUCATION OF  
CHATHAM TOWNSHIP AND CHATHAM BOROUGH, MORRIS COUNTY.

For the Chatham Township Board of Education, Arthur Hensler, Esq.

For the Chatham Borough Board of Education, Wm. T. Osborne, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This decision is on a motion offered by respondent, the Board of Education of the Borough of Chatham, to dismiss the petition brought by the Board of Education of the Township of Chatham, to terminate, or modify, the existing sending-receiving agreement pertaining to secondary school pupils between the two boards. The motion is presented to the Commissioner on briefs of counsel.

Petitioner seeks to modify an agreement made in 1955, pursuant to *R. S. 18:14-7.3*, which reads as follows:

“Whenever a board of education, now or hereafter furnishing high school education for the pupils of another school district pursuant to section 18:14-7 of the Revised Statutes, finds it necessary to provide additional facilities for the furnishing of education to high school pupils, it may, as a condition precedent to the provision of such additional facilities, enter into an agreement with the board of education of such other district for a term not exceeding ten years whereby it agrees to provide such education to the pupils of such other district during the term of such agreement, in consideration of the agreement by the board of education of such other district that it will not withdraw its pupils and provide high school facilities for them in its own district during the term of said agreement, except as provided in this act.”

In the agreement, respondent undertakes to provide high school education for petitioner's pupils beginning with the school year 1955-56 and ending, following a gradual withdrawal plan, with a single twelfth grade class in 1964-65. An option in the agreement provides that petitioner may withdraw its ninth grade pupils at the close of the school year 1961-62. Petitioner seeks further modification of the agreement to permit withholding its tenth grade pupils also at the beginning of the school year 1962-63, so that during that year it would send only eleventh and twelfth grade pupils to respondent's high school, and only twelfth grade pupils in the 1963-64 school year. Thus, the sending-receiving relationship would come to an end at the close of the 1963-64 school year instead of 1964-65.

Respondent's position is that, regardless of the merits of petitioner's application, the Commissioner's statutory power under *R. S. 18:14-7.4* to authorize *termination* of the agreement does not include power to *modify the agreement*. Petitioner contends that the Commissioner's authority is not

so limited and that a liberal construction should be placed on his power to terminate the agreement pursuant to the statute which reads as follows:

“Any board of education which shall have entered into such an agreement may apply to the Commissioner of Education for consent to terminate same, and to cease providing high school education to the pupils of the other contracting district on the ground that it is no longer able to provide facilities for the pupils of the other district, or to withdraw its high school pupils from the schools of other contracting districts and provide high school educational facilities for them in its own district on the ground that the board of education of the receiving district is not providing school facilities and an educational program suitable to the needs of the pupils of the sending district or that the board of education of the receiving district will not be seriously affected educationally or financially by their withdrawal.”

The issue turns upon the construction of the word “terminate” in the statute cited, *supra*. The common definition of “terminate” as given in *Webster’s Third New International Dictionary*, 1961, is in part:

“\* \* \* to bring to an ending or cessation in time, sequence, or continuity \* \* \* to form the ending or conclusion of \* \* \* to end formally and definitely (as a pact, agreement, contract) \* \* \*.”

It is also defined in 86 *C. J. S.* at page 606, as follows:

“TERMINATE. In the absence of qualification, either directly or by context, the word ‘terminate’ means to put an end to; to make to cease; to end; as, to terminate an effort or a controversy; and it implies that that which is brought to an end had previously existed.”

The Supreme Court has said that “statutory language is to be given its ordinary meaning in the absence of specific intent to the contrary.” *State v. Sperry and Hutchinson Co.*, 23 *N. J.* 38 (1956); *Abbotts Dairies v. Armstrong*, 14 *N. J.* 319 (1954). When read in its context in the statute, *supra*, the meaning of “terminate” achieves its ordinary sense:

“Any board of education which shall have entered into such an agreement may apply to the Commissioner of Education for consent to *terminate* the same, and to *cease* providing high school education \* \* \*” (Emphasis supplied.)

Petitioner’s request as stated in its application to the Commissioner is “for consent to modify (or to advance termination of) a sending-receiving agreement,” and “to secure permission to accelerate further the withdrawal of students from the Borough and to advance by one year the termination of the agreement.” Clearly, the application does not ask the Commissioner to *terminate*, but rather to *modify* the agreement so as to advance the termination by one year. Petitioner in effect seeks termination of the agreement as regards the class of 1965, but wishes to preserve its effectiveness for the classes of 1963 and 1964.

“In the absence of an express provision therefore, a contract cannot be partially abrogated under a provision for its termination, hence, the party who elects to terminate cannot thereafter assert the contract for some purposes, while regarding it as an end for others.” 17 *C. J. S.* 893.

Consideration of *R. S. 18:14-7.3, supra*, clarifies the purposes of *R. S. 18:14-7.4*. "If doubt exists as to the proper construction of a statute, resort may be had to the preamble for clarification." *Lane v. Holderman*, 23 *N. J.* 304, 318 (1957). The Commissioner finds ample expression of the intent of the Legislature here. Boards of education wishing to build additional high school facilities to accommodate not only their own pupils but those of sending districts are enabled under this act (Chapter 273 of the Laws of 1953) to make substantial predictions of their requirements for facilities and their tuition receipts for a period of ten years into the future. Without such assurance that sending districts will not withdraw and provide their own high school facilities shortly after additional facilities have been constructed, receiving districts might hesitate to act. The conditions for termination of such agreements by the Commissioner are, therefore, precise.

Petitioner opposes respondent's motion further on the ground that prior to the ten-year agreement made pursuant to *R. S. 18:14-7.3*, a sending-receiving relationship already existed under the terms and conditions of *R. S. 18:14-7*, which the agreement reinforced but could not change. The latter statute provides in part:

"Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof to attend, may designate any high school or schools of this State as the school or schools which the children of such district are to attend. \* \* \*

"No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner \* \* \*. Any sending or receiving district aggrieved by the decision of the commissioner, may appeal such decision to the State Board of Education which, in its discretion, may affirm, revise or modify such decision."

The provisions of *R. S. 18:14-7*, as specifically stated in its first sentence, apply only to a district "which lacks or shall lack high school facilities \* \* \*." Once a district provides its own high school facilities, the statute cited is inapplicable as to it. Under the statute, the Commissioner may consider a request by a sending district for a "change" of high school designation or by a receiving district that the pupils it is required to receive be "withdrawn." But this has no application to the instant case where, after the expiration of the agreement, petitioner will have in operation its own high school facilities. It was for this exact purpose that *R. S. 18:14-7.3* was enacted, permitting boards of education to fix a sending-receiving relationship for up to ten years in order to safeguard the receiving district from loss of tuition revenue should the sending district decide to provide its own high school facilities either by itself or by joining in a regional high school district. Absent such an agreement, the sending district could withdraw once its facilities are ready, without any necessity for an application and approval

by the Commissioner. Since *R. S. 18:14-7* does not control the instant case, the decisions of the Commissioner in respect to this statute, as cited by petitioner, do not apply.

The Commissioner determines that *R. S. 18:14-7.4* gives him the power to consent to terminate a sending-receiving agreement between two boards of education, but he finds no authority by which he can act to alter or modify the terms of such a contract. Respondent's motion is granted, therefore, and petitioner's application is dismissed.

COMMISSIONER OF EDUCATION.

April 17, 1962.

XXV.

BOARD OF EDUCATION MAY WITHHOLD SALARY INCREMENTS

RAYMOND E. WACHTER,

*Petitioner,*

v.

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

*Respondent.*

For the Petitioner: Carl R. Fenstemaker, Esq.

For the Respondent: Harold M. Kain, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner here seeks to have reversed the action of the respondent in withholding his salary increment on the ground that such action was arbitrary, discriminatory, and capricious. Respondent contends that the withholding of petitioner's salary increment was within its discretion, and that such action was based on good and sufficient cause.

A hearing in the matter was held before the Assistant Commissioner in Charge of Controversies and Disputes on January 26, 1962, at the office of the Essex County Superintendent of Schools in Newark.

Petitioner was first employed as a music teacher in the Millburn Public Schools in 1946. During the school year 1959-60 he was earning an annual salary of \$8,300, and was on the next to the maximum step of the salary guide for teachers. Had he been granted an increment in accordance with the guide adopted for the 1960-61 school year, his salary for that year would have been \$9,000, the maximum on the guide. Upon the recommendation of the Superintendent of Schools that petitioner's increment for 1960-61 be withheld, the Board of Education on May 9, 1960, approved a contract for the petitioner calling for a salary of \$8,300, plus \$100 compensation for extra duties.

The salary guide adopted by respondent Board on January 25, 1960, for use in determining salaries for the 1960-61 school year (P-1) contains these two statements:

“I. This Salary Guide is not in any sense a contract between the teachers and the Board of Education. It is not intended to provide for strictly automatic increases. It will be subject to review annually and may be revised, suspended or abrogated by the Board of Education at any time.

“II. Since no guide can be fairly administered if interpreted on a rigidly mechanical basis, the following modifications are provided:

“(A) In determining the teacher’s salary in any year, the increment, adjustment, or both, for that year may be withheld for reasons judged sufficient by the Superintendent and approved by the Board of Education. \* \* \*”

The State minimum salary law for teachers (*R. S. 18:13-13, et seq.*) provides a schedule for minimum salaries and increments for teachers in various classifications. *R. S. 18:13-13.13* provides, *inter alia*:

“Boards of education shall have the power to increase for any teacher or classification of teachers included in any schedule, the initial salary or the amount of any increment or the number of increments.”

The guide adopted by respondent provides for higher initial salaries and a greater number of increments than are required by the statute. Petitioner makes no claim that any rights accruing under the minimum salary law have been violated.

The Superintendent testified that petitioner’s “competency had been a matter of continual discussion” over the period during which he had been Superintendent (since 1950). He testified further that during the year preceding the Board’s decision to withhold the increment, the matter of “competency had been raised and discussed by me with the Board, and with the Board to me.” (Tr. p. 86). It was his determination, approved by the Board, that sufficient reason existed for withholding the increment.

The question before the Commissioner is not the competency of the petitioner, or even determination of the merit of respondent’s reasons for withholding petitioner’s increment. The sole question before the Commissioner is whether the Board in accordance with its own guide, *supra*, acted on the basis of “reasons judged sufficient by the Superintendent and approved by the Board of Education,” or whether the Board acted arbitrarily and without reason. In this respect, the instant case differs from the case of *Kopera v. Board of Education of West Orange*, decided by the Commissioner on August 2, 1960, on remand from Superior Court, Appellate Division, 60 *N. J. Super.* 288 (1960). *Kopera* was denied an increment because her work had been rated “unsatisfactory.” The salary guide of the district provided automatic increments unless the services rendered were evaluated as unsatisfactory. In remanding the case to the Commissioner, the Court said:

“ \* \* \* the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice and closely familiar with the *mise en scene*; and that the burden of proving unreasonableness is upon the appellant.”

In the instant case, the salary guide specifically excludes the *automatic* increment feature and requires that the withholding of increments shall be based on nothing more than "reasons judged sufficient by the Superintendent and approved by the Board of Education." No measure of sufficiency of reasons is provided, as in the case of *Kopera, supra*.

The testimony of the Superintendent was that he had been dissatisfied with the performance of the marching band which petitioner directed, that petitioner had not developed a program to hold and continue training of string instrument players coming to the high school from the lower schools, that petitioner was a disruptive influence in departmental staff meetings, and that there had been difficulties in getting petitioner to accept responsibility for marching band or rehearsals outside of school time.

Nothing in the testimony gave any indication of bias or prejudice on the part of the Superintendent, or demonstrated arbitrary or capricious behavior on the part of the Board in approving his reasons for recommending withholding of the increment. The Commissioner will not intervene in actions of a local board of education which lie within the exercise of its discretionary powers unless such actions are patently arbitrary, without rational basis, or induced by improper motives. *Kopera v. Board of Education of West Orange, supra*, at 294; *Boult v. Board of Education of Passaic*, 136 N. J. L. 521, (E. & A. 1947).

The Commissioner finds and determines that petitioner's salary increment for the school year 1960-61 was withheld for reasons judged sufficient by the Superintendent of Schools and approved by respondent Board of Education, and that respondent's action was properly within its discretionary authority.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

April 19, 1962.

XXVI.

PREPONDERANCE OF EVIDENCE TO SUPPORT CHARGES OF MIS-  
CONDUCT SUFFICIENT TO WARRANT DISMISSAL OF  
JANITOR UNDER TENURE

VICTOR DEBELLIS,

*Appellant,*

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE,  
ESSEX COUNTY,

*Respondent.*

For the Appellant, Sam Magnes, Esq.

For the Respondent, Lee A. Holley, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was a janitor under tenure at the Park Avenue School in the City of Orange. On June 4, 1959, he was suspended from his position as a

result of charges filed against him in the Municipal Court by the parent of a pupil in the school. Hearings were held before the Board of Education on the charge that he had carnally abused a pupil in the Park Avenue School during the last week of April, 1959. On December 8, 1959, appellant was found guilty of the charges and his employment was terminated as of June 4, 1959, the date of his suspension. Four members of the five member Board voted yea on the call for yeas and nays. One member had not participated in the hearings. There was an appeal to the Commissioner.

The Commissioner in his decision held as follows:

1. The Board of Education was not precluded from finding appellant guilty because of the failure of the Grand Jury to indict him.
2. The measure of proof necessary for a finding of guilty is a belief of a majority of the Board members that the proofs support the charges by a fair preponderance of believable evidence.
3. No grounds for reversal exist *per se* because board members act as complainants, prosecutors, judges and jurors.
4. The member who had not heard the testimony did not participate in the discussion and determination.
5. The meeting at which the vote was taken commenced after the statutory limit of 8 P. M. and no valid determination could be made at such a meeting.
6. In his review, the Commissioner's function is to examine the record to determine whether there was substantial, competent and relevant evidence to support the finding of guilt and whether there was a rational basis for the determination of the Board of Education.
7. The findings of fact in the instant case were inadequate for a proper review of the Board's determination.

Despite the holding that a valid determination could not be made at a special meeting which commenced after 8 P. M. and that adequate findings of fact were lacking, the Commissioner held that the matter was of too serious an import to dispose of by technicalities and, therefore, he did not reverse the judgment below and reinstate the appellant. Instead, he remanded the case to the Board of Education for a full finding of fact with any action thereon to be made at a properly called meeting. The Board of Education was authorized to make such further inquiry as it deemed advisable, amend and supplement the charges, if any, call additional witnesses and take such other steps as might be appropriate for the proper determination of the matter. In accordance with *Mackler v. Camden*, 16 N. J. 362 (*Sup. Ct.* 1954) the Board was reminded that only members who have heard the evidence may participate and that if, for any reason, other members participated, it would be necessary to rehear the testimony as was done in *Mackler v. Camden, supra*.

The Board of Education on June 19, 1961, resolved that any further proceeding and findings of fact should be determined by the remaining three members of the Board of Education who had heard the prior testimony. The fourth person who had originally heard the testimony and voted to dismiss appellant was no longer a member of the Board. On July 10, 1961, at 7:42

P. M. a special meeting of the Board of Education was held for the purpose of disposing of the instant case. The three members who had previously heard the testimony were present. The Board made the following finding of fact:

- “1. On April 30, 1959, Victor W. DeBellis was employed at Park Avenue School as a custodian, or sometimes called janitor, and was in or about the premises of the janitors’ lunchroom and boiler room during the pertinent periods of time between 10:15 A. M. and 11 A. M.
- “2. Paulette Miller, twelve (12) year old student, of Park Avenue School, on April 30, 1959, took the female students of the third grade to the lavatory in the basement and then outside to await the arrival of their teacher.
- “3. Upon the arrival of the third grade teacher, Paulette Miller, at the request of the gym teacher, Mr. Felber, delivered a parcel to the janitors’ lunchroom and placed it therein.
- “4. Said Paulette Miller tarried in the janitors’ lunchroom until met by Victor W. DeBellis, who took her by the hand into the boiler room and led her upon a platform located in said boiler room.
- “5. At that time, the said Victor W. DeBellis did remove the lower clothing of Paulette Miller, unloosened his trousers and in some manner placed his male organ against the female organ of Paulette Miller and eventually had an ejaculation.
- “6. Said action constitutes sufficient misbehavior as charged in the verified complaint of Mrs. Ruth Miller against Victor W. DeBellis in order to demand his immediate suspension from employment as of written notice thereof on June 4, 1959, and to justify his final and permanent discharge from employment for all purposes because of such misbehavior.
- “7. Paulette Miller was an extremely cooperative and credible witness testifying to the best of her knowledge to the matters occurring.
- “8. Victor W. DeBellis, under the circumstances, was not as cooperative and candid as would reasonably be expected upon the serious charges involved and did not appear as a believable witness.”

Two members voted yea and the third participating member recorded not voting on adoption of the findings of fact.

The Board next moved to a resolution finding appellant guilty of charges of misconduct and misbehavior and suspending, terminating and extinguishing all rights to employment and benefits in accordance with law as of June 4, 1959. Upon roll call, two members voted yea and the third member reported “not voting.” The Secretary of the Board was directed to prepare copies of the Opinion, Findings of Fact, Conclusions and Order in the matter and to serve the same upon appellant, the Commissioner, and other interested parties.

The record reveals that counsel for appellant attended the meeting and before the vote was taken announced generally to the Board as follows:

“I wish to state at this time I would like to consider it my obligation to object—that is—in regard to the Resolution passed as to the findings on the part of the Board of Education who do not comprise the total number of the Board of Education who originally heard the case against Victor W. DeBellis. I wish that this would be noted on the minutes. I reserve any right I might have to address my opinions as to the findings to the Commissioner of Education. The vote is a vote of two. Is that right?”

In remanding this case to the Board of Education for findings of fact, the Commissioner pointed out that in order to give proper weight to the Board members' observation of the demeanor of witnesses and the resolution of conflicting testimony, it was necessary to know how the Board resolved the conflicting evidence and the basis on which it made its final determination. Also needed was assurance that the Board members did not base their judgment on factual knowledge in their possession but not in the record. In making the remand, the Commissioner also took the position that in a disciplinary proceeding the quantum of proof necessary to convict is different from that in a criminal trial. The proof does not need to be sufficient to demonstrate guilt of a crime to a jury beyond a reasonable doubt. Preponderance of the credible evidence is sufficient to establish the misbehavior of an employee in a disciplinary proceeding. *Fitch v. South Amboy Board of Education*, 1938 S. L. D. 292; *Reilly v. Jersey City*, 64 N. J. L. 508 (Sup. Ct., 1900); *Martin v. Smith*, 100 N. J. L. 50 (Sup. Ct., 1924).

The Commissioner agrees with the Board of Education that each of the alleged events, alone or collectively, *i. e.*, the mere taking of a child into the boiler room or any intimacy, the removal or loosening of any of her clothing or that of the janitor would be sufficient misbehavior to warrant dismissal regardless of whether there was carnal abuse. The Board found that appellant did take the child to a platform located in the boiler room and did remove her clothing. In the opinion of the Commissioner, these actions are sufficient to warrant dismissal and it is unnecessary to consider further the question whether penetration actually occurred.

The Commissioner must place reliance upon the Board members who had an opportunity to observe the witnesses and to evaluate their credibility, and his review is limited to a determination of whether there was a rational basis for the Board's action. The Commissioner is satisfied after examining the opinion and the findings of fact submitted by the Board that the quantum of proof necessary for a finding of guilt in a disciplinary proceeding was sufficient. He determines that there was substantial, competent, and relevant evidence and findings of fact adequate to support a finding of guilt.

The Board of Education of the City of Orange is composed of five members. Four members conducted the original hearings and voted for appellant's dismissal. One of the four was no longer a member when the findings of facts were adopted. Another member was recorded as not voting. The result is that the findings of fact and the dismissal were made by the affirmative votes of only two members of the Board.

Appellant poses the following question: Where a panel of four members has heard all of the testimony and proceedings, are the opinion, findings of fact, conclusion and order which have been determined by only two members of the Board conclusive as a judgment of the Board; or, is it merely a minority report which does not reflect the determination of the majority of the panel or the majority of the Board?

The fourth member who originally participated could no longer participate because he was no longer a board member. The record discloses that the meeting of the Board of Education which adopted the findings of fact and the dismissal was a special meeting of the Board of Education. It was not a committee meeting. The Board members did not sit as a committee to which had been delegated the duty of making the findings. The non-participation of the two other members was tantamount to their disqualifying themselves because they were not eligible in accordance with previous court decisions to participate for the reason that they had not heard the testimony. There is nothing in the record to indicate that appellant made any objection to the non-participation of the full membership until just prior to the vote on the question of dismissal.

It has not been unusual for some members of a board of education to decline to participate in tenure proceedings because of necessary absence or the belief that they should disqualify themselves. It is the opinion of the Commissioner that a quorum of the Board of Education was competent to conduct tenure proceedings. There is no statute fixing a quorum for a board of education. In the absence of a statute, a majority of the Board constitutes a quorum. *Ross v. Miller*, 115 N. J. L. 61 (Sup. Ct., 1955); *Peter's Garage v. Burlington*, 121 N. J. L. 523 (E. & A. 1938); *Dombal v. Garfield*, 129 N. J. L. 555 (Sup. Ct. 1943).

The next question to be decided is whether in the case of a five-member board two affirmative votes are sufficient for dismissal of a janitor. This question must be answered in the affirmative. It is well established that a majority vote of all members is necessary only where a statute requires it. *Manno v. City of Clifton*, 14 N. J. Super. 100 (App. Div. 1951); *Dombal v. Garfield*, *supra*. The Legislature has specified in R. S. 18:6-20 those acts which require a majority vote of the whole number of members of the Board as follows:

“No principal or teacher shall be appointed, transferred, or dismissed, nor the amount of his salary fixed, nor school term shall be determined, and no course of study shall be adopted or altered, nor textbooks selected, except by a majority vote of the whole number of members of the board.”

It should be noted that principals and teachers are specified but not janitors. It should also be noted that R. S. 18:6-67 makes no requirement for dismissal by a majority vote of the whole number of members of the board. In the Commissioner's judgment the legal axiom “*expressio unius est exclusio alterius*” is applicable here. If the Legislature had intended that a majority of the whole membership be required to dismiss a janitor, it would have so specified.

The rule that the affirmative vote of a majority of a quorum is sufficient for valid action is of common law origin. A statute to supersede common law

must contain some express or specific statement to that effect. *State v. Western Union Telegraph Co.*, 12 N. J. 468 (Sup. Ct., 1953). There is no such specific statement relative to the dismissal of janitors in the School Act.

The record indicates that one of the three members remained silent and was recorded as not voting. It has been held that

“where no specified number of votes is required, but a majority of the board regularly convened are entitled to act, a person declining to vote is to be considered as assenting to those who do.” *Mount v. Parker*, 32 N. J. L. 341 (Sup. Ct. 1867); *Laconia Water Co. v. City of Laconia*, 112 A 2d 58 (Sup. Ct. of New Hampshire, 1955); *Mann v. Housing Authority of Paterson*, 20 N. J. Super. 276 (Law Div. 1952).

The Commissioner decided a similar question in *Thorpe v. Board of Education of Bayonne*, 1938 S. L. D. 145, affirmed by State Board, 1938 S. L. D. 147. Appellant in that case was employed as a chauffeur. His employment was terminated by the affirmative votes of only 4 out of 9 members present, while 3 voted in the negative and 2 refrained from voting. The Commissioner, relying upon *Mount v. Parker, supra*, held that “the two members who refrained from voting must be deemed to have voted in the affirmative so as to carry the resolution by a vote of 6 to 3, which is a majority of those present constituting the quorum.” The Commissioner holds that the findings of fact and the resolution dismissing the appellant represent a valid action of the Board of Education rather than a minority report.

The Commissioner considers without merit the contention that the findings made by the Board must be the product of the deliberation and conference of all members. Reference has already been made to the fact that it is not unusual for some members to disqualify themselves. Appellant was given a full hearing at the original proceedings. There is no record that he requested the opportunity to present more evidence. The findings of fact should have been made originally. The Commissioner’s remand was made to supply this omission. The new resolution for dismissal was adopted to cure the technical defect in adopting the resolution at the meeting which began after 8 P. M. The fourth member who heard the case originally would not participate because he was no longer a member. It would be idle, and it is indeed unnecessary to speculate how he might have voted on the findings of fact. Even if his vote had been favorable to appellant, according to the precedents cited above, there would have been a majority for the findings and the dismissal.

The Commissioner does not consider as grounds for reversal the failure to supply written findings to appellant prior to making the order. The reasons for requiring findings of fact were stated in the original case in the following quotation from *Mackler v. Board of Education of Camden, supra*:

“The two chief reasons for requiring findings of fact are that the case shall be decided according to evidence rather than arbitrarily and so that the parties and authorities may determine whether it has been.”

The findings of fact have been available to the appellant to help him in shaping this appeal to the Commissioner.

The question remains whether appellant is entitled to his salary from the date of suspension to the date of the determination of guilt. The answer must

be in the negative. It is well established that a public board, specifically granted power by statute to remove an inferior officer or employee for misconduct, has implied power to suspend him temporarily pending trial of charges against him, where the public interest so requires. *Vanderbach v. Hudson County Board of Taxation*, 133 N. J. L. 126 (E. & A. 1945). Also see *DeMano v. Board of Chosen Freeholders of Bergen County*, 21 N. J. 137, 139 (Sup. Ct. 1956).

N. J. S. A. 18:5-49.1 provides as follows:

“Whenever any person holding office, position or employment with a local board of education or with the State Board of Education shall be illegally dismissed or suspended from his office, position or employment, and such dismissal or suspension shall upon appeal be decided to have been without good cause, the said person shall be entitled to compensation for the period covered by the illegal dismissal or suspension; provided, that a written application therefor shall be filed with the local board of education or with the State Board of Education, as the case may be, within thirty days after such judicial determination.”

For the reason that appellant was not illegally suspended and was not reinstated upon appeal, he is not entitled to salary.

The Commissioner finds and determines (1) that there was a rational basis for the determination by the Board of Education of misconduct by appellant; (2) that appellant was given a fair trial; (3) that the resolution to dismiss was adopted legally, and (4) that appellant is not entitled to any salary.

COMMISSIONER OF EDUCATION.

April 24, 1962.

XXVII.

BOARD OF EDUCATION NOT REQUIRED TO ADMIT PUPIL  
FIVE YEARS OF AGE ON TRANSFER FROM  
NURSERY SCHOOL PROGRAM

MR. AND MRS. LEWIS WERNICK,

*Petitioners,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF GLASSBORO,  
GLOUCESTER COUNTY,

*Respondent.*

For the Petitioners: Pro Se

For the Respondent: Walter L. Marshall, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners are the parents of a daughter, Mindy Joann Wernick, who attained the age of 5 years on December 3, 1961, and who was thereafter denied admission to the Glassboro Public Schools on transfer from the Jack and Jill School, an approved child care center located in Pitman Borough,

Gloucester County. Petitioners seek an order from the Commissioner directing respondent to admit their child as a transfer pupil.

Respondent admits the facts of the child's residence, age, and attendance at the Jack and Jill School, but contends that its refusal to admit the child was "in conformance with a policy of the Board not to accept kindergarten students who failed to meet the age requirements at the commencement of the school year."

Oral argument on the petition was heard by the Assistant Commissioner of Education in Charge of Controversies and Disputes on April 16, 1962, at the office of the Gloucester County Superintendent of Schools at Clayton. Statements concerning respondent's admissions policy were made by the president of the Board and the superintendent of schools.

The pertinent statutes are *R. S. 18:14-1*, which says in part:

"Public schools shall be free to the following persons over 5 and under 20 years of age:

- a. Any person who is domiciled within the school district; \* \* \*

and *R. S. 18:14-3*, which reads:

"Children who have never attended any public or private school may be admitted to a public school during the ten days immediately following the opening of the school for the fall term, and at no other time except by a majority vote of all the members of the board of education of the school district in which the school is situated."

There being no question of fact concerning the child, the sole question before the Commissioner is whether respondent acted within its discretionary authority in determining that the Jack and Jill School is not a "private school" within the meaning and intent of *R. S. 18:14-3*, *supra*.

In the case of *Wilcox v. Board of Education of Oceanport*, 1954-55 *S. L. D.* 75, affirmed State Board of Education 1954, the Commissioner held that attendance in the kindergarten class of a private elementary school constituted attendance at a "private school" within the meaning of the statute, and that a pupil who had attended such a school was entitled to transfer to a public school on attainment of age 5. The question raised in the instant case is whether a nursery school is a "school" within the intendment of the statute and if attendance at a nursery school constitutes a legal basis for admission to public school by transfer, which the board of education cannot refuse, or as a *new entrant*, which the board may accept or refuse in its discretion.

The Commissioner takes judicial notice that Jack and Jill School, located in Pitman, which petitioners' child attended, was licensed on November 20, 1959, as a child care center pursuant to *R. S. 18:20A-1* to 10, in which the term "child care center" is defined to

" \* \* \* include every private non-sectarian child care center, day nursery, nursery school, boarding school, or other establishment of similar character for the care of children, in which any tuition fee, board, or other form of compensation for the care of children, is charged and in which more than five children over the age of two years and under the age of five years are cared for \* \* \*."

Reports of visits made by representatives of the State Department of Education, at the time of licensing in 1959 and subsequently, show that the program of Jack and Jill School is that of a nursery school and not that of a kindergarten. Children are organized into two groups, one for children aged 2 and 3 years, and the other for children aged 4 years and those who have become 5 years old during the school year.

In his statement to the Commissioner at the hearing, the president of the respondent Board of Education stated that it was the policy of the Board to accept transfers from other public school kindergartens and from private kindergartens operated by religious organizations, but not to accept pupils on transfer from nursery schools. The right of a board of education to determine equivalency of educational programs, while not applied specifically to kindergarten programs, is implicit in the compulsory education statutes, *R. S. 18:14-14, et seq.*, which place responsibility for application and enforcement of compulsory school attendance upon the local board of education.

In the Commissioner's judgment, the *Wilcox* case, *supra*, is not in point, in the instant matter. The *Wilcox* child had been enrolled and was in attendance at a non-public school comprising not only the kindergarten but other elementary grades. That this was a school within the meaning of the statute could not be questioned. In the instant case, however, the child has been attending a school whose sole grade is a nursery class. In such case, enrollment in a public school kindergarten would constitute *promotion* and not *transfer*.

*R. S. 18:14-3* was enacted in order to insure the continuity of a pupil's education once he was enrolled in school and to prevent his being barred from school attendance in the case of a *bona fide* transfer from one district to another because of a variation in admission ages and regulations. In the Commissioner's judgment, the statute was never intended to provide a means to circumvent local school district admission requirements by enrollment at a nursery school with subsequent transfer to public school after attaining age five.

Absent any showing by petitioners that said Jack and Jill School provides the conditions and program which would warrant respondent Board in determining that petitioners' daughter was enrolled in a kindergarten program from which she could transfer to respondent's kindergarten program, and absent any clear indication in the records of the State Department of Education, of which the Commissioner takes judicial notice, that would justify a conclusion that said nursery school is a private school having a kindergarten program within the meaning of *R. S. 18:14-3, supra*, the Commissioner finds that respondent acted within its discretionary powers in refusing to accept petitioners' daughter as a transfer after the date prescribed in this statute.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

May 29, 1962.

XXVIII.

COURT ORDER REINSTATING TEACHER WHO RESIGNED DID NOT  
PROVIDE FOR RESTORATION OF SALARY INCREMENTS

FLORENCE S. EVAUL,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,  
CAMDEN COUNTY,

*Respondent.*

For the Petitioner: Meyer L. Sakin, Esq.

For the Respondent: A. Donald Bigley, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

On March 13, 1959, petitioner submitted her resignation as a teacher in the Camden schools. The Board of Education accepted her resignation on the same day, and petitioner subsequently appealed the Board's action. On June 30, 1961, the Supreme Court (35 N. J. 244) held "that, in the unusual circumstances of this case, it is unduly harsh for appellant to lose rights acquired during the many years she served as a teacher in the Camden school system." The Court accordingly directed that she be reinstated without back salary. Respondent reinstated her for the school year 1961-62 at a salary of \$6350.00, the amount that she presumably would have received under the salary schedule for the school year 1959-60, had her employment not been interrupted. Petitioner now seeks an order from the Commissioner directing that her salary for 1961-62 be fixed at \$7150.00, giving her the benefit of all increments and adjustments for the years 1959-60 and 1960-61, and 1961-62, as though she had been continually in service.

The case is presented to the Commissioner on a stipulation of facts and briefs of counsel.

Petitioner bases her argument on the fact that she was "denied employment" by respondent as a result of its action in accepting her alleged resignation, and that the effect of the Supreme Court's decision was not only to restore her to her employment but also to restore her to any rights which she would have enjoyed had she not been thus denied employment. She refers to cases decided in the federal and other state courts indicating that "reinstatement" means not only restoration to a former status, but also the restoration of all the ordinary incidents of such former status. See *U. S. v. Holley, etc.*, 199 F. 2d 575 (*U. S. Circuit Court of Appeals, Georgia*, 1952); *Horrigan v. Pittsfield*, 11 N. E. 2d 585, 298 Mass. 492 (1937); *Malora v. Monaghan*, 131 N. Y. S. 2d 270 (1954). Reliance is also placed on the decision of the Supreme Court in *Miele v. McGuire*, 31 N. J. 339, 157 A.2d 306, (1960), in which it was found that an employee who had been wrongfully dismissed was entitled to reinstatement with back pay. In remanding the case, the court said:

"The Law Division will give due consideration to the plaintiff's contention which was not met by the defendants in this court, that he is also

entitled to the benefit of the normal increments he would have received during the period of his wrongful discharge as well as to interest on his recovery of back pay.”

For its defense respondent looks to the language of the Supreme Court’s decision ordering petitioner’s reinstatement. The court, having held that “appellant must be reinstated,” then said:

“The appellant has not asked for back salary in this appeal. To avoid later litigation, however, we hold that because the loss of her teaching position was occasioned by her own impetuous conduct and her reinstatement is based upon equitable principles, she is not entitled to collect her salary for the period dating from the acceptance of her resignation until her reinstatement.”

Respondent contends that it is to be assumed that the court was aware of the statutory mandated salary schedules for school teachers, and that if it had intended that petitioner should be given credit for all increments and adjustments between the acceptance of her resignation and her reinstatement, it would have said so.

The Commissioner agrees with petitioner that respondent’s policy for fixing salaries of teachers who return after voluntary leave of absence or after resignation and reemployment has no relevance to the instant case. By the same reasoning, the Commissioner does not find that the cases cited by petitioner, and in particular *Miele v. McGuire, supra*, and *Lowenstein v. Newark Board of Education, 35 N.J. 94 (1961)*, are applicable to this case, since in each instance the reinstatement ordered by the court followed a wrongful dismissal of the employees. Reinstatement in the instant case can be regarded as following neither voluntary withdrawal nor wrongful dismissal. The court found no “conduct by the school officials which amounts to duress,” nor did it hold that she was illegally dismissed. Rather, the court looked upon the “extraordinary concatenation of events” which precluded her attempted rescission of her resignation as “unduly harsh for appellant to lose rights acquired during the many years she served as a teacher in the Camden school system.”

The Commissioner can find no basis for concluding that the court, to avoid later litigation, found petitioner “not entitled to collect her (back) salary,” while leaving open to her a right to claim the benefits of such increments and adjustments as she would have gained if her employment had not been interrupted “by her own impetuous conduct.” Rather, the Commissioner finds in the court’s decision a clear intent to resolve, once and for all, any salary claims arising out of its decision in the appeal before it.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

June 4, 1962.

Pending before State Board of Education.

XXIX.

TEACHER MAY NOT USE PHYSICAL FORCE OR VIOLENCE  
TO COMPEL OBEDIENCE

IN THE MATTER OF THE TENURE HEARING OF DAVID FULCOMER  
(HOLLAND TOWNSHIP, HUNTERDON COUNTY)

For Petitioner: William R. Stem, Esq.

For Respondent Fulcomer: John Dale Seip, Esq.

For Respondent Board of Education: Cowles W. Herr, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This matter comes before the Commissioner of Education pursuant to the provisions of *R. S. 18:3-14* and *18:3-23, et seq.*, known as the Tenure Employees' Hearing Act. The complainant, Howard L. Yowell, parent of a pupil in the Holland Township School, filed charges with the Holland Township Board of Education on January 29, 1962, against David Fulcomer, a teacher under tenure in the school. The Board of Education met on February 12, 1962, to consider the evidence in support of the charges, made its determination and certified the charges to the Commissioner of Education as being sufficient, if true in fact, to warrant dismissal of the teacher.

The charges are:

- "1. That a teacher, namely, David Fulcomer, in the school system of the said township did on the 20th day of December, 1961, strike, hit, slap, push and shove with threats and violence a pupil, namely, Donald H. Yowell, a pupil in the said school system and of the said teacher, in, upon and about the body, shoulder and face of the said Donald H. Yowell.
- "2. That the teacher, David Fulcomer, did use his hand or fist as a weapon in striking, hitting, slapping, pushing and shoving the said pupil, Donald H. Yowell.
- "3. That as a result of such striking, hitting, slapping, pushing and shoving the said pupil, Donald H. Yowell, was put in fear of his safety."

On April 11, 1962, the Assistant Commissioner of Education in Charge of Controversies and Disputes conducted a hearing on the charges at the Hunterdon County Court House in Flemington. Testimony was heard from 8 pupils, 5 of whom (including petitioner's son) were called by petitioner, and 3 by respondent Fulcomer. The mother of the pupil and the teacher were also heard.

The Commissioner has always been mindful that the testimony of children must be examined with great care.

" \* \* \* It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to

discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at a teacher's mercy because there is no way to prove certain charges except by the testimony of children." *Palmer v. Board of Education of Audubon*, 1939-49 S. L. D. 183, 188.

In this case, the Commissioner is impressed with the clarity of the evidence supplied by the pupils. The differences in their relation of what happened were relatively minor, depending, it would appear, on their vantage point in the classroom, and there was little variation in the accounts given by the pupils called by petitioner and those by respondent Fulcomer. Respondent, in his own testimony, confirmed to a large extent the events described by the pupils.

The testimony discloses that on the morning of December 20, 1961, while respondent was teaching an eighth grade arithmetic class, a girl's pocketbook was passed among several pupils until it came to rest beside the desk of Donald Yowell. The teacher, becoming aware of inattention and discovering its source, dropped his textbook on the first pupil's desk, went to Donald and laid hands upon him. When released, the boy went to the front of the room, was directed to resume his seat by the teacher, made as though to do so, but instead ran toward the door in the rear to leave the classroom. The teacher pursued the boy, again laid hands upon him, and both of them fell to the floor. The pupil escaped the teacher's hold, left the classroom, and reported to the principal, requesting permission to telephone his parents and go home. From the beginning of the incident until the pupil left the room, the teacher gave no commands to the pupil other than to resume his seat.

The testimony varies as to whether the teacher actually struck the pupil with his fist or hand, the exact hold which he had upon the boy, and whether he "tackled" the pupil in the rear of the classroom or grabbed him as they caromed off the furniture. The Commissioner finds these differences immaterial because in the teacher's own words he

"[w]ithout hesitation, \* \* \* whirled and went in \* \* \* quite fast. \* \* \* I grabbed for him with my right hand. It struck his shoulder as I grabbed for him. I got ahold of his back of his neck with my left hand and my momentum carried the chair over towards the book case. Also my momentum pushed his head down near the book case. It may have been touching. I just held him there. \* \* \* As soon as I saw that Joan had her pocketbook, I released him. \* \* \* ." (Tr. 83, 84)

and subsequently—

"I told him to sit down. \* \* \* Instead he broke and ran down the aisle and I went after him. \* \* \* So he ran down the one aisle; I went down the other. Back near my desk I laid a hand on him. I hit my desk and knocked the chair over, \* \* \* I was thrown off balance and we both went down. I had ahold of his foot at that time." (Tr. 84, 85)

Testimony also varies with regard to Donald's participation in the pocket-book-passing episode. He denies involvement. This also appears immaterial in the light of the teacher's admission that a spoken order or request to give

back the pocketbook would have accomplished its return, (Tr. 88) and that the use of force was not necessary. (Tr. 90) Although the teacher alluded to prior provocation, the testimony discloses that this pupil had never been suspended from school, and his mother's testimony that the parents had received no word "from the principal or any teacher concerning Donald's department or conduct in school" during the more than 3 years he had attended Holland Township School, was not refuted or challenged. (Tr. 78)

With regard to his attempt to prevent the boy from leaving the room, the teacher takes the position that this was a proper exercise of restraint because "no pupil will leave my room without permission." (Tr. 84) In support of his action, he cited instances in which he had restrained pupils engaged in fighting. With this position, the Commissioner cannot agree. There is a significant difference between physically restraining a pupil from injuring himself or others and the use of physical force to compel obedience to an order. A teacher has the duty to protect his pupils and may exercise physical force if necessary to do so. *Leistner v. Landis Township*, 1938 S. L. D. 359, affirmed State Board of Education 361.

This principle cannot be stretched to cover instances of indiscipline or disobedience to teachers' directions such as in the instant case without opening the door to the use of all kinds of physical enforcement and doing violence to the statutory prohibition of corporal punishment as found in R. S. 18:19-1:

"No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void."

By the enactment of this statute many years ago, the New Jersey Legislature subscribed to the philosophy that

" \* \* \* an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another altho no actual physical harm be done." (*Teacher Liability for Pupil Injuries*, National Education Association of the United States, p. 8)

The Commissioner would point out that such a philosophy with its prohibition of the use of corporal punishment or physical enforcement does not leave a teacher helpless to control his pupils. Competent teachers never find it necessary to resort to physical force or violence to maintain discipline or compel obedience. If all other means fail, there is always a resort to removal from the classroom or school through suspension or expulsion. The Commissioner cannot find any justification for, nor can he condone the use of physical force by a teacher to maintain discipline or to punish infractions. Nor can the Commissioner find validity in any defense of the use of force or violence on the ground that "it was one of those things that just happened \* \* \*." (Tr. 90) While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control.

In the instant case, the Commissioner finds that the teacher, David Fulcomer, improperly and unnecessarily did physical violence to the person of a pupil, Donald Yowell, in two incidents on the morning of December 21, 1961, in his classroom in the Holland Township School. The Commissioner further finds and determines that these acts constitute conduct unbecoming a teacher. He therefore determines that the findings in the charges against respondent Fulcomer are sufficient to warrant his dismissal by the Board of Education of Holland Township under the provisions of R. S. 18:13-17.

COMMISSIONER OF EDUCATION.

June 11, 1962.

Pending before State Board of Education.

XXX.

BOARD OF EDUCATION MAY FIX OR ALTER ATTENDANCE AREAS,  
PROVIDED THERE IS NO DISCRIMINATION

LEONARD GUNSBERG, IN BEHALF OF HIS CHILDREN, AMY AND FREDERICK;  
AARON MALTIN, IN BEHALF OF HIS CHILDREN, BERNARD AND LEONARD;  
STANLEY S. GILINSKY, IN BEHALF OF ALL PARENTS OF CHILDREN  
INVOLVED IN THE REZONING OF PUPILS FROM EUGENE FIELD  
SCHOOL TO WASHINGTON IRVING SCHOOL,

*Petitioners,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK,  
BERGEN COUNTY,

*Respondent.*

For the Petitioners: Pro Se.

For the Respondent: Harold D. Green, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners, who are parents of children now enrolled in the Teaneck Public Schools, seek an order from the Commissioner setting aside a redistricting or rezoning plan adopted by the Teaneck Board of Education whereby said children were transferred from School No. 8, Eugene Field School, to School No. 2, Washington Irving School, and directing respondent to assign pupils to schools on the basis of the least additional distance to travel.

The case comes before the Commissioner on a stipulation of facts and briefs of petitioners and counsel for respondent.

Petitioners complain that in redistricting in order to reduce class sizes in the Eugene Field School, respondent Board drew the district lines in such a way that children living nearer the Washington Irving School are permitted to continue at Eugene Field School, while other pupils (including petitioners' children) residing nearer Eugene Field School are required to attend Washington Irving School. Petitioners further complain that respondent continues to permit pupils residing outside the Eugene Field School district to attend that school, contributing to the increase in class sizes, on which the necessity

for rezoning rests. Such actions, say petitioners, deprive their children of the right to attend the school nearest their homes, and thereby constitute unfair, arbitrary, and illegal discrimination against their children.

Respondent, while stipulating that the redistricting does not assign petitioners' children to the school nearest their homes, asserts that the establishment of school districts or zones is an action within the discretionary power of the Board of Education and denies that the particular redistricting resolutions *sub judice* are discriminatory.

The rezoning resolutions were adopted as a means of relieving overcrowding at the Eugene Field School. A referendum that would have authorized the construction of eight additional classrooms at this school was defeated in February, 1961. On June 14, 1961, respondent Board of Education adopted two resolutions whereby beginning September 1, 1961, the boundary lines of the Washington Irving School district were shifted to lines which included all homes whose addresses are either on or between certain designated streets. The effect of the resolutions was to transfer 58 children, including petitioners' children, from Eugene Field School to Washington Irving School. The redistricted area lies in the northwesterly section of the Eugene Field district bounded on the north by Elizabeth Avenue, on the west by West Shore Railroad, on the south by Grayson Place, and on the east by Teaneck Road. Examination of a map of Teaneck showing this area (Ex. C) and reference to a chart (Ex. D-1) showing distances from mid-points of the blocks to each of the two schools, indicate clearly that the distances to Washington Irving School are greater than the distances to Eugene Field School.

Subsequent to the adoption of the redistricting resolutions, petitioners protested to respondent Board, requesting that pupils be assigned on the basis of least additional distance to travel. Petitioners offered to the Board several alternate plans which they claim would accomplish the desired relief of overcrowding without the alleged inequities of respondent's plan. The Board rejected these alternate proposals.

The authority of the local board of education to determine which schools pupils in the district shall attend has long been recognized. In *Pierce v. Union District School Trustees*, 46 N. J. L. 76 (*Sup. Ct.* 1884) the Court said:

“\* \* \* it is equally clear that the respondents may make reasonable by-laws, not incompatible with the laws of the United States or of this state, \* \* \* and not in conflict with the general regulations of the state board of education, \* \* \* for determining into which schools these children shall be admitted.”

In *Edwards v. Board of Education of Atlantic City*, 1938 S. L. D. 683 (1923) affirmed by State Board of Education 685, the Commissioner said:

“To permit all parents to select the schools which they desire their children to attend, would be demoralizing. The regularly constituted school authorities must, of necessity, have power to determine the grade of pupils, and the building which each shall attend; and this cannot be changed by higher authority unless discrimination or unreasonable requirements can be proven \* \* \*.”

Similarly, the right to transfer pupils to relieve overcrowding has been frequently affirmed. The Court, in the *Pierce* case, *supra*, said that if a child

were refused admission to a particular school because it was full, "a refusal so supported would be legal." In the *Edwards* case, *supra*, the Commissioner sustained the school authorities in refusing a child admission to a school of her choice "solely because of the crowded conditions" in the school. In the case of *Clausner, et al. v. Board of Education of Millburn, 1938 S. L. D. 645*, the Commissioner wrote:

"\* \* \* whenever the enrollment in a building or in certain of its classrooms, is in the judgment of the board excessive for the best interest of the pupils, the board has a legal right to transfer to another school with more adequate accommodations on a nondiscriminatory basis."

In the decisions cited, it was made clear that in determining which schools pupils should attend, the local board must make its determination on a non-discriminatory basis. The issue in *Pierce*, and *Edwards, supra*, as well as in *Worthy, et al. v. Board of Education of Berkeley Township, 1938 S. L. D. 686*, dismissed by State Board of Education 1928 and *Kenney v. Board of Education of Montclair, 1938 S. L. D. 647*, affirmed State Board of Education 1935, was whether the school attendance areas had been established, or the admission to or exclusion from particular schools had discriminated against pupils on the basis of race. Similarly, the decision of the Commissioner in *Walker v. Board of Education of Englewood* (May 19, 1955) upon which petitioners rely, was rendered in an action brought before him pursuant to Chapter 169 of the Laws of 1945 (*R. S. 18:25-1, et seq.*) the "Law Against Discrimination," and the principles enunciated therein had particular reference to discrimination on the basis of race.

No claim is made in the instant case that there is any discrimination on the basis of race, color, creed, national origin, or ancestry. Petitioner's children are affected in no manner different from other children residing in the area rezoned from the Eugene Field School to the Washington Irving School. Nor is it shown that rezoning imposes unreasonable hardship on petitioners' children. The distances to be traveled by petitioners' children to Washington Irving School as demonstrated by the exhibits, are not shown to be unreasonable.

The local board of education of a school district is under obligation (*R. S. 18:11-1*) to "provide suitable school facilities and accommodations for all children who reside in the district \* \* \* convenient of access thereto \* \* \*." To hold that in the fulfillment of this obligation a board of education must assign pupils and designate attendance areas after exactly measuring the distance for every child to each school, and must assign solely on the basis of nearness, stretches the principles enunciated in the *Walker* case and others, *supra*, beyond reasonableness. To confine a board's exercise of discretion within such rigid limits is to remove discretion entirely. Such a rule, rigidly enforced, could produce unrealistic attendance areas whose lines, slicing through streets and between homes, would be difficult to delineate and impractical to administer. No such holding is either necessary or desirable in order to preserve the principles set forth in the cases cited above, where the issue raised is one of racial discrimination. The test must always be that of reasonableness; that is, whether the board's action was taken after fair consideration and in good faith. It is shown that after the defeat of the building referendum in February, 1961, respondent fixed the attendance areas

in June, 1961, and that subsequently respondent considered five alternate proposals submitted by petitioners and rejected them as not meeting the aims and objectives required. Absent any showing of arbitrary, capricious, or unreasonable abuse of respondent Board's discretionary power to determine attendance areas, the Commissioner will not substitute his own discretion for that of the Board. Cf. *Mackler v. Board of Education of Camden*, 1953-54 *S. L. D.* 53, at pages 65, 66; *Fournabai, et al. v. Board of Education of Emerson*, 1959-60 *S. L. D.* 41.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

June 19, 1962.

SCHOOL LAW DECISIONS  
JULY 1, 1962 — DECEMBER 31, 1962

I.

COUNTY SUPERINTENDENT WILL BE GUIDED BY STATE BOARD  
RULES IN APPROVING EMERGENCY SCHOOL FACILITIES

BOARD OF EDUCATION OF THE TOWNSHIP OF EDGEWATER PARK,  
BURLINGTON COUNTY,

*Petitioner,*

v.

WILLIAM L. APETZ, BURLINGTON COUNTY SUPERINTENDENT OF SCHOOLS,

*Respondent.*

For the Petitioner: Ernest N. Sever, Esq.

For the Respondent: Pro Se

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner here appeals the refusal of respondent, a County Superintendent of Schools, to approve the use of Farnum Elementary School to house public school classes of the Township of Edgewater Park for the school year 1962-63.

A hearing in the case was conducted by the Assistant Commissioner in Charge of Controversies and Disputes in the State House Annex, Trenton, on May 31, 1962. The matter comes before the Commissioner pursuant to a rule of the State Board of Education (Section No. 1, adopted June 26, 1957) as follows:

*“Emergency Provisions for the Accommodation of School Pupils*

“ \* \* \* RESOLVED: That all emergency provisions for the accommodation of school pupils shall be approved by the county superintendent of schools of the county in which the district is situated, such approval to be given for one year only, renewable if, in the opinion of the county superintendent, effort is being made for the provision of adequate and proper school accommodations, be it further

“RESOLVED: That, in making a determination upon any application for the use of emergency facilities, the county superintendent shall take into account the following:

- |                         |                                      |
|-------------------------|--------------------------------------|
| 1. Safety factors       | 6. Drinking water                    |
| 2. Ceiling height       | 7. School ground and play facilities |
| 3. Heat and ventilation | 8. Equipment and supplies            |
| 4. Toilet facilities    | 9. Room size                         |
| 5. Lighting             |                                      |

and be it further

“RESOLVED: That any board of education which is dissatisfied with the county superintendent's determination on any application may appeal such determina-

tion to the Commissioner of Education and to the State Board of Education successively.”

The building in question, known as the Farnum Preparatory School, is located in the City of Beverly adjacent to Edgewater Park and is the property of the Trustees of the Farnum Estate, from whom the school district has leased the building for many years.

At some time in the past the Edgewater Park Board of Education rented the building at the rate of one dollar per year, and assumed responsibility for maintenance and repair. More recently, the Board has paid \$1500 per year rent, and the trustees have maintained the building. The Board last occupied the building during the school year 1960-61, abandoning its use during the year 1961-62 when newer facilities within the district made housing of classes in the Farnum School unnecessary. In anticipation of increasing enrollment, the Board of Education made application to Burlington County Superintendent William L. Apetz for permission to re-occupy the building for the 1962-63 school year. On February 14, 1962, by letter, the county superintendent denied the application.

Petitioner contends that its need to use this facility is imperative. It is undisputed that its present facilities are inadequate to house the anticipated enrollment for 1962-63 on a single session basis. It is also undisputed that petitioner's efforts to find other temporary classrooms have thus far been unsuccessful and that the Board is undertaking a long-range solution to its housing problem, involving land acquisition and construction, which it estimates will require two years at best. Enrollment projections also disclose that while use of the Farnum School will provide for next year's increased enrollment, additional temporary classrooms will be needed for subsequent years.

The County Superintendent's refusal to approve Farnum School for emergency classroom use is based upon his finding, through personal inspection and the report of a representative of the Bureau of Building Services of the State Department of Education, that the building is unsuitable in the light of the criteria set forth in the State Board rule, *supra*. It is not necessary for the purposes of this decision to enumerate in detail the conditions which form the bases for his finding, especially since they were not contested in any material respect by the petitioner. For purposes of illustration only, it may be mentioned that he referred to several fire hazards, to inadequacy and insufficiency of classroom size and playground space, lighting, toilet and drinking water facilities, and heating and ventilation. The building is over one hundred years old. In 1929, a school building inspector recommended to the Commissioner of Education “that this school building be abandoned for use as a public school and the Township be required to provide a modern, up-to-date school building for the children of this community.” (Tr. 17) In a brochure prepared in connection with an addition to the district's Magowan School some years ago, the Board itself called attention to the physical and educational inadequacies of the Farnum School, stating in part:

“ \* \* \* The layout, room arrangement, and general facilities when measured by today's conceptions of schools are obviously extremely sub-standard. To all intents and purposes the school could readily be classified as condemned.” (Tr. 18)

The testimony reveals that the application for approval submitted by the Board of Education and which the County Superintendent denied was for use of the Farnum School in its entirety. The Board now contends that its needs can be met by occupancy of only four classrooms located on the first floor. The building comprises a basement partly above grade and two stories above it. Petitioner called a licensed architect who testified that, in his opinion, the second floor could be sealed off and certain repairs and alterations made which would eliminate hazards to the health and safety of pupils housed only on the first floor. Respondent and his witnesses agreed that certain of their objections would not be applicable if only the first floor were utilized.

The Commissioner finds and determines that the County Superintendent's refusal to approve use of the Farnum School, as revealed in his letter of February 14, 1962, is based upon full and fair consideration of the criteria established by the State Board of Education for approval of emergency classrooms and that the evidence supports his action. He finds further that the County Superintendent has neither given nor denied his approval for occupancy of a part of the Farnum School for the reason that no such application has been submitted to him by the Board of Education.

Insofar as the appeal herein pertains to the determination of the respondent with regard to use of the Farnum School in its entirety, the petition is dismissed and the County Superintendent's action is sustained, without prejudice to any application that may be made by petitioner to the County Superintendent of Schools for approval of a portion of the building.

ACTING COMMISSIONER OF EDUCATION.

July 9, 1962.

II.

SUPERINTENDENT ALONE MAY REMOVE CLERKS IN HIS OFFICE

ELEANOR M. JECKEL,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF CHATHAM, MORRIS COUNTY,  
AND JOHN M. NIES, SUPERINTENDENT,

*Respondents.*

For the Petitioner: Hoffman and Humphreys

For the Respondents: Arthur C. Hensler, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Respondent Board of Education in this proceeding moves to dismiss a petition of appeal in which petitioner claims that she was illegally dismissed from her position as secretary to the superintendent of schools by respondent Board of Education.

As recited in her petition of appeal, and admitted by respondent Board, petitioner was employed on or about September 14, 1959, as secretary to the superintendent of schools of Chatham Township. She served in that position

until, on November 2, 1961, respondent Board of Education attempted to terminate her employment, effective December 4, 1961. Respondent Superintendent of Schools opposed such termination.

The argument on the motion to dismiss the petition is presented to the Commissioner on memoranda and briefs of counsel.

Respondent's motion to dismiss is based on these reasons:

1. The dismissal of petitioner was legal under an employment contract providing for termination by either party on 30 days' notice.
2. Petitioner had not acquired tenure.
3. Respondent Board has authority to dismiss employees not under tenure whenever it becomes dissatisfied with them.

Petitioner contends in reply that the action of the Board was illegal and unlawful in that respondent superintendent has sole authority to appoint and remove clerks and secretaries in his office. She emphasizes that the language of *R. S. 18:6-38* controls the appointment and removal of clerks in the office of a superintendent of schools pursuant to *R. S. 18:7-70.2*, which reads in part as follows:

"The superintendent of schools in districts governed under the provisions of chapter seven of Title 18 of the Revised Statutes \* \* \* shall have the same powers within such district or districts as are conferred by sections 18:6-38 and 18:6-42 of the Revised Statutes upon superintendents of schools in school districts governed under the provisions of chapter six of Title 18 of the Revised Statutes."

The pertinent parts of *R. S. 18:6-38* read as follows:

"The superintendent of schools \* \* \* may appoint and, subject to the provisions of section 18:6-27 of this Title, may remove clerks in his office, but the number and salaries of such clerks shall be determined by the board."

Petitioner contends that this statute confers the authority to employ and remove his clerks solely on the superintendent.

The challenge of usurpation of the superintendent's statutory powers by the board of education came before the Commissioner in *Valente v. Board of Education of Hoboken*, 1950-51 *S. L. D.* 57, and again in *Rinaldi v. Board of Education of North Bergen*, 1959-60 *S. L. D.* 109, affirmed December 7, 1960, by the State Board of Education.

In the *Valente* case, *supra*, petitioner challenged the board's appointment of an assistant superintendent without prior nomination by the superintendent, as provided by statute. In setting aside the appointment, the Commissioner said:

"The Board of Education has the final power to make the appointment, but cannot take the initiative in appointing any person other than one nominated by the Superintendent. It is the opinion of the Commissioner that this method of selecting an assistant superintendent of schools is mandatory and cannot be circumvented. A school board cannot by its vote

or order deprive an officer of power conferred upon him by statute. 56 *Corpus Juris*, page 333, Section 202.”

and elsewhere:

“Inasmuch as the powers of a superintendent of schools derive from statutes, a board of education cannot assume and exercise his powers.”

In *Rinaldi*, *supra*, the board of education first attempted to confer tenure upon a clerk-typist in the superintendent’s office, and in a later resolution attempted to remove her. While the Commissioner upheld her dismissal because the superintendent confirmed the board’s resolution, he said of the board’s first action:

“ \* \* \* the Legislature by the terms of section 18:6-38 limited the power of the board of education with regard to the superintendent’s clerks to the determination of their number and the fixing of their salaries. The superintendent’s power to remove clerks would be meaningless if a board of education could by resolution confer tenure upon his appointees subsequent to their appointment. What cannot be done directly cannot be accomplished by indirection.”

and concerning the Board’s dismissal resolution:

“The Commissioner takes the view that the resolution was not effective per se because, for the reasons previously stated, the Board of Education did not control the removal of a particular clerk. The Board’s authority would be limited to ordering a reduction in the number of clerks. *Only the Superintendent could order the removal of a particular clerk.*” (Emphasis added.)

The two cases cited, *supra*, are relatively recent decisions of the Commissioner. An analogous decision was rendered in 1929 in the case of *Rochford v. Board of Education of Bayonne*, 1938 *S. L. D.* 93, affirmed State Board of Education, wherein the board’s assumption of the board secretary’s power to dismiss his clerks was similarly tested, and wherein the Commissioner stated:

“It is the Commissioner’s present opinion \* \* \* that the function of the Board of Education was solely the determination of the number of clerks in the Secretary’s office and that the Board possessed no power for removal or appointment within that number.”

Respondent Board takes the position that the decisions in *Valente* and *Rinaldi* are not applicable here, the former because it dealt with the appointment and not the removal of an assistant superintendent, and the latter because it dealt with granting tenure to a clerk whose later dismissal was subsequently upheld. The Commissioner recognizes these factual differences but finds unchanged in the instant case the underlying principle of the relationship of the legal authority of the superintendent and the board of education which lies at the heart of his previous decisions. Had the Commissioner’s interpretation of legislative intent in these decisions been incorrect, it is reasonable to assume that the Legislature would have amended the statutes in accordance with its intent. *Caputo v. The Best Foods*, 17 *N. J.* 259 (1955); *Asbury Park Press v. City of Asbury Park*, 19 *N. J.* 183, (1955); *Lane v.*

*Holderman*, 40 *N. J. Super.* 329 (*App. Div.* 1956), affirmed 23 *N. J.* 304 (1957).

Nor does the Commissioner find that the word "may" in *R. S.* 18:6-38, *supra*, must be construed as granting to the superintendent a discretionary power which will be shared by the board. In the first place, it cannot be assumed that "may" and "shall" (or "must") are mutually exclusive terms. See *Curtis v. Board of Education of Newark*, 1938 *S. L. D.* 671, affirmed State Board of Education 673 (1915); *Harvey v. Essex County Board of Freeholders*, 30 *N. J.* 381, 391 (1959). Moreover, as petitioner points out, "shall" would be inappropriate in the context of the statute, since it would thereby require the superintendent to employ clerks whether he needed them or not. No such legislative intent is apparent. "A statute will not be construed so as to reach an absurd or anomalous result." *Robson v. Rodriguez*, 26 *N. J.* 517 (1958). If the interpretation urged by respondent Board were accepted, an absurd situation could result, in which the superintendent might employ, the board dismiss, the superintendent rehire, and so on.

As to respondent Board's argument that it is not reasonable that the Legislature should have singled out the position of clerk in the superintendent's office for preferential treatment, the Commissioner finds evidence of the Legislature's intention to give employing authority to school officers as well as to boards of education, under prescribed conditions, in *R. S.* 18:7-56, which reads in part:

"All persons holding any secretarial or clerical position under any board of education, or under any officer thereof, in the school system in this State, shall enjoy tenure of office or position during good behavior and efficiency, after the expiration of a period of employment of 3 consecutive calendar years in that district, unless a shorter period be fixed by the employing *board, body or person* \* \* \*." (Emphasis supplied.)

It is harmonious with the established rules of tenure that the power to confer tenure implies the power to dismiss before tenure is achieved, and that the power to dismiss lies within the same authority that can confer tenure, in the absence of any statutory provisions to the contrary.

The Commissioner cannot agree with the respondent Board that a board of education organized under Chapter 6 of Title 18 of the Revised Statutes has co-extensive authority under the terms of *R. S.* 18:6-27 to employ and dismiss clerks in the superintendent's office. *R. S.* 18:6-38, which must be read with *R. S.* 18:6-27, applies equally to school districts organized under either Chapter 6 or Chapter 7. Moreover, the decisions in both *Valente* and *Rinaldi*, *supra*, concerned districts known as "Chapter 6 districts."

The Commissioner finds that the right to dismiss the superintendent's clerical employees rests solely with the superintendent, and may not be assumed by the board of education.

Respondent Board contends that notwithstanding the authority granted to the superintendent in *R. S.* 18:6-38, it had entered into an employment contract with petitioner providing that either party might terminate the contract on 30 days' written notice to the other party. Having found that the power to employ and dismiss petitioner rests only with the superintendent,

the Commissioner can only conclude that since through this contract the Board of Education had assumed powers which it did not legally have, such a contract is void and without effect. *16 McQuillin, Municipal Corporations, 3rd edition*, § 46.07; 78 *C. J. S.* § 299; *Fletcher v. Board of Education of Closter*, 85 *N. J. L.* 1, (*Sup. Ct.* 1913); *Rankin v. Board of Education of Egg Harbor Township*, 1939-49 *S. L. D.* 209 (1945) reversed State Board of Education 217 (1946), affirmed *Sup. Ct.* 134 *N. J. L.* 342 (1946), affirmed *E. & A.* 135 *N. J. L.* 299 (1946). See also *LaCarrubba v. Board of Education of North Bergen*, 1959-60 *S. L. D.* 99.

It was agreed by counsel that in ruling upon respondent Board's motion to dismiss, the Commissioner would necessarily decide the merits of the petition of appeal before him. Having found that respondent Board lacked authority to dismiss petitioner, the Commissioner further finds that she was illegally dismissed from her employment on December 4, 1961. He therefore directs that she be reinstated as secretary to the respondent superintendent of schools as of December 4, 1961, with such rights as to compensation as may be hers pursuant to *R. S.* 18:5-49.1.

ACTING COMMISSIONER OF EDUCATION.

July 11, 1962.

III.

COMMISSIONER WILL NOT DECIDE MOOT QUESTION

CITIZENS TAX COUNCIL,

*Petitioner,*

v.

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

*Respondent.*

For the Petitioner, Mr. Seymour S. Weinblatt.

For the Respondent, Mr. Max N. Schwartz.

ON MOTION TO DISMISS AMENDED COMPLAINT

DECISION OF THE COMMISSIONER OF EDUCATION

Respondent has moved to dismiss an amended complaint filed on February 1, 1962, alleging in 10 counts illegal action by respondent in connection with a referendum on a local school building bond issue.

Petitioner had originally filed a petition of appeal on September 14, 1961, which was dismissed by memorandum of the Assistant Commissioner in Charge of Controversies and Disputes because it alleged violations of a statute over which the Commissioner has no jurisdiction. Concurrently with the dismissal of the first petition, the Commissioner accepted a "Petition for Public Hearing" as an amended petition of appeal, which respondent answered and moved to dismiss. Before the motion was answered, petitioner engaged counsel, and on February 1, 1962, filed an amended complaint which respondent here seeks to have dismissed.

During the period of this litigation, the Board of Education submitted proposals for the issuance of bonds for school construction to the voters at two referendums. The first, held October 17, 1961, was rejected and the second, on December 21, 1961, was approved. Proceedings instituted by petitioner in Superior Court, Chancery Division, Essex County (No. C 1100—61) seeking an injunction to enjoin respondent Board from holding the second referendum were unsuccessful.

The Motion to Dismiss has been argued in briefs of counsel.

Respondent urges dismissal on the following grounds:

1. Petitioner's failure to contest the validity of a bond issue referendum conducted on December 21, 1961, within 15 days thereafter, as provided in *R. S. 18:7-89*, is a bar to those proceedings.
2. Petitioner is without standing to contest the action of respondent.
3. The Commissioner has no authority to "censure the respondent Board of Education."
4. The determination and dismissal of injunction proceedings instituted in Superior Court, Chancery Division, covering the same questions of law and fact, are dispositive of the issues and are *res adjudicata* thereof.

Petitioner's original complaint contained some of the charges embodied in the amended petition *sub judice*, and preceded the rejected referendum of October 17, 1961. The second referendum, conducted on December 21, 1961, which petitioners sought unsuccessfully in Superior Court to enjoin, was approved by the voters. Counsel for petitioner asserts in his brief that the second referendum is not in contest, but that the acts alleged in the amended petition preceded the first referendum and were both reprehensible and unlawful. The Commissioner must accept as a fact, assented to by both counsel in their briefs, that the acts alleged do not relate to the second referendum; and the Commissioner agrees with the respondent that even if they do, they are *res adjudicata* in the light of the Court's finding that the motion for injunction had "no sound basis in law." There remains then, the question of whether the Commissioner should decide a controversy bearing upon the earlier rejected referendum.

It is well established that the Commissioner will not decide moot questions. *Rodgers v. Board of Education of the City of Orange*, 1956-57 S. L. D. 50; *Worthy, et al. v. Board of Education of the Township of Berkeley*, 1938 S. L. D. 686, dismissed by State Board of Education 689; *Tedesco v. Board of Education of Lodi*, 1955-56 S. L. D. 69. See also *Mills v. Green*, 159 U. S. 653 (1895); *Freeholders of Essex v. Freeholders of Union*, 44 N. J. L. 483 (*E. & A.* 1882). However, the Commissioner will not hesitate to take corrective action in order to avoid repetition of improper procedures. *Halligan v. Board of Education of Rutherford*, 1959-60 S. L. D. 198; *McAllister v. Board of Education of Lawnside*, 1951-52 S. L. D. 39. In the *Halligan* case, the Commissioner said:

"Furthermore, the Supreme Court in the matter of *Joseph J. Masiello, Jr. v. State Board of Examiners*, 25 N. J. 590 (*Sup. Ct.* 1958) pointed out that if on appeal to him it appeared to him that there had been an inter-

pretation of a rule violative of the letter or spirit of such rule, the proper discharge of the Commissioner's duty requires corrective action."

In the instant case, the bond issue referendum with which the alleged unlawful acts are associated was defeated. Assuming but not deciding that the allegations are true, the efforts of respondent Board to secure a favorable vote on the referendum did not succeed. See *Halligan, supra*. Petitioner in his brief concedes that there was no repetition of these acts prior to the second referendum, and the Court so found. The corrective action, if any evil existed, was taken by respondent on its own initiative. The Commissioner finds and determines, therefore, that the issues herein are moot, and the petition should be dismissed.

Having so found, there is no necessity for the Commissioner to rule on the other points urged by respondent in the Motion to Dismiss.

The motion is granted and the petition is dismissed.

COMMISSIONER OF EDUCATION.

July 25, 1962.

IV.

TENURE IS ACQUIRED AFTER CONTINUOUS EMPLOYMENT FOR  
THIRTY-SIX CONSECUTIVE MONTHS

MILO E. SCHUMACHER, JR.,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MANCHESTER,  
OCEAN COUNTY,

*Respondent.*

For the Petitioner: Franklin H. Berry, Jr., Esq.

For the Respondent: Morton C. Steinberg, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case seeks an order declaring that he has acquired tenure as a principal and directing his reinstatement in that position in respondent's schools. There being no factual issue in dispute, by agreement of counsel the matter is presented to the Commissioner by briefs and memoranda.

Petitioner was employed under contracts with respondent from July 1, 1959, to June 30, 1962, said contracts containing clauses permitting either party to terminate by giving to the other party 60 days' notice in writing of such intention. Neither party gave such written notice. On May 10, 1962, respondent Board passed a motion "that an employment contract be denied Mr. Schumacher."

Petitioner contends that by virtue of the terms of his employment and the failure of respondent to give him 60 days' notice of intention to terminate the third year's contract, he has acquired tenure pursuant to condition (a) of R. S. 18:13-16, and cannot be denied continued employment except for

cause. Respondent denies that petitioner has been employed for three consecutive calendar years and therefore contends that he is not protected by the tenure statute.

R. S. 18:13-16 reads as follows:

“The services of all teachers, principals, superintendents and assistant superintendents, of the public schools, excepting those who are not the holders of proper teachers’ certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years, some part of which must be served in an academic year after July first, one thousand nine hundred and forty; *provided*, that the time any teacher, principal or supervising principal had taught in the district in which he was employed at the end of the academic year immediately preceding July first, one thousand nine hundred and forty, shall be counted in determining such period or periods of employment in that district.

“An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation.”

The decision in this case turns on the meaning of the words “three consecutive calendar years.” It is not disputed that petitioner has been employed for 36 consecutive months, from July 1, 1959, to June 30, 1962. Respondent contends, however, that the term “calendar years” in the statute, *supra*, can only be construed to mean periods beginning January 1 and concluding December 31 and reckons petitioner’s employment as follows:

July 1, 1959 to December 31, 1959 .....	6 months
January 1, 1960 to December 31, 1960 .....	1 year
January 1, 1961 to December 31, 1961 .....	1 year
January 1, 1962 to June 30, 1962 .....	6 months

Respondent argues that this employment does not constitute three calendar years within the meaning of the statute.

Respondent cites numerous definitions of “calendar year” in support of its contention, of which the following are representative:

“The period from January 1 to December 31, inclusive. *Byrne v. Bearden*, 27 Ga. App. 149, 107 S.E. 782, 783; *Application of Title Guarantee & Trust Co.* 183 Misc. 490, 48 N.Y.S. 374, 375. Ordinarily calendar year means 365 days except leap year, and is composed of 12 months varying in length. *Shaffner v. Lipinsky*, 194 N.C. 1, 138 S.E. 418, 419; *United States, for Use of Strona v. Bussey*, D.C. Cal., 51 F. Supp. 996, 999.

“‘Calendar year preceding election’ means year beginning January 1 and ending December 31. *People v. Milan*, 89 Colo. 556, 5 P. 2d 249, 253. *Black’s Law Dictionary, 4th Edition*, p. 255.”

“Calendar year. Ordinarily and in common acceptance a ‘calendar year’ is three hundred and sixty-five days save leap year; from January the first to December the thirty-first, inclusive. A calendar year is composed of twelve months, varying in length, according to the common or Gregorian calendar. 85 C. J. S. 835.”

To these definitions might be added the following:

“In computing time by the calendar year, days are not counted, but the calendar is examined and the day numerically corresponding to that day in the following year is ascertained, and the calendar year expires on that day less one. 209 Ill. App. 320, 279 Ill. 408.” Shumaker and Longsdorf: *Cyclopedic Law Dictionary*, 3rd Edition, 1186.

The Commissioner can find in the scope of these definitions only clear indication that “calendar year” is susceptible of more than one definition, depending on the circumstances in which it is used.

Respondent relies also on decisions of the Courts in support of its contention that the school year, from July 1 to the following June 30, is not a calendar year within the meaning of *R. S. 18:13-16* and cites the following in *Carroll v. State Board of Education*, 8 N. J. Misc. 859 (*Sup. Ct.* 1930):

“It is next contended that the contracts of the prosecutrix and the statute in question should be considered and construed in connection with the statute fixing the school year as from July 1st of one year, until June 30th, of the year succeeding.

“That statute is 4 *Comp. Stat.*, p. 4804, § 238: ‘The school year shall begin on the first day of July and end at the thirtieth day of June,’ and has been construed to be ‘for fiscal and administrative purposes.’ *Wooley v. Hendrickson*, 73 N. J. L. 14 (at p. 20).

“We think the Tenure act, *Pamph. L.* 1909, *supra*, cannot be construed in the light of the statute last referred to, but, on the contrary, with the assistance of the statute (4 *Comp. Stat.*, p. 4973, § 10), which is a legislative guide given for the purpose of construing the language of the law-making body and which provides:

“‘That the word ‘month,’ when used in any statute shall be construed to mean a calendar month and the words ‘a year’ shall be construed to mean a calendar year.’

“So construed the prosecutrix was not in the position of a teacher engaged to teach and teaching ‘after the expiration of a period of employment of three consecutive years in that district’ when her employment was terminated under the terms of her third contract.”

Respondent also relies on *Newman v. Fair Lawn*, 31 N. J. 279 (1960):

“Does the phrase ‘end of each year’ as used in *N. J. S. A.* 40:55-1.4 mean December 31 of each year? Defendants answer this question in the affirmative, arguing that ‘year’ means calendar year, *i. e.*, the period between January 1 and December 31. Plaintiffs on the other hand argue that ‘year’ as used in the statute means year of service.

“*N. J. S. A. 1:1-2* provides:

‘Unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction, the following words and phrases, when used in any statute and in the Revised Statutes, shall have the meaning herein given to them.

\* \* \* \* \*  
\* \* \* ‘year’ means a calendar year.’

A calendar year runs from January 1 to December 31. *American Woolen Co. v. Edwards*, 90 *N. J. L.* 69 (*Sup. Ct.* 1916), affirmed 90 *N. J. L.* 293 (*E. & A.* 1917); *State v. Van Gunten*, 84 *Ohio St.* 172, 95 *N. E.* 664 (*Sup. Ct.* 1911); *Wilson v. Board of Education*, 394 *Ill.* 197, 68 *N. E.* 2d 257 (*Sup. Ct.* 1946); *Bryant v. State*, 97 *Tex. Cr. R.* 11, 260 *S. W.* 598 (*Ct. Crim. App.* 1924). This is unquestionably the meaning of ‘calendar year’ in *N. J. S. A. 1:1-2*.

“The word ‘year’ has been given many meanings. \* \* \* However, when used in a statute, and especially where the legislature had indicated how the word should be construed in the absence of an obviously contrary intent, ‘year’ is taken to mean the period between January 1 and December 31, unless strong reasons compel a contrary conclusion. *Brooke v. Atlantic Woolen Mills*, 18 *Ga. App.* 505, 89 *S. E.* 598 (*Ct. App.* 1916); *J. L. Hammett Co. v. Alfred Peates Co.*, 217 *Mass.* 520, 105 *N. E.* 370, *L. R. A.* 1915A, 334 (*Sup. Jud. Ct.* 1914); *Pere Marquette R. Co. v. Kalamazoo, L. S. & C. Ry. Co.*, 158 *Mich.* 40, 122 *N. W.* 356 (*Sup. Ct.* 1909).”

Petitioner, on the other hand, points to the fact that nowhere in its decision in *Carroll, supra*, did the Court define calendar year as running from January 1 to December 31. On the contrary, the Court’s decision is concerned with distinguishing between the school fiscal period between July 1 and the following June 30 and “year of employment” as contemplated in the Tenure Law, and clearly interprets “calendar year” to be a twelve-months’ period ending, in that particular instance, on September 7. After reviewing petitioner’s argument that she had completed her three years of service between September 7, 1926, when she first began to teach, and the end of school sessions in June 1929, the Court said:

“Be this as it may, prosecutrix under no circumstances would have performed three calendar years of service until September 7th, 1929; three years from the commencement of her first contract of employment.”

Petitioner argues further that the statement of the Court in *Newman, supra*, must be regarded as the Court’s finding in that particular circumstance; that is, the construction of “end of each year” in the statute (*R. S. 40:55-1.4*) establishing the terms of members of municipal planning boards. In the same way, petitioner says, “calendar year” in the Tenure Act must be construed in the light of legislative intent.

The statute granting tenure status to teachers and principals goes back to 1909. The earliest Tenure Law (*Pamph. L.* 1909, ch. 243) reads in part as follows:

“The services of all teachers, principals, supervising principals of the public schools in any school district in this State shall be during good

behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board \* \* \*.”

When the law was amended by Chapter 188 of the Laws of 1934, the terms “calendar year” and “academic year” were introduced to provide alternative time periods for acquiring tenure:

“\* \* \* after the expiration of a period of employment of three consecutive calendar years \* \* \*; or upon beginning service for the fourth consecutive academic year, or upon continuous employment during all the time schools are open in the district for a period of *three calendar years from the date of original employment* \* \* \*. An academic year shall be interpreted to mean the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation. \* \* \*” (Emphasis added.)

Subsequent amendments to the act by Chap. 27 of the Laws of 1935, and to R. S. 18:13–16 by Chapter 43 of the Laws of 1940, further defined and established the time periods of employment for acquiring tenure status in their present form.

Examination of the original law and all of its subsequent amendments, which serve only to refine the meaning of the original term of “three consecutive years,” makes it obvious to the Commissioner that the intent of the Legislature was to provide a probationary period of 36 months prior to the acquisition of tenure status. The intent of the statute and not “scholastic strictness” must control the construction of a particular term, if a reasonable construction is to be reached. “The essential legislative intention cannot be made to depend on grammatical nicety or precision in terms.” *State v. Brown*, 22 N. J. 405 (1956). See also *Palkoski v. Garcia*, 19 N. J. 175 (1955); *Caputo v. The Best Foods, Inc.*, 17 N. J. 259 (1955); *Alexander v. New Jersey Power and Light Co.* 21 N. J. 373 (1956).

“The reason and spirit of the correlated symbols of expression prevails over the strict letter. Once we have grasped the genius of the regulatory measure, we are in a fair way to assay the particular terms used to fulfill the legislative design.” *Caputo v. The Best Foods, Inc.*, *supra*, at p. 263.

Respondent would have the Commissioner so construe the statute that in order for petitioner to acquire tenure, he would be obliged to complete not 36, but 42 months of employment in order to embrace three calendar years starting on January 1 and ending December 31. The Commissioner can find no such intent in the statute, either in its own terms, or in long-standing administrative and judicial practice. See *Shierstead v. Brigantine*, 29 N. J. 220 (1959), at p. 231; *Lane v. Holderman*, 23 N. J. 304 (1957); *State Dept. of Civil Service v. Clark*, 15 N. J. 334 (1954). The probationary period of 36 months was recognized in 1912 in the case of *Davis v. Board of Education of Overpeck Township*, 1938 S. L. D. 464, reversed State Board of Education 466 (1913), affirmed Supreme Court 470 (1913). The language of the Court in its memorandum not only sustains the three-year probationary period, but also recognizes that a calendar year can begin other than on January 1:

“I agree entirely with the State Board that Mr. Davis was protected by the act; that his three years of service beginning with September 1, 1909, entitled him to the benefit of its provisions \* \* \*.

“The technical objection that the appeal was taken on August 28, 1912, before the expiration of a calendar year \* \* \* would have no weight. \* \* \*”

The Commissioner’s decision in the case of *Carroll v. Board of Education of Matawan*, 1938 S. L. D. 383 (1929) affirmed State Board of Education 387 (1930), affirmed Supreme Court 8 N. J. Misc. 859 (1930), again emphasizes the concept of a 36-month probationary period (p. 384), as well as construing the term “calendar year:”

“According to the Statutory Construction Act (N. J. Compiled Statutes, p. 4973) ‘the words ‘a year’ shall be construed to mean a calendar year.’ Appellant insists that if calendar years are to be required in making up the period necessary for tenure, such year would have to be considered as being from January 1st to December 31st. In the Commissioner’s opinion, however, a calendar year must mean any period of 365 days, or any period including twelve calendar months.”

While the Supreme Court in its decision in *Carroll, supra*, considered the comparative meanings of “calendar year” and “school year,” neither of the higher appellate tribunals took exception to the Commissioner’s interpretation of the meaning of “calendar year.”

Most recently, in a decision of the Supreme Court in the case of *Zimmerman v. Board of Education of Newark*, decided by the Commissioner November 9, 1960, affirmed State Board December 31, 1961, affirmed Supreme Court June 29, 1962, the Court considered the various grounds upon which appellant based his claim for tenure under R. S. 18:13–16. One of these was that appellant

“\* \* \* contracted with the defendant on June 30, 1952, to begin teaching on September 1, 1952. In his view recognition of his employment status up through June 30, 1955, would constitute ‘employment’ for the required period. \* \* \*

“Our former Supreme Court had occasion to interpret the word ‘employment’ contained in R. S. 18:13–16 under similar circumstances and held contrary to the position urged by Zimmerman. *Carroll v. State Board of Education*, 8 N. J. Misc. 859 (Sup. Ct. 1930). \* \* \*

“We agree with this interpretation. Consequently, appellant was not employed for three calendar years prior to June 30, 1955, within the meaning of the statute. It follows that he is not entitled to tenure on that theory.” (Emphasis added.)

Beyond the aid given to the construction of the statute by its legislative history, *Lloyd v. Vermeulen*, 22 N. J. 200 (1956), at 206, and the long years of administrative and judicial practice in recognizing a 36 months’ probationary period, however designated, as the basic period for acquiring tenure, there remains a further consideration.

Even granting that “calendar year” in certain contexts is to be construed to mean the period from January 1 to December 31, as in *Newman v. Fair Lawn, supra*, the courts have held:

“When the words of a statute are susceptible to two meanings, the one favorable, and the other hostile to its principal design, the former should prevail and control the construction.” *Waters v. Quimby*, 27 N. J. L. 296, 311 (Sup. Ct. 1859) affirmed 28 N. J. L. 533 (E. & A. 1859).

See also *Lloyd v. Vermeulen*, *supra*, at p. 205.

Having found that the “principal design” of the Tenure Law is to establish a 36-month probationary period, without regard to the date on the calendar on which employment begins, the Commissioner must conclude that the meaning of the expression “calendar year” favorable to such design is the one which he expressed in *Carroll*, *supra*: “a calendar year must mean any period of 365 days, or any period including twelve calendar months.” Any other meaning would create an anomaly; that is, under respondent’s argument, a teacher, principal, or superintendent employed only during the academic year as defined in R. S. 18:13–16, would acquire tenure by employment at the beginning of the fourth academic year, whereas a teacher, principal, or superintendent employed twelve months of the year would have to serve a probationary period in excess of 36 months *unless his employment began on January 1*. A statute will not be construed so as to reach an anomalous result. *Robson v. Rodriguez*, 26 N. J. 517 (1958); *Slocum v. Krupy*, 11 N. J. Super. 81 (App. Div. 1951). Moreover, as the Court said in *Gannon v. Saddle Brook Township*, 56 N. J. Super. 76 (App. Div. 1959):

“The legislative mind is presumed to be consistent, and statutes should be construed to the end that their respective provisions will be consistent one with the other, thus giving effect to the true meaning, intent and purpose of the legislation as a whole.”

In construing “calendar year” as the Commissioner defined it in *Carroll*, *supra*, and as he now reaffirms it, he finds no inconsistency with the express provisions of R. S. 1:1–1:

“In the construction of the laws and statutes of this state, both Civil and criminal, words and phrases shall be read and construed with their context, and shall unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language. Technical words and phrases, and words and phrases having a special or accepted meaning in the law, shall be construed in accordance with such technical or special and accepted meaning.”

and R. S. 1:1–2, as follows:

“Unless it be otherwise expressly provided or there is something in the subject or context repugnant to such construction, the following words and phrases, when used in any statute and in the Revised Statutes, shall have the meaning herein given to them. \* \* \*

“Month; year. The word ‘month’ means a calendar month, and the word ‘year’ means a calendar year.”

The Commissioner therefore finds and determines that petitioner acquired tenure in the position of principal in respondents’ schools on the completion of employment for three calendar years from July 1, 1959, to June 30, 1962.

He directs that respondent restore petitioner to his employment as of July 1, 1962.

COMMISSIONER OF EDUCATION.

August 20, 1962.

Pending before Superior Court, Appellate Division.

V.

BOARD MAY REMOVE MEMBER ON FINDING THAT ABSENCE  
FROM THREE CONSECUTIVE REGULAR MEETINGS  
WAS WITHOUT GOOD CAUSE

NICHOLAS P. REALE,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE,  
SOMERSET COUNTY,

*Respondent.*

For the Petitioner: Seymour S. Weinblatt, Esq.

For the Respondent: Trombadore & Trombadore  
(Raymond R. Trombadore, Esq. of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

By resolution adopted on February 6, 1962, respondent removed petitioner from office as a member of the Board of Education of the Borough of Manville on the grounds that he had failed to attend more than three consecutive regular meetings of the Board without good cause. Petitioner asks that the resolution be set aside and that he be restored to full membership on the Board.

By agreement of counsel, the matter was presented to the Commissioner by the submission of exhibits and by briefs of counsel.

The facts in the case are these: Petitioner was absent from consecutive regular meetings of the Board in the months of July, August, September, October, and November, 1961. On November 23, 1961, respondent adopted a resolution removing petitioner from office on the grounds stated. On December 5 a temporary restraining order against the removal was issued out of Superior Court, Chancery Division, which order was made final on January 12, 1962, and the matter was remanded to the Board of Education for a full hearing and redetermination. On January 18, 1962, at a special meeting held for such purpose, a hearing was conducted and petitioner appeared and presented evidence to show cause why he should not be removed from the Manville Board of Education. At a special meeting called for the purpose on February 6, 1962, the Board passed a resolution by a vote of 6-0, with one member abstaining, determining that petitioner's absences were without good cause and removing him from office pursuant to R. S. 18:7-13, which provides as follows:

“A member of a board who shall fail to attend three consecutive regular meetings of the board, without good cause, may be removed by the board. The vacancy thus created shall be filled in the same manner as other vacancies.”

Petitioner contends that the resolution is void for not being supported by a finding that he has missed regular meetings without good cause. The text of the resolution reads in full as follows:

“RESOLUTION

“MANVILLE BOARD OF EDUCATION  
MANVILLE, NEW JERSEY

“RESOLUTION PROVIDING FOR REMOVAL OF MEMBER  
NICHOLAS P. REALE FOR NON-ATTENDANCE AT MEETINGS

“WHEREAS N. J. S. 18:7-13 provides as follows:

‘A Member of a Board who shall fail to attend three consecutive regular meetings of the Board, without good cause, may be removed by the Board. The vacancy thus created shall be filled in the same manner as other vacancies.’; and

“WHEREAS Dr. Nicholas P. Reale, a member of the Manville Board of Education has failed to attend more than three consecutive regular meetings of the said Board, to wit: has failed to attend consecutive regular meetings of the Board of Education held in the months of July, August, September, October, and November of 1961; and

“WHEREAS the said Dr. Nicholas P. Reale has been afforded a fair and ample opportunity to be heard by the Board to show that his absences were with good cause; and

“WHEREAS after careful consideration of the evidence presented by and on behalf of member Dr. Nicholas P. Reale it is determined and found by the Board that the absences of said member Dr. Nicholas P. Reale have been without good cause;

“NOW THEREFORE, BE IT RESOLVED by the Manville Board of Education of the Borough of Manville, County of Somerset and State of New Jersey, that the said Doctor Nicholas P. Reale be and he is hereby removed from office pursuant to the terms of N. J. S. 18:7-13 and said office is hereby declared vacant.

“BE IT FURTHER RESOLVED that this resolution will take effect immediately unless within ten days from the date of adoption hereof said Board member, Dr. Nicholas P. Reale, perfects an appeal from the finds herein as provided by law, in which latter event this resolution will take effect upon disposition of such appeal.”

The Commissioner cannot agree with petitioner’s contention that the resolution is not supported by a finding that he has missed more than three regular meetings without good cause. The transcript of the hearing held on January 12 reveals that Dr. Reale testified that his absences from the regular meetings on July 17, September 18, and October 16, 1961, were due to his office hours as a practicing physician; that he was on vacation at the time of

the regular meeting on August 21, 1961, and that he attended a symphony concert in which his son was performing on the evening of the regular meeting of November 20, 1961. He testified further that while he began his office hours earlier than usual on Monday evenings in an effort to attend Board meetings, even if late in arrival, this was not always possible, nor could he promise any better attendance in the future. In his words: "I can't explain it, sir, I try very hard and no matter how hard I try, I am just unable to get to the meetings usually." (Tr. 14)

The Commissioner finds that respondent reached its determination after a full and fair hearing, that it made a reasonable and proper finding in accordance with the weight of evidence, and that its finding is duly recorded in the resolution of removal.

In making this determination, the Commissioner would observe that petitioner practices in a profession in which the hours are notoriously long and frequently irregular, and impose real hardship upon those of its membership who would serve in a position of public endeavor such as membership on a board of education. On the other hand, the official work of a board of education can be conducted only at its regular and special meetings, a fact which the Legislature has recognized in *R. S. 18:7-13 supra*. The continued or frequent absence of one or more of its members could seriously impair the transaction of business, especially in those actions requiring approval of a majority of the whole number of members of the board. See, for example, *R. S. 18:7-58* and *R. S. 18:14-3*.

Petitioner next contends that the resolution of removal should be set aside as invalid because it was prepared in advance of the meeting at which it was adopted, and was in fact adopted without proper deliberation. He cites *Grogan v. DeSapio*, 11 *N. J.* 308 (1953), and *Cullum v. Board of Education of the Township of North Bergen*, 15 *N. J.* 285 (1954) in support of his contention that his removal was the result of "private final action." Aside from the advance preparation of the resolution the Commissioner finds in the instant case none of the elements which appeared reprehensible in *Grogan* and *Cullum, supra*. It is apparent in the minutes of the February 6 meeting that the attorney for the Board had prepared the resolution in advance of the meeting. It also appears that all members had received copies of the transcript of the hearing prior to the meeting, and that full opportunity was given to all members of the Board and to petitioner and his attorney to ask questions and offer comments both before and after the resolution was moved for adoption. In fact, a motion for adoption of the resolution had been made and seconded before petitioner arrived at the meeting. The minutes then report:

"Due to the Doctor being late member Kulaszewski and member Pawlik withdrew their motion on the Resolution to give Dr. Reale ample time to speak."

There was extended further discussion both before and after the resolution was again moved. Nothing was introduced to show that there had been any form of caucus or private meeting at which adoption of the resolution was predetermined—the fault which the Court condemned in both *Grogan* and *Cullum, supra*. The Commissioner finds that the resolution was adopted in a proper manner.

The Commissioner finds and determines that petitioner was removed from office as a member of the Board of Education of the Borough of Manville in accordance with *R. S. 18:7-13*.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

September 11, 1962.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from the decision of the Commissioner of Education dated September 11, 1962, wherein he affirmed the action of the respondent Board of Education on February 6, 1962, in removing petitioner-appellant from office as a member of the Board of Education of the Borough of Manville. The grounds of the said removal were that petitioner-appellant had failed to attend more than three consecutive regular meetings of the Board without cause. The removal was based on *R. S. 18:7-13*, which reads as follows:

“A member of a board who shall fail to attend three consecutive regular meetings of the board, without good cause, may be removed by the board. The vacancy thus created shall be filled in the same manner as other vacancies.”

In his decision the Commissioner based his affirmance upon a review of the entire record and found that the removal of petitioner-appellant was not without good cause. He further found, for reasons more particularly stated in his decision, that the resolution of removal was not invalid.

For the reasons stated in the opinion below, it is recommended that the decision of the Commissioner be affirmed.

January 9, 1963.

VI.

BOARD MAY PAY SALARY WITHOUT REQUIRING SERVICE DURING  
PERIOD OF NOTICE OF INTENTION TO TERMINATE  
TEACHER'S CONTRACT

MURIEL E. BARRATT,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HARRISON,  
GLOUCESTER COUNTY,

*Respondent.*

For the Petitioner: Andrew Klepka, Esq.

For the Respondent: Herbert Butler, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was dismissed by respondent from her position as teacher and seeks an order from the Commissioner directing respondent to comply with the terms of the employment contract.

A hearing in the matter was held by the Assistant Commissioner in Charge of Controversies and Disputes on May 24, 1962, at the office of the Gloucester County Superintendent of Schools in Clayton. Briefs and memoranda were submitted by counsel.

Petitioner was first employed under a contract in effect from July 1, 1961, to June 30, 1962, unless either party gave to the other 30 days' notice in writing of intention to terminate the contract prior to its expiration date. On November 7, 1961, petitioner received the following letter (P-2) addressed to her and signed by the principal of the school:

"In compliance with the authorization of the Administration Committee and the President of the Board of Education, your tour of duty as teacher in the Harrison Township School is ended as of the close of the school day, November 7, 1961.

"You will receive all pay and allowances up to December 7, 1961."

On November 13, the principal sent to petitioner a second letter (P-3), which she received the next day, as follows:

"At a special meeting of the Harrison Township Board of Education on Tuesday evening, November 7, it was unanimously voted to approve the recommendation of the Administration Committee. The complete recommendation is set forth in the letter which you received from me on Tuesday afternoon.

\* \* \* \* \*

"Since your departure on Wednesday morning, some questions have arisen. I have been unable to find any report cards of your students. If you know where these are, please write and tell us. If you have them, let us know, we will send someone to pick them up. Unless all school materials can be found to be in order, final payment of your salary will be held up until all materials are in order."

On November 28 petitioner requested a hearing which was denied by respondent at its regular meeting on December 18.

Petitioner testified that she was paid in full for the month of November. Payroll check #2638 was issued on December 22 to the order of petitioner in the amount of \$71.51, representing her salary less all deductions for school days to December 7, 1961, computed at a daily rate of  $\frac{1}{200}$  of annual salary. Subsequently, and apparently because of some misunderstanding, a replacement check (#2666) was issued for the former check; both checks were introduced in evidence. It is thus clear that petitioner was paid in full for a period of 30 days following her dismissal on November 7.

The authority of respondent Board to terminate petitioner's contract is not disputed. The sole question is whether the Board exercised its authority in a valid and legal manner. Petitioner asserts that she did not receive 30 days' notice in writing of the Board's intention to terminate her contract. Respondent admits that the notice contained in the letter from the principal on November 7 was not a formal notice couched in the language of its contract with petitioner. It contends, however, that in ending petitioner's services on November 7, and promising to pay her salary to December 7, without requiring her services through the intervening period, it made its intention com-

pletely clear and complied with the requirements of law and the terms of the contract.

A local board of education may make rules for employment of teachers under authority granted in *R. S. 18:13-5*, and enter into contracts with them under the terms of *R. S. 18:13-7*. There is no requirement in the statutes that a hearing be granted to a teacher whose contract is terminated under a clause providing for termination on the giving of notice. *R. S. 18:13-11.1* does provide, however:

“If the employment of any teacher is terminated on notice pursuant to a contract entered into between the teacher and a board of education, it shall be optional with the board of education whether or not the teacher shall teach for the unexpired term.”

Does the letter written by the principal on November 7, combined with subsequent unanimous adoption by the Board of the recommendations of its president and administration committee later that day, constitute termination on notice pursuant to the contract of employment? To answer this question the Commissioner must look to the intent of the Board. Granting *arguendo* that the letter does not in terms give 30 days' notice of termination and that even if it had, only the Board of Education had authority to issue such notice, the subsequent ratification of the terms of the letter made amply clear the intent of the Board to terminate the petitioner's services as of the close of the school on November 7, and to pay her for a 30-day period thereafter. Further, the ratification of an act of its agent which it had power to authorize in advance gives the principal's letter the full legal effect of notice.

“An assembly may ratify any action which it has the power to authorize in advance, in which case the ratification relates back to the date of the action ratified.” *Harker v. McKissock*, 10 *N. J. Super.* 26 (*App. Div.* 1950).

See also *Ratajczak v. Board of Education, Perth Amboy*, 114 *N. J. L.* 577 (*Sup. Ct.* 1935). While it is unfortunate that petitioner did not receive notification of the formal action of the Board until a week later, and while the Commissioner believes that the Board should have directed its secretary, rather than the principal, to communicate its official action, these facts do not disturb the validity of the action itself.

The Commissioner finds that respondent formally terminated petitioner's contract of employment, gave her sufficient notice of its action, and discharged its financial obligations under the contract.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

October 8, 1962.

VII.

EXPULSION WHICH CONSTITUTES UNREASONABLE  
PUNISHMENT WILL BE SET ASIDE

JEFFREY PASKO,

*Petitioner,*

V.

THE BOARD OF EDUCATION OF THE BOROUGH OF DUNELLEN,  
MIDDLESEX COUNTY,

*Respondent.*

For the Petitioner: Joseph C. Doren, Esq.

For the Respondent: Robert Runyon, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, who was 16 years old in December 1961, was expelled for the school year 1962-63, and seeks an order from the Commissioner of Education reinstating him in the 12th grade of the Dunellen High School. The facts in the matter were made known in a hearing before the Assistant Commissioner of Education in Charge of Controversies and Disputes, at the Middlesex County Court House on October 9, 1962.

The school records reveal a series of rule infractions by petitioner, chiefly truancy and unauthorized absence from particular classes, during the 1960-61 and 1961-62 school years, for which he was punished by detention or by suspension from school.

On a night in March 1962, during the early morning hours following a school dance, the school was entered and acts of vandalism committed. Police investigation resulted in apprehension, some weeks later, of five juveniles, one of whom was petitioner, who admitted the vandalism and were held for Juvenile Court. At this disclosure, the school authorities placed petitioner on school probation, warning him that subsequent misconduct would result in expulsion.

Apparently petitioner conformed to school regulations from then on until after completion of final examinations and just a day or two before the close of school in June when his class was scheduled to take a class trip to the seashore. All members of the class whose "dues" were paid were eligible to go. Those not going were required to attend regular classes. Petitioner, who was \$8.00 in arrears in payment of "dues," did not go with the class but attended school until afternoon, when he and several others "cut" the 7th and 8th period classes and drove to the seashore to join in the class excursion. Following this infraction, the high school principal recommended expulsion of petitioner for the next school year. The Board of Education discussed the recommendation in one or more committee or caucus sessions, and at its regular meeting on June 28, 1962, took action to expel petitioner for the 1962-63 school year.

In July 1962, petitioner was arraigned in Middlesex County Juvenile Court to answer for the unlawful entry committed in March, with the result

that he was placed on probation and required to report to a probation officer of the Court. It appears that the Court also recommended that he be permitted to return to school and "work out his punishment" there. The testimony discloses that the Court's recommendation was received, considered, and rejected by the Board of Education at its meeting in August, and the expulsion was allowed to remain in force. When subsequent efforts for reinstatement by petitioner's parents and attorney were unsuccessful, the petition of appeal herein was filed with the Commissioner of Education.

Placed in evidence were the school's discipline records of petitioner's offenses for the 1960-61 and 1961-62 school terms as follows:

<i>Date</i>	<i>Class</i>	<i>Offense</i>	<i>Punishment</i>
12-2-60	Biology	Talking	Pupil conference— none imposed
12-7-60	English II	Noise in class	Detention
2-9-61		Truancy	8 hours detention
3-6-61		Cut two classes	Make up classes—parent conference held
9-25-61	Journalism	Cut class	1 hour detention
9-28-61	English III	Cut class	5 hours detention
10-2-61	English III	Out of order	Teacher conference— none imposed
10-9-61	English III	Impertinence	1 week suspension from school
2-26-62		Truancy	1 week suspension from school
5-2-62	Unlawful entry and vandalism on 3-30-62 disclosed— "Jeff has been placed on an open suspension pending an action of possible expulsion by the Board of Education."		

The contention of petitioner and his parents is that expulsion for one year for an unauthorized absence from class or even for a series of such absences is an excessively harsh punishment which exceeds reasonableness. They allege that such drastic action was motivated by consideration, either consciously or unconsciously, of petitioner's involvement in the vandalism occurrence for which he is being punished by the Juvenile Court. For the school authorities to mete out punishment based on the incident to which he is answerable to the Court amounts, in effect, to double jeopardy, they claim.

Respondent Board of Education denies being influenced by petitioner's involvement in the vandalism incident and says its action was a direct result of a series of school offenses culminating in an act of truancy from classes while on probation. It points out that it reached its conclusion after careful deliberation of the facts and recommendations of the high school principal and superintendent. It contends that the action was necessary in order to uphold the authority of the principal and to preserve proper discipline in the school; that readmission of petitioner would impair the authority of the principal and would affect negatively the morale of both pupils and teachers; and that the action taken is within the discretionary authority of a board of education.

There can be no question of the power of a board of education to enforce proper discipline in its schools, or of the obligation of pupils to behave

appropriately and obey the rules and regulations of the school. *R. S. 18:7-56* gives a board of education power to "make, amend and repeal rules, regulations and by-laws not inconsistent with this Title or with the rules and regulations of the State Board of Education, for \* \* \* the government and management of the public schools \* \* \* in the district \* \* \*." *R. S. 18:7-57* confers upon the board the specific power to suspend or expel pupils. Pupils are required to submit to the authority of the school under *R. S. 18:14-50*:

"Pupils in the public school shall comply with the regulations established in pursuance of law for the government of such schools, pursue the prescribed course of study, and submit to the authority of the teacher. Continued and willful disobedience, open defiance of the authority of the teacher, or the habitual use of profanity or obscene language shall be good cause for suspension or expulsion of any pupil from school."

They are also liable to suspension and punishment for damage to school property under *R. S. 18:14-51*:

"Any pupil who shall cut, deface, or otherwise injure any schoolhouse, furniture, fences, outbuildings, or other property of the school district shall be liable to suspension and punishment, and his parents or guardian shall be liable for damages to the amount of the injury to be collected by the board of education in any court having jurisdiction, together with costs of the action."

It is well established that the Commissioner will not substitute his judgment for that of the chosen representatives of the school district who comprise the board of education. *Fitch v. Board of Education of South Amboy*, 1938 *S. L. D.* 292, affirmed State Board of Education 293 (1914); *Cook v. Board of Education of Plainfield*, 1939-49 *S. L. D.* 177, affirmed State Board of Education 180 (1939); *Palmer v. Board of Education of Audubon*, 1939-49 *S. L. D.* 183, affirmed State Board of Education 189 (1946); *Mackler v. Board of Education of Camden*, 1953-54 *S. L. D.* 53, affirmed State Board of Education 66 (1954), 16 *N. J.* 362 (1954); *Boult and Harris v. Board of Education of Passaic*, 1939-49 *S. L. D.* 7, affirmed State Board of Education 15, 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1948). His adjudication of a controversy such as the one herein is therefore limited to a determination of whether the board's action was reasonable.

"\* \* \* Boards of education cannot exercise the authority given to them in ways that are arbitrary, capricious or unreasonable, overworked and difficult of precise definition as these words may be. *N. J. Good Humor, Inc. v. Bradley Beach*, 124 *N. J. L.* 162 at 164 (*E. & A.* 1939). Reasonable is defined as 'conformable to reason; such as is rational, fitting or proper, sensible.' It imports that which is appropriate or necessary under the circumstances. A reasonable rule implies that there is a rational and substantial relationship to some legitimate purpose." *Angel et al. and Ackerman et al. v. Board of Education of Newark*, 1959-60 *S. L. D.* 141 at 143.

The Commissioner does not find in the Board's determination to expel petitioner those elements of reasonableness which are necessary in dealing with a pupil's offenses against the rules of the school. While the Commissioner will not condone or excuse petitioner's failure to submit to school regulations,

expulsion as punishment is so drastic that it implies that no further means are available to the school to effect correction of behavior. The Commissioner is convinced that such is not the case here; rather it is clear beyond question that the school authorities were so influenced by petitioner's involvement in the vandalism episode as to include in their determination some measure of punishment for his civil offense. The testimony reveals clearly that had it not been for this incident, expulsion for a full year would not have been contemplated. It must be recognized that the Juvenile Court has jurisdiction to deal with this kind of delinquency; and the Court having assumed the responsibility for so doing, petitioner's unrelated misconduct in school should not be forever colored by his connection with a past occurrence however foolish or misguided.

Respondent argues that the provisions of *R. S. 18:14-51* are exactly in point; that petitioner did damage school property and may therefore be expelled by the school authorities even though he is at the same time answerable to the Court. While this may be so, the Commissioner finds no evidence that the school authorities exercised any powers under this statute, admitting that the matter was turned over in its entirety to the police authorities for whatever disposition was deemed proper. The punishment must be reasonable and related to the offense; and the offense charged here is that petitioner, while on school probation for prior misconduct, absented himself without leave from two classes on the next to last day of school and went by private transportation to participate in a class trip in violation of school regulations. Exclusion for a full school year for such an offense is clearly beyond the bounds of reasonableness and must be held to be an abuse of discretion.

Respondent also relies on *Gibbs v. Middle Township Board of Education*, 1955-56 *S. L. D.* 95, in which the expulsion of a pupil for continuous defiance and misconduct was upheld. The record in that case, however, shows a much more flagrant disregard for authority with offenses both more numerous and more extreme than in the instant matter. In the Commissioner's opinion, the case of *Hoey v. Lakewood Board of Education*, 1938 *S. L. D.* 678, is more in point. In this case the principal recommended suspension of a boy from November 24 for the balance of the school year for "truancy, disobedience, swearing, insubordination, dismissal from algebra, dismissal from physical training, dismissal from chapel, and insolence." In his decision the Commissioner said:

"The question really involved is whether the suspension of so long a time as to take in the remainder of the school year after December 13, 1919, is excessive in its severity. This is the important question for consideration.

"The only punishment the law permits in the public schools of New Jersey is suspension or expulsion from school for offenses against the good government and discipline of a school. The object to be attained by suspension or expulsion is to have some means of maintaining good order and respect for authority in the schoolroom, but the punishment must not be so excessive and unreasonable in its severity as to cause disrespect for authority that administers the punishment. The following is laid down as a fundamental proposition by Sir William Blackstone in his Commentaries on the Laws of England (Edition by George Chase):

‘Lastly: as a conclusion to the whole, we may observe that punishments of unreasonable severity, especially when indiscriminately inflicted, have less effect in amending the manners of a people, than such as are more merciful in general, yet properly intermixed with due distinctions of severity. It is the sentiment of an ingenious writer, who seems to have well studied the springs of human action, that offenses are more effectually prevented by the certainty than by the severity of punishment.’

“It is, therefore, a very grave question whether the manners of this boy could not be amended by less harsh treatment than that which was equivalent to expulsion from school for the greater part of a year. A high school education is of tremendous value to a boy or girl, and no boy or girl should be deprived for such a long period of time of the right to such an education without most serious consideration.

“It is, therefore, the opinion of the Commissioner of Education that the suspension from school of the appellant’s son, \* \* \* was reasonable only to the extent of the time covered by the suspension prescribed by the principal of the school, namely, until the meeting of the Board of Education. This was in itself a sufficient punishment to meet the offenses as they were presented at the hearing, and sufficient in the judgment of the Commissioner to accomplish the proper disciplinary effect as an example to the rest of the school.”

The Commissioner believes that the fears expressed by the high school principal in his testimony that “the whole discipline set-up will be harmed” and that the “morale of teachers and pupils will be lowered” if petitioner is reinstated, are unfounded. The belief that misconduct in a student body will increase because those in authority temper justice with mercy, seeking to correct rather than condemn, to rehabilitate rather than reject, is without foundation. Pupils in all schools recognize the need for authority, and respect that authority when it is fairly and reasonably administered. Either excessively harsh punishment at one extreme or uneven and vacillating discipline at the other will produce a student body whose morale is low and whose attitude toward authority is negative.

The Commissioner would also observe that whenever a school expels a pupil it has in effect, barred his way to almost all further education elsewhere, as well as in the school in the district where he resides. In this present era, when every effort is being made to keep young persons in school, and where the future of the young is so closely bound to educational opportunities, expulsion at the age of 16 is a severe penalty indeed. Admittedly there are occasionally individual pupils with whom the school cannot accomplish its objectives for reasons beyond its control. The Commissioner cannot believe that this is true in the instant case, however. The Commissioner has every confidence that the school herein has dealt and will continue to deal successfully with problems such as those exhibited by this pupil, difficult though they may be at times.

Although the question was not raised by either party, the Commissioner feels compelled to comment on the matter of requiring payment of “dues” as a prerequisite to participation in a school activity. In the instant matter the class trip was a school activity, sponsored by the Board of Education and

supervised by appropriate members of the school's professional staff. As such, it must be deemed to be part of the school curriculum with certain educational values and purposes. The imposition of payment of a fee labeled "class dues" or under any other name as a requirement to participation in a part of the school curriculum does violence to the provisions of paragraph 1, Section IV, Article VIII of the New Jersey State Constitution and R. S. 18: 14-1, which states that "public schools shall be free" to those eligible to attend. While he does not wish to rule on the question at this time, absent all the facts, and finds no necessity to do so in order to adjudicate the major issue herein, the Commissioner feels constrained to point out to school authorities his doubts that a regulation of this kind could successfully sustain a challenge.

The Commissioner concludes that sufficient punishment has already been sustained by the pupil in this case by reason of his having already missed the first six weeks or more of this school year. Reinstatement into the school environment, with its opportunities for that patient understanding and guidance which the school is best equipped to give, holds more potential value for petitioner than further exclusion. On the other hand, readmission places upon the pupil the obligation to conduct himself in such a manner that the school authorities will have no further cause to object to his behavior. It is hereby ordered that Jeffrey Pasko be reinstated in his classes at the Dunellen High School from the date hereof, without prejudice.

COMMISSIONER OF EDUCATION.

October 19, 1962.

VIII.

TENURE AS MUNICIPAL COLLECTOR DOES NOT CONFER TENURE RIGHTS AS CUSTODIAN OF SCHOOL MONEYS

ANTHONY M. ORECCHIO,

*Petitioner,*

v.

BOARD OF EDUCATION OF THE BOROUGH OF FAIRVIEW,  
BERGEN COUNTY,

*Respondent.*

For the Petitioner: Frank Piscatella, Esq.

For the Respondent: Arthur Gentilella, Esq.  
(Robert M. Zweiman, Esq. On the Brief.)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, who has been custodian of school moneys for the school district of Fairview since 1950, protests the reduction of his annual salary from \$1,900 in the school year 1961-62 to \$1,000 in 1962-63. He seeks an order from the Commissioner restoring his compensation annually to \$1,900.

The matter has been submitted to the Commissioner in briefs of counsel.

Petitioner contends that the reduction of his salary is unlawful not only because such reduction is arbitrary and capricious and without basis in fact,

but also because he enjoys tenure in his position under several statutes. Respondent replies that the reduction in salary is an economy measure taken within the authority granted to the Board by statute, and denies that petitioner enjoys any protection of tenure in his position as custodian.

The designation and compensation of the custodian of school moneys are controlled by *R. S. 18:5-53*, as follows:

“The person designated by law as the custodian of the moneys belonging to the municipality in which a school district is situated shall be the custodian of the school moneys of such district unless the collector shall be designated as such custodian by the board of education of the district in which case he shall be such custodian.

“The custodian shall receive such compensation as the board of education of the municipality shall determine, which compensation shall be paid by the board from its funds.

“The bonds given by the collector or other person for the faithful performance of his duty as such officer, shall be held to cover and secure the faithful performance of his duty as custodian of school moneys, and the bondsmen thereon shall be liable therefor.”

Petitioner became Tax Collector and Treasurer of the Borough of Fairview in 1950, and by virtue of that office became also custodian of school moneys. His initial compensation as custodian was \$1,050; subsequent increases in 1951, 1954, 1955, and 1959 brought it to \$1,900, where it remained until respondent reduced the amount to \$1,000 in the budget adopted for the school year 1962-63. Petitioner argues that the \$900 reduction is drastic, that no cogent or practical reason has been assigned for such a reduction, and that the reduction was made at a time when all other salaries paid by respondent either remained the same or were increased. In the absence of logical reason to substantiate the reduction, says petitioner, the action must be termed arbitrary and capricious.

Respondent denies this charge. It argues that the statute, *R. S. 18:5-53*, *supra*, clearly gives it the power to determine the custodian's compensation, and that it exercised such authority in the best interests of the people of Fairview. As to the factual basis for its determination of the amount of compensation, respondent asserts that it determined, after studying salaries paid to other non-tenure persons in the school system (school physician, dentist, auditor—Appendix C of respondent's brief) and comparative compensation of custodians in other communities (Appendix D), among other factors, that the custodian's compensation at \$1,900 annually was “an excessive expenditure of public moneys” in which economy could be effected. Respondent looks to *Rice v. Middletown Township*, 76 *N. J. L.* 399 (*Sup. Ct.* 1908) for justification of its use of comparative salaries of other custodians as a factor in its determination:

“A great deal of evidence was taken to show what was paid to other officials in the neighborhood having corresponding or similar duties. This, of course, should have due weight, but we cannot see that the salary in question, even in comparison with these other salaries, is so grossly unreasonable as to show abuse of discretion on the part of the township committee \* \* \*.”

The Commissioner finds in the actions of respondent leading to its decision to reduce the custodian's compensation suitable motive to establish a rational basis for its determination. No claim or argument is made by petitioner that the salary as reduced is unreasonable in terms of the kind and amount of work required to be performed. A salary reduction amounting to almost 50% is undoubtedly a drastic one, but in the absence of any claim by petitioner that the new salary is not commensurate with the responsibilities of his office, and in the face of respondent's claim that careful study preceded its determination, the Commissioner will not set aside as unreasonable an action such as this which lies within the discretionary authority of the board of education. Respondent points in this case, as did the respondent in *Kopera v. Board of Education of West Orange*, 60 N. J. Super. 288 (App. Div. 1960) at 294:

“\* \* \* to the well established rule that action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives.”

Respondent's action, therefore, cannot be set aside as arbitrary and capricious and without rational basis.

There remains the question of whether petitioner's compensation was protected by tenure. Petitioner asserts that the electorate granted him tenure in the office of Tax Collector and Treasurer in the general election of November 8, 1960, pursuant to the provisions of R. S. 40:46-6.14. It is conceded that the Commissioner will not comment on any question of validity of petitioner's tenure in this position. Nor will the Commissioner decide whether petitioner enjoys any protection under the terms of R. S. 38:16-1, commonly known as the Veterans Tenure Act. The authority of the Commissioner of Education is restricted by R. S. 18:3-14 to deciding “controversies and disputes arising under the school laws.” *Reilly v. Board of Education of Camden*, 127 N. J. L. 490 (Sup. Ct. 1941). See also *Baratelli v. Board of Education of Jersey City*, 1956-57 S. L. D. 80; *Lascari v. Board of Education of Lodi*, 1954-55 S. L. D. 83, affirmed State Board of Education 89, affirmed 36 N. J. Super. 426 (App. Div. 1955). The sole question before the Commissioner is whether petitioner is afforded any protection of tenure within the limits of the Commissioner's jurisdiction to decide.

Specific provisions in Title 18 of the Revised Statutes grant tenure to several categories of employees of boards of education. R. S. 18:5-51 confers tenure status upon secretaries, assistant secretaries, and business managers of boards of education devoting full time to the duties of their offices. Clearly this statute, by its own terms, does not comprehend the office of custodian. Another statute, R. S. 18:7-56 provides that all persons holding any secretarial or clerical position under any board of education, or officer thereof, shall enjoy tenure after the completion of a statutory probationary period. This statute, applying to persons holding secretarial or clerical “positions” and referring to their “employment,” cannot be stretched to cover the custodian of school moneys who holds an office created by the Legislature with statutory powers and duties. See *Frederick v. Board of Health of West Hoboken*, 82 N. J. L. 200 (Sup. Ct. 1912). In further support of this reasoning is R. S. 18:5-59, which requires the custodian to “pay over the balance of school funds remaining in his hands to his successor in office.” (Emphasis added.) Thus, R. S. 18:7-56 affords no tenure status to the custodian.

Legislative intent with regard to the tenure of custodians of school moneys is evidenced in *R. S. 40:145-14.1* which makes possible the granting of tenure by the general electorate to a person holding "the offices, positions, or employments of *treasurer and custodian of school moneys* in any township" (emphasis added), after a period of twenty years from the date of his original appointment. There appears to be no comparable means of granting tenure to a treasurer and custodian in a borough. Had the Legislature intended that the custodian in a borough acquire tenure, it would have said so. The Legislature is deemed to be conversant with its own legislation. *Asbury Park Press, Inc. v. City of Asbury Park*, 19 *N. J.* 183 (1955).

But, petitioner argues, his tenure status as Tax Collector and Treasurer of the Borough granted by the electorate automatically conveys tenure status to the office of custodian of school moneys. He cites the decision of the court in *Marr v. Inhabitants of Bloomfield* 64, *N. J. L.* 305 (*E. & A.* 1899) wherein it is stated concerning the collector's duties as custodian:

"This is not a mere *designation of the person* who shall perform the duty—it is the ingrafting of the duty upon the office itself."

Petitioner reasons that the ingrafted duty of custodian attached to it the tenure status and salary protection which he enjoys in his municipal office. The Commissioner does not agree with this reasoning. *Marr, supra*, deals with a situation in which, under the 1879 statute then prevailing, the township committee fixed the compensation of the collector for the "performance of all official duties," which included, in the Court's finding, those duties of custodian "ingrafted" upon the office of collector. It was not until 1912 that the Legislature (Chap. 285, Laws of 1912) imposed upon the board of education the responsibility for fixing the separate compensation of the custodian. Thus *Marr*, interpreted in the light of legislative evolution, supports the separation of the school district from the municipal function which was sharply defined in *Botkin v. Mayor and Borough of Westwood*, 52 *N. J. Super.* 416 (*App. Div.* 1958), appeal dismissed 28 *N. J.* 218 (1958).

Moreover, in municipalities having separate offices of collector and treasurer, the board of education is afforded a choice in the designation of the custodian. (*R. S. 18:5-53 supra*) If petitioner's reasoning were to hold, the attainment of tenure by the collector pursuant to *R. S. 40:46-6.14*, where the collector had previously been designated by the board of education as custodian, could operate so as to deprive the board of a choice guaranteed by statute. Elsewhere in Title 18 the Legislature has been specific in stating the limitations imposed by statute on the power of appointment and removal. See for example, *R. S. 18:6-31*, *18:6-38*, *18:6-40*, *18:7-58*, *18:7-70.3*, *18:7-71*. No such limitation, either upon the choice of one of two persons to be designated as custodian, or upon the determination of his compensation, appears in *R. S. 18:5-53*. Admittedly no such choice exists where a single incumbent holds the office of both collector and treasurer, as in the Borough of Fairview, nor will any choice of designation exist so long as the incumbent, the petitioner herein, enjoys tenure in those offices. However, the absence of choice originates in the pattern of the municipal officary rather than in the operation of any tenure law to limit it.

Respondent calls attention to the following statement in *Moresch v. Board of Education of Bayonne*, 52 *N. J. Super.* 105 (*App. Div.* 1958) at 109:

“To establish the right to a preference in public employment the claimant ‘must be able to put his finger upon the precise provision of the statute which confers it.’”

Petitioner has failed to point to such a precise statement in the statute within the jurisdiction of the Commissioner. On the contrary, it is clear that the statute which precisely confers tenure upon the custodian, R. S. 40:145-14.1, does so only in a set of conditions under which petitioner can make no claim to qualify.

The Commissioner finds and determines that petitioner enjoys no tenure status within the limits of Title 18 which confers protection against reduction of his compensation as custodian, and that the action of respondent in reducing such compensation was within its discretionary authority.

The petition of appeal is dismissed.

COMMISSIONER OF EDUCATION.

November 14, 1962.

IX.

BOARD MAY CONTROL MEMBERSHIP IN HIGH SCHOOL  
FRATERNITIES NOT WHOLLY CONTAINED WITHIN THE SCHOOL

HELEN MILLIGAN AND ROBERT MILLIGAN, HER SON, AND  
JOSEPH RENARD AND MICHAEL RENARD, HIS SON,

*Petitioners,*

v.

THE BOARD OF EDUCATION OF MANCHESTER REGIONAL HIGH SCHOOL,  
PASSAIC COUNTY,

*Respondent.*

For the Petitioners, Irving I. Lieberman, Esq.

For the Respondent, Samuel A. Wiener, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

On July 19, 1962, respondent adopted a “Resolution Establishing Policy, Rules, Regulations, and Discipline with Respect to Membership in Fraternities, Sororities, and Other Secret Organizations,” subsequently amended on September 20, 1962. Petitioners herein protest that the resolution violates their legal rights and seek an order from the Commissioner directing that the resolution be rescinded.

The matter comes before the Commissioner in briefs and memoranda of counsel. Exhibits comprising resolutions of respondent and pertinent correspondence are made part of the record by agreement of counsel.

The aforementioned resolution of respondent was adopted pursuant to R. S. 18:14-110, which reads as follows:

“For the purpose of section 18:14-111 of this title, a fraternity, sorority, or secret society in the public schools is defined to be an organiza-

tion composed in whole or in part of public school pupils, which seeks to organize and perpetuate itself by taking in members from among the pupils enrolled in such school in which they are students, upon the basis of decision of the membership of such organization, rather than from the free choice of any pupils in such school, who are otherwise qualified to fill the special aims of such organization.”

and R. S. 18:14–111, which reads as follows:

“A fraternity, sorority, or secret society of public school pupils is hereby declared to be an organization inimical to the good of the school system and to the democratic principles and ideals of public education and to the public good.

“No secret fraternity or sorority shall be formed or maintained in any public high school. The board of education of every school district shall adopt rules and regulations providing for the necessary disciplinary measures to enforce this section.

“This section shall not apply to any normal school.”

Respondent’s resolution requires

“from the parent, parents, guardian or person *in loco parentis* of each, every, and all of the students and pupils who attend Manchester Regional High School or directly from each, every, and all of said students or pupils a written declaration in the respective form and pursuant to the rules and regulations hereinafter set forth in this resolution that each of said students or pupils does not belong to, participate in, or is not affiliated with any such fraternity, sorority, or secret society, (as defined in R. S. 18:14–110) prohibited within Manchester Regional High School as hereinafter set forth \* \* \*.”

The resolution provides further that failure or refusal to make such a declaration subjects the pupil to disciplinary action, which, in the first place, deprives him of the right

“to receive any honor, prize, position of honor, authority, or trust, hold any office within any approved school organization or activity, be a member of any athletic or other team or organized activity of any kind representing Manchester Regional High School, or attend or participate in any school sponsored function or athletic event of any kind \* \* \*.”

Continued failure or refusal to comply exposes the pupil, after due hearing before the Board, to the penalties of suspension or expulsion from school.

The resolution also establishes procedures for determining whether any organization which pupils of the High School are members of, participate in, or are affiliated with, falls within the prohibited categories. Moreover, no person, whether a Manchester High School pupil or not, is permitted to participate in or attend a school sponsored function or event while wearing or displaying any insignia or clothing indicative of membership in a fraternity, sorority, or secret society of the prohibited categories.

Pursuant to this resolution, upon the failure or refusal of petitioner Robert Milligan or his parent to sign the declaration, he was required to return

football gear issued to him, and on September 15 he was barred from attending a school dance. On October 4, 1962, after due notice according to the resolution, hearings were afforded petitioners by the respondent Board, at which they admitted that as of that date they were members of a fraternity. Petitioners were then, by resolution, suspended from school. Subsequently, Robert Milligan signed a declaration "under protest" and was reinstated. Michael Renard is still under suspension.

Petitioners do not deny that respondent has both a right and a duty to adopt rules and regulations, pursuant to *R. S. 18:14-111*, to bar secret fraternities and sororities formed and maintained "in" the high school. They contend, however, that respondent exceeds its statutory authority when it attempts to control membership in organizations which have no direct or indirect connection with the school. The statements required by the resolution, they argue, go far beyond a declaration of membership or participation in any type of organization which the statute gives the board of education the right to control.

Respondent defends its action as being within the four corners of the statute. The Board finds fraternities, sororities, and other secret societies, as defined in *R. S. 18:14-110*, "inimical to the good of Passaic County Manchester Regional High School, the democratic principles and ideals of public education, the public good and the student body of Manchester Regional High School," and seeks through its rules and regulations both to eliminate such organizations from the school and prevent its pupils from participating in or belonging to them.

Although the statutes in question, *R. S. 18:14-110* and *111*, were adopted in substantially their present form as Chapter 160 of the Laws of 1922, the Commissioner has had no previous occasion to decide any controversy or dispute arising under them. In 1915, prior to the enactment of these laws, he rendered a decision in the case of *Spence v. Board of Education of Atlantic City*, 1938 *S. L. D.* 692, in which a pupil had been expelled for his refusal to sign a declaration that he was not then and would not during his enrollment in the Atlantic City High School become "a member of a fraternity, sorority, club, society, or other organization composed wholly or in part of pupils in high school, which has been disapproved by the school authorities because its influence is, in the judgment of the principal and teachers, injurious to the best interests of the high school \* \* \*." While the Commissioner found in favor of the petitioner because he had been, in fact, expelled by the principal rather than by the Board of Education, as required by law, he nonetheless passed upon other questions raised by petitioners, because as he said, "they are of such importance that they should be decided at this time." Thereupon, the Commissioner decided as follows:

"As stated in the decision in the case of *Laehder v. the Board of Education of Manasquan*, recently rendered by me, the right of a board of education to punish pupils for acts committed when the school was not in session has never been before the courts in this State, but there are numerous decisions by the courts in other States. I have no doubt as to the right of a board of education to prohibit pupils from joining fraternities, sororities, or other school societies which, in its judgment, are prejudicial to the best interests of the school or the pupils, even though

the meetings of such societies are not held in the schoolhouse, or on a school day. School secret societies are generally regarded as detrimental to discipline, and to the best interests of the pupils. The National Education Association, composed of leading superintendents and teachers, recently adopted resolutions condemning such societies. The resolution reads, in part, as follows: 'We condemn these organizations because they are subversive of the principles of democracy which should prevail in the public schools; because they are selfish and tend to narrow the minds and sympathies of the pupils; because they dissipate energy and proper ambition; because they set wrong standards; \* \* \* because they detract interest from study.' 35 *Cyc.* 1136, section D, reads as follows: 'The school authorities may also punish, as by suspension for acts committed outside of school hours, even after a pupil has returned to his home, when such acts have a direct and immediate tendency to influence the conduct of other pupils while in the schoolroom, or set at naught proper discipline, to impair the authority of the teachers, and to bring them into ridicule and contempt.' In the case of *Kinzer v. Directors*, 105 *N. W. Rep.* 686, the court said: 'The general character of the school and the conduct of its pupils as affecting the efficiency of the work to be done in the schoolroom, and the discipline of the scholars, are matters to be taken into account by the school board making rules for the government of the school. They have no concern, it is true, with the individual conduct of the pupils wholly outside of the schoolroom and school grounds and while they are presumed to be under the control of their parents \* \* \* but the conduct of pupils which directly relates to and affects the management of the school and its efficiency, is within the proper regulation of the school authorities.' 35 *Cyc.* 1137 says: 'It has been held that a rule of a school board forbidding pupils to play football games under the auspices of the school is not unreasonable or an excess of the authority of the board, although applied to conduct on holidays and away from the school grounds.'

The Commissioner herein reaffirms these findings, and sees in the statutes, *R. S.* 18:14-110 and 111, *supra*, subsequently enacted, a clear intent to remedy by legislation the mischief contemplated by the Atlantic City Board of Education in its resolution as being a problem of the public schools generally. "The will of the lawgiver is to be gathered from the object and nature of the subject matter, the contextual setting, and the mischief felt and the remedy in view." *San Lan Builders, Inc. v. Baxendale*, 28 *N. J.* 148, 155 (1958). See also *Kappish v. Lotsey*, 76 *N. J. Super.* 215, 222 (*Law Div., Warren Co. Dist. Ct.* 1962).

Petitioners make much of the point that respondent has offered nothing to show that the fraternities, sororities, or secret organizations proscribed by its resolution have any connection or relation with the school, either direct or indirect. They urge that any organization so proscribed must in the terms of *R. S.* 18:14-111, be formed or maintained *in* the high school, and that this language of the statute must be strictly construed. The Commissioner does not find in the legislation here the basis for such a narrow construction. *R. S.* 18:14-111 may be read only in the light of the definition provided by *R. S.* 18:14-110. By defining, "for the purpose of section 18:14-111, a fraternity, sorority, or secret society *in* the public schools \* \* \* to be an organization *composed in whole or in part of public school pupils*" (emphasis

added), the statute clearly embraces organizations which do not operate exclusively *within* the four walls of the school or *within* the time of day normally given to school purposes. The legislature in its own words recognized that such organizations, "composed in whole or in part of public school pupils" are "inimical to the good of the school system and to the democratic principles and ideals of public education and to the public good." Insistence upon a narrow construction of the preposition "in," as it is employed in *R. S. 18:14-111*, defeats the legislative intention to protect the public schools, and the public good, from the divisive and other harmful influences which may result from the superimposition of these organizations upon the democracy of a public high school. The court, in *Kappish v. Lotsey, supra*, at page 223 said:

"Of course, no broader construction should be given to a statute than its language justifies. In construing a statute, however, the ultimate objective is a determination of the true intention of the enactment, and to such end, the particular words of the act are to be regarded as responsive to the essential principle of the statute. *Wollen v. Fort Lee*, 27 *N. J.* 408 (1958). Not the words of the statute, but the internal sense thereof controls."

Further evidence that the legislature intended the act to include organizations not exclusively formed and maintained within the school itself is found in an examination of the statute as originally enacted as Chapter 160 of the Laws of 1922. In order to make the statute immediately effective, as approved March 11, 1922, section 4 of the act read in part as follows:

"4. It shall be the duty of the board of education of *any school district in which such an organization may exist*, within sixty days after the passage of this act, to notify the parents and pupils of said school district of the terms of this act \* \* \*." (Emphasis added.)

It is to be observed that the statute does not confine the organization to the *school*, but to the *district*.

While, as it has been previously remarked, the particular questions herein have not been adjudicated in New Jersey, the authority of the legislature to prohibit membership in high school fraternities has been tested in a number of other jurisdictions. Edwards, in *The Courts and the Public Schools* (Chicago: University of Chicago Press, 1933) at page 549, writes:

"\* \* \* Without exception the courts have held that the legislature may prohibit fraternities and secret societies in the public schools of the state and may authorize or require boards of education to expel any pupil maintaining membership in such fraternities or societies. *Sutton v. Board of Education*, 306 *Ill.* 507, 138 *N. E.* 131; *Lee v. Hoffman*, 182 *Iowa* 1216, 166 *N. W.* 565, *L. R. A.* 1918 *C.*, 933; *Bradford v. Board of Education*, 18 *Cal. App.* 19, 121 *Pac.* 929; *Steele v. Sexton*, 253 *Mich.* 32, 234 *N. W.* 436."

In *Antell v. Stokes*, 287 *Mass.* 103, 191 *N. E.* 407 (1934), the court upheld a board rule requiring pupils to sign a "pledge" against affiliation with a secret society although the rule extended to "organizations designed to be operative away from the school premises and outside school hours," and found the rule "not an invasion of the domain reserved exclusively to home and family." See also *Wayland v. Board of School Directors*, 43 *Wash.* 441, 86 *P.* 642, 7

*L. R. A. (N. S.)* 352 (1906). A statute abolishing secret societies at the University of Mississippi was attacked on the grounds that it violated rights guaranteed by the Fourteenth Amendment of the United States Constitution, but the U. S. Supreme Court held that it violated no constitutional right. *Waugh v. Board of Trustees of the University of Mississippi*, 237 U. S. 589, 35 S. Ct. 720, 59 L. Ed. 1131 (1915). See also *Burkitt v. School District*, 195 Ore. 471, 246 P. 2d 566 (1952); *Satan Fraternity v. Board of Public Instruction*, 156 Fla. 222, 22 S. 2d 892 (1945); *Bradford v. Board of Education of San Francisco*, *supra*.

Regarded, then, in the light of the intent of the statute, as expressed in its own terms, its legislative history, and judicial support of similar legislation in other states, the resolution of respondent is within its statutory power to adopt, in so far as it seeks to regulate the organization, maintenance, or existence of fraternities, sororities, and other secret societies "whether such organization exists within the student body of Manchester Regional High School only or is composed of students and pupils of Manchester Regional High School and students and pupils of any other school, group, organization or activity of any kind but which is in reality related to high school life and activities and chooses all or any of its members from high school students." Further, it is within respondent's statutory authority to adopt reasonable regulations providing for the necessary disciplinary measures to enforce its rules and regulations. To this end and the declarations required of either the pupil or his parent are not unreasonable, except as will be hereafter noted. The Commissioner so finds.

The letters of declaration, as previously mentioned, declare that the student is not now associated with any organization described in the terms of the definition in *R. S. 18:14-110*, *supra*, and promise that if at any time in the future, while still enrolled in the school, he becomes associated with such an organization, he will promptly notify the respondent Board of Education, in writing, to that effect. With this much of the declaration, the Commissioner takes no issue.

However, the last paragraph of the declaration requires the pupil or his parent to list the pupil's memberships in all "non-school sponsored organizations." Such a requirement seems to the Commissioner to be an unwarranted invasion of privacy, leading possibly, as an example, to inquiries as to a pupil's or his family's religious or political affiliations. It is enough that the pupil, or his parent declares that he is not associated with an organization which is adequately described in the language of the statute which gives authority for obtaining the declaration. To require more is supererogation.

The Commissioner finds and determines that the resolution adopted by respondent pursuant to *R. S. 18:14-111* is a proper exercise of its authority under the statute, except as to the requirement that the pupil, or his parent, guardian, or other person *in loco parentis*, list the pupil's memberships in non-school sponsored organizations, which requirement is ordered to be stricken.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

December 27, 1962.

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION,  
SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME  
COURT ON CASES PREVIOUSLY REPORTED

ELIZABETH GILCHRIST,

*Appellant,*

v.

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

*Respondent.*

DECISION OF THE STATE BOARD OF EDUCATION

Decided by the Commissioner January 12, 1960.

The State Board of Education at its meeting held on April 4, 1962, affirmed the decision of the Commissioner of Education in the case of *Elizabeth Gilchrist v. The Board of Education of the Township of Livingston, Essex County*, on the basis of the opinion written by the Commissioner in this matter.

April 4, 1962.

HAZEL HARENBERG,

Docket No. A-323-58.

*Petitioner-Appellant,*

v.

STATE BOARD OF EDUCATION OF THE STATE OF NEW JERSEY AND  
THE BOARD OF EDUCATION OF THE CITY OF NEWARK, NEW JERSEY,

*Respondents.*

HAZEL HARENBERG,

Docket No. A-426-60.

*Petitioner-Appellant,*

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK, NEW JERSEY, BOARD OF  
TRUSTEES OF TEACHERS' PENSION AND ANNUITY FUND, AND FREDERICK  
RAUBINGER, COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY,

*Respondents.*

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued June 12, 1961—Decided July 7, 1961.

Before Judges Price, Gaulkin and Sullivan.

*Mr. Samuel H. Nelson* argued the cause for the appellant.

*Mr. Jacob Fox* argued the cause for the respondent The Board of Education of the City of Newark.

*Mr. Robert S. Miller*, Deputy Attorney General, argued the cause for the remaining respondents (*Mr. David D. Furman*, Attorney General, attorney).

The opinion of the court was delivered by GAULKIN, J. A. D.

These are consolidated appeals. In the first (A-323-58) petitioner appeals from a decision of the State Board of Education filed January 14, 1959. Since that decision states most of the facts and issues which are pertinent to both appeals, we quote it almost in full:

“Appellant here seeks reversal of a judgment of the Commissioner of Education (rendered on July 16, 1958) which dismissed her petition of appeal (filed in February, 1956) from the action of the Board of Education of Newark in removing her from her teaching status pursuant to *R. S. 18:5-50.5*. The specific ground for respondent's action was that appellant had shown evidence of deviation from normal mental health and examinations by physicians, made at respondent's request, indicated ‘mental abnormality.’ The petition of appeal before the Commissioner sought restoration of appellant to her teaching status.

The proofs before the Commissioner consisted principally of a written stipulation of facts, supplemented to a degree by the testimony of appellant before the Commissioner.

Appellant had been employed as an elementary school teacher in the Newark public schools since September, 1921. During that period she was absent on furlough from December 1, 1941 to December 1, 1942 and on sick leave from December 1, 1942 to the beginning of the 1944 and 1945 school year. These absences were due to an illness which produced epileptic convulsions on several occasions in the schools where she was employed. She was permitted to return in September, 1944 on her written representation that she was fully recovered and on her agreement that she would resign if she had a recurrence of her attacks. From that time to 1954 there were instances of behavior by appellant which deviated from the normal, particularly in appellant's relations with her fellow teachers and superiors . . . as a result of which the school authorities requested that she discontinue teaching and had appellant examined by certain competent physicians. There is no need to recount the reports in detail here. Suffice it to say that they ‘indicated’ ‘mental abnormality.’ She was paid and accepted sick leave pay at the rate of full salary from October 13, 1954 to February 11, 1955 and at the same rate, less substitute's pay, from February 11, 1955 to April 29, 1955, after which there were no further sick leave days to her credit.

Between October 13, 1954 and December 3, 1955, appellant produced no medical evidence that she was competent to teach and should be returned to that status. Under date of October 12, 1954, appellant had forwarded to the respondent, through its Assistant Superintendent of Schools, a written report of Dr. Arthur S. McQuillan, a general practitioner, which simply stated that appellant had been his patient for some time past and that ‘she is in a good state of health’. On December 3, 1955, appellant's counsel and counsel for the local Board met to discuss appellant's claim that she should be returned to active employment. At this conference appellant's counsel produced a report dated January 8, 1955 from Dr.

Rafael Russomanno as to medical examinations which he had made on December 21, 1954 and January 7, 1955. Dr. Russomanno was a general practitioner and not a specialist in psychiatry. In making the report, Dr. Russomanno did not have available to him respondent's medical file relating to appellant, her family medical history, nor the report of the examinations made by the physicians who had examined appellant at the request of the respondent. This report concluded that appellant was 'in physical good health, neurologically and psychiatrically sound and can return to her duties as a school teacher.' Dr. Russomanno had not been 'approved' by the local Board as required by the statute in instances of an employee selecting a physician. It is also noted that the report was not submitted until 11 months after it was made.

On December 15, 1955, appellant's counsel forwarded to counsel for respondent a report by Dr. Vincent J. Riggs as to an examination made of appellant on December 7, 1955. Dr. Riggs is a Doctor of Medicine and specializes in psychiatry. His examination was not made with respondent's knowledge nor had he been approved by respondent under the provisions of *R. S. 18:5-50.5*. Dr. Riggs did not have available to him at the time of his examination respondent's medical file of appellant, her family medical history, nor the reports of the doctors who had examined her at respondent's request. It concluded that appellant was 'free of psychosis and well suited to continue at the teaching profession which she loves.'

Appellant contends that the reports of Dr. Russomanno and Dr. Riggs, together with a certain electroencephalogram (made for the purpose of determining whether appellant's driver's license, which had previously been suspended, should be restored), constitute 'satisfactory proof of recovery' under the provisions of *R. S. 18:5-50.5*.

On October 15, 1954, at respondent's request, appellant was given a complete physical examination in respondent's Bureau of Health, Education and Service. As part of it she completed a questionnaire in which she was asked whether there was any family history of mental disturbances and she answered in the negative. This reply was not accurate. Respondent's Director, Dr. Gerard, ordered a psychiatric examination to be performed by Dr. Bruce B. Robinson, a competent psychiatrist employed by respondent. Without detailing Dr. Robinson's report here, it is sufficient to say that it supported respondent's position that appellant should not have been restored to her teaching status. However, Dr. Robinson recommended that an examination be performed by another psychiatrist. Accordingly, an examination was conducted by Dr. John G. Novak on November 29, 1954. His thorough report concluded that: 'There is a very definite psychiatric illness that I would classify as a Paranoid condition.'

On February 16, 1956, appellant's petition of appeal was filed with the Commissioner. On February 28, 1956, respondent adopted a resolution whereby it applied to the Board of Trustees of the Teachers' Pension and Annuity Fund for appellant's retirement for ordinary disability under the provisions of *R. S. 18:13-112.41*. On July 12, 1956, the Board of Trustees of the Pension Fund approved the disability retirement as of March 1, 1956.

It was stipulated below that the validity of the retirement was not before the Commissioner for adjudication. The issue below was succinctly stated in the stipulation as follows (paragraph 16) :

“In the within proceedings respondent relies on the contention, which appellant opposes, that appellant was ‘ineligible for further service’ under the provisions of *R. S. 18:5-50.5* beginning with October 13, 1954, because of mental abnormality and that no ‘satisfactory proof of recovery’ within the provisions of that statute has been adduced to date.”

Appellant here complains that, as evidenced by the opinion of the Commissioner below, the latter actually passed upon the validity of the retirement, in contravention of the stipulation, and that the Commissioner did not pass upon the issue raised, namely the provisions of the ‘mental abnormality’ statute (*R. S. 18:5-50.5*) or the pertinent proofs below with respect thereto.

Before this Board both counsel still adhere to the proposition that the validity of the retirement is not in issue. The fact is that there is pending an appeal by appellant attacking the validity of the retirement. That question should be decided upon that appeal. On the other hand the instant appeal came before the Commissioner below while the retirement stood unreversed. He could not have granted appellant’s prayer in her petition of appeal that she ‘be restored to her teaching status’ while the ‘retirement’ was effective.

In any event, this Board affirms the Commissioner in refusing to restore petitioner to her teaching status. We consider that appellant, by the mere submission of the written reports of Dr. McQuillan, Dr. Russomanno and Dr. Riggs, and the encephalogram, did not sustain her burden of furnishing ‘satisfactory proof of recovery’ which would warrant a declaration that she was eligible for further service as a teacher. On the other hand, we feel that an examination of the reports of Drs. Robinson and Novak, together with the other pertinent history of appellant’s service and family history, amply justified the removal of appellant from her teaching position and far outweighs the asserted efficacy of the reports submitted upon her behalf as evidence of ‘satisfactory proof of recovery.’

\* \* \*

Holding therefore, as we do, that appellant did not furnish ‘satisfactory proof of recovery’ within the meaning of *R. S. 18:5-50.5*, we affirm the order of the Commissioner denying appellant’s petition of appeal.”

Petitioner’s appeal from her involuntary retirement by the Board of Trustees of the Teachers’ Pension and Annuity Fund (hereafter called the Pension Fund), mentioned in the above quoted decision, had been filed August 11, 1958, but when A-323-58 (the suspension appeal) first came on for argument before this court, on May 4, 1959, no steps had been taken by petitioner to pursue the retirement appeal. Since the two appeals were so intermeshed, we directed that A-323-58 be stayed until the decision by the administrative tribunals of the retirement appeal.

On February 16, 1961 the Commissioner of Education dismissed the retirement appeal on the ground of laches. Although petitioner had not taken an appeal to the State Board of Education, upon consent of all of the parties this court granted petitioner leave to appeal the February 16, 1961 decision to this court, and consolidated that appeal (which became A-426-60) with A-323-58.

*A-323-58*

Petitioner argues that her appeal to the Commissioner of Education in A-323-58, filed February 16, 1956, was (a) from her original suspension in October 1954, and (b) from the refusal to restore her to duty in January 1956. The Newark Board of Education (Newark) denies this, pointing out that present counsel did not represent petitioner until after the decision of the Commissioner of Education, which was filed July 16, 1958; that present counsel then, in the appeal from that decision to the State Board of Education, for the first time attacked the original suspension; that the statements and stipulations of counsel who had theretofore represented petitioner, as well as the petition of appeal to the Commissioner, had confined the appeal to (b); and that, in any event, when the petition of appeal to the Commissioner was filed, in February 1956, it was too late to challenge the suspension of October 1954. Newark points out that the only challenge petitioner interposed to her suspension at the time she was suspended was the two-line letter from Dr. McQuillan, a general practitioner, dated October 12, 1954, who said he had "recently" examined petitioner and found her "in a good state of health." In our opinion this was not enough to allay the just concern which had been created by petitioner's actions and her medical history, and Newark properly suspended her. It is significant that on December 21, 1954 and January 7, 1955 petitioner was examined by her own Dr. Russomanno. He sent his report of those examinations to petitioner's then attorney on January 8, 1955, five days after the Newark Superintendent of Schools had written petitioner advising her to retire for disability, yet Dr. Russomanno's report was not submitted until 11 months later! It may have been because the report in part said: "Miss Harenberg is slightly emotionally disturbed because of a recent death in the family and she feels she is no longer wanted in the school system." In the meantime, petitioner accepted sick leave pay from October 13, 1954 until she exhausted her sick leave in April 1955. It was not until about eight months after she collected the last of her sick leave that her then counsel presented to Newark the encephalogram and the reports of Dr. Russomanno and Dr. Riggs, upon which she demanded reinstatement.

Our own examination of the record satisfies us that petitioner well knew why she was suspended; that the suspension was justified; that she did not challenge that suspension, but acquiesced in it; and that the sole issue she tendered before the Commissioner for determination was whether the proofs she submitted in December 1955 and January 1956 were "satisfactory proof of recovery" sufficient to require her reinstatement in accordance with *R. S. 18:5-50.5*. The Commissioner found that the proofs were not sufficient, and the State Board affirmed in the decision above quoted.

On the basis that the validity of the original suspension was before the Commissioner, petitioner devoted a large part of her brief in A-323-58 to an attack upon that original suspension. Since we have found that the validity of the original suspension was not in issue before the Commissioner,

we need not take up the arguments contained in that portion of petitioner's brief in detail. It is true that in order to evaluate the proofs of "recovery" submitted by petitioner it was necessary for the Commissioner (as well as the State Board) to know why she had been suspended. By stipulation, the medical reports of Newark's and petitioner's doctors were submitted with the same effect as if the doctors had testified. If the Commissioner had found that the reasons for her suspension were insufficient, he doubtless would have reinstated her. Where, as here, he found them ample, and practically unchallenged at the time of the suspension and until late 1955, he not only had the right but it was his duty to treat the suspension as valid and subsisting and to proceed on the basis that the only question before him was whether there had been "Satisfactory proof of recovery."

Nearly all of the remainder of petitioner's brief in A-323-58 is devoted to an attack upon the opinion of the Commissioner, based principally upon the proposition that the Commissioner did not pass upon the merits of her application for reinstatement but ruled rather upon the validity of her involuntary retirement and, after finding that said retirement was valid, that the Commissioner said it was unnecessary to pass upon the sufficiency of her proof of recovery. The State Board rejected that construction of the Commissioner's opinion. Since the appeal before us is from the judgment of the State Board, we see no need to analyze the respective arguments as to the construction of the Commissioner's opinion. Suffice it to say that we agree with the construction which the State Board placed upon the Commissioner's opinion, in the decision quoted above. In any event, even if the Commissioner did express himself in a manner which affords some justification for petitioner to advance the construction set forth in her brief, the Commissioner's opinion did not lead the State Board into error.

The question therefore narrows itself to this—were the reports submitted in December 1955 and January 1956, made by doctors not approved by Newark, "satisfactory proof of recovery?" We agree with the State Board that they were not, substantially for the reasons stated in the opinion of the State Board above quoted.

The judgment in A-323-58 is affirmed.

*A-426-60*

Petitioner brushes aside the Commissioner's dismissal of her appeal to him for laches, and attacks the involuntary retirement by the Pension Fund under three main heads. She argues that the action of the Fund was void because (1) no physician "designated by the board . . . first made a medical examination of [her] . . . and . . . certified to the Board that [she] . . . is . . . mentally incapacitated for the performance of duty and should be retired" as required by *R. S. 18:13-112.41*; (2) she was given no hearing before the Fund with "confrontation with the evidence, the right to cross-examination, the right to offer counter-proof, and the right to argue"; and (3) the proofs upon which the Fund acted "were insufficient to retire appellant."

Passing the question of laches for the moment we first take up the argument that the retirement is void because there was no examination and certification by a doctor designated by the Fund prior to the retirement.

R. S. 18:13–112.41 does provide:

“A member, who shall have been a teacher and a member of the retirement system for each of the 10 years next preceding his retirement, shall, upon the application of his employer or upon his own application or the application of one acting in his behalf, be retired for ordinary disability by the board of trustees, on a regular disability allowance if he is under 60 years of age and on a service allowance if he has reached or passed that age. The physician or physicians designated by the board shall have first made a medical examination of him at his residence or at any other place mutually agreed upon and shall have certified to the board that the member is physically or mentally incapacitated for the performance of duty and should be retired.”

The Fund takes the position that it has the right to “designate” the doctors who examined the teacher at the request of the local board as the doctors to certify the teacher’s disability under the statute, and to accept the reports of those doctors (after review of their own medical advisers) as proper and sufficient certification under said statute. The Fund argues that this is “in accordance with [its] settled administrative practice” and therefore we should not disapprove it unless it is clearly forbidden by the statute.

We find it unnecessary to express an opinion on this for, even if this practice can not be approved, the defect, if any, was cured by the examination of petitioner by Dr. Kelly on March 21, 1957. Dr. Kelly was designated by the Fund and he did certify to the Fund that petitioner was then mentally incapacitated for the performance of duty and should remain in retirement. The fact that he did so after the Fund’s initial resolution approving her retirement rather than before is a mere irregularity which does not affect the essential validity of the retirement. Certainly petitioner would not wish to challenge her right to the pension payments from 1956 to the date of Dr. Kelly’s report, if her retirement is legal in any event as of the date of his report. Of what avail would it be to declare the retirement invalid prior to March 1957, the date of Dr. Kelly’s report, but valid thereafter?

In short, it is now too late to raise this question. Indeed, this question was not even raised before the Commissioner. It was presented for the first time in the brief in this appeal.

This brings us to the question whether a trial-type hearing is an essential prerequisite to retirement under R. S. 18:13–112.41. It has been held, under similar statutes, that it is not. *Ellmore v. Brucker*, 236 F. 2d 734 (D. C. Cir. 1956), cert. denied, 352 U. S. 884, 77 S. Ct. 329, 1 L. ed. 2d 244 (1956); *Murphy v. Wilson*, 236 F. 2d 737 (D. C. Cir. 1956), cert. denied, 352 U. S. 954, 77 S. Ct. 326, 1 L. ed. 2d 243 (1956). However, we do not need to resolve that issue in the case at bar, for petitioner acquiesced in a determination of her disability by the Fund upon an evaluation of the reports filed on her behalf and on behalf of Newark. She never asked the Fund for a trial-type hearing, and it is too late now to raise that question.

In short, the first two attacks on the validity of the action of the Fund are indeed barred by acquiescence and laches. We come then to the argument that the proofs are insufficient.

In his argument before the Commissioner petitioner's counsel took the position that, on the principles of collateral estoppel, the judgment in A-323-58 would dictate the result in A-426-60. However, here petitioner's counsel withdraws from that position; but, now that we have upheld the continuance of petitioner's suspension since 1954, we are compelled to observe that if petitioner succeeds in voiding her retirement by the Fund she may win little or nothing and lose much. She was awarded a disability pension of approximately \$3,000 per year, which she has thus far refused to accept, and there is now payable to her on demand over \$15,000. In addition, there will be paid to her for life (unless terminated pursuant to R. S. 18:13-112.42) the sum of approximately \$250 per month. If she succeeds in voiding the action of the Fund, she will disentitle herself to all of these sums and yet, at the same time, will not be entitled to return to teaching. She may then be permanently barred from all further compensation or pension. Even if we assume that she could properly be retired with a pension at some future date, we presume her pension payments would start as of that future date and would not be retroactive.

These considerations were suggested to petitioner's counsel who advised us that, in spite of them, petitioner insists upon an adjudication as to the validity of her involuntary retirement. Nevertheless the interrelation between the two cases, the decision of the Commissioner and the State Board that the continuance of her suspension was proper and our affirmance thereof, and the considerations mentioned by the Commissioner in his decision, justify the conclusion that it is now too late to attack the retirement. However, we prefer to decide this point on the merits, and we hold that the evidence amply justifies petitioner's retirement. As was done in *Ellmore v. Brucker, supra*, at p. 736, n. 8, and for the same reasons, "We purposefully refrain from appending verbatim references to the medical reports . . .", and from reviewing the testimony to show how even her own testimony and her statements to her own doctors support her retirement. The judgment in A-426-60 is affirmed.

SHIRLEY HIMMELMANN,

*Petitioner-Appellant,*

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL  
HIGH SCHOOL DISTRICT NUMBER ONE,

*Respondent-Respondent.*

Decided by the Commissioner June 14, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

This appeal challenges a decision of the Commissioner of Education which held that the respondent Board acted within its authority when, on March 24, 1960, it adopted a rule to the effect that no department head shall be an officer of the Faculty Association of its school district, nor shall he or she serve as a member of a committee of the Faculty Association dealing with the Board regarding salaries. The Commissioner further held that the Board acted within its authority in conditioning its offer to petitioner-

appellant of the position of head of the Department of Business Education upon her agreement not to serve as a member of the Faculty Association or as a member of the salary committee thereof. At the time of her appointment petitioner-appellant was President of the Lower Camden County Regional High School Faculty Association in respondent's district.

We are informed that since the Commissioner's decision, petitioner-appellant has left the employ of the respondent Board so that, in a sense, this appeal, so far as it affects petitioner-appellant's individual rights, is moot. Nevertheless, since the rule of March 24, 1960, is still a rule of respondent Board, there remains the question of policy established by said rule, and we believe we should pass upon said policy for the guidance of this and other Boards.

We recommend that the Commissioner's decision be affirmed for the reasons set forth in his opinion. We would add to his decision a reference to the National Labor Relations Act, § 8(a) (1) (2) (29 U. S. C. A. § 158 (a) (1) (2)), and the decisions of the National Labor Relations Board pursuant thereto which support the proposition that employees should be represented in collective bargaining negotiations by persons who do not hold supervisory positions under the management for whom the employees work. *Nassau & Suffolk Contractors Assn.*, 118 *NLRB* 19, 40 *LRRM* 1146 (1957); *Houston Maritime Assn.*, 121 *NLRB* 57, 42 *LRRM* 1364 (1958). We consider the principles recognized in the field of national labor relations, to the effect that it is in the interest of the employees that their representatives shall have a single minded loyalty to the interests of the employees and not be part of the management team, are analogically applicable to the problem presented by the rule of respondent Board which is here in question. Further, we think it is sound policy that a supervisory employee such as a head of a department in a school system, and thus, in effect, a part of a management team, should not have a loyalty divided between the Board and its employees.

We therefore hold that the rule adopted by the respondent Board on March 24, 1960, was within the authority of the Board and is a reasonable exercise of its power to make rules and regulations, as provided in *R. S.* 18:13-5.

DATED: October 3, 1962.

FLOYD G. HOEK,

*Appellant,*

v.

BOARD OF EDUCATION OF THE CITY OF ASBURY PARK IN THE  
COUNTY OF MONMOUTH AND STATE OF NEW JERSEY,

*Respondent.*

Decided by the Commissioner June 4, 1960.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by appellant Floyd G. Hoek from a decision of the Commissioner of Education affirming the dismissal of appellant from his

position as Secretary-Business Manager of the school system of Asbury Park by the Board of Education of that community. The dismissal by the local Board, effective April 22, 1958, by a vote of 3 to 2, followed the filing of some 41 charges against appellant and extensive hearings before the local Board. The record consumed 2,248 pages. Its prolixity has not been conducive to a more speedy determination of this appeal.

Of the 41 charges originally filed, all were dropped at some time during the proceedings except 17, and as to these the local Board found appellant guilty of 9. The charges themselves are set forth on pages 2 to 5 of the Commissioner's Decision and need not be repeated here. Suffice it to say that those upon which appellant was found guilty may be generally described as alleging conversion of food stuffs and other property of the Board, to his own use or to the use of others; failure to declare in his inventory certain surplus foods and destruction of same without justification; falsification of the minutes of the local Board so as to improperly record alleged action of the Board at a meeting; directing use of school property for the benefit of one of the members of the Board without authority, and directing an employee of the Board to spend his time obtaining a motor vehicle license on school time for the benefit of a third party without authority of the Board.

In his Decision, the Commissioner of Education agreed with the local Board's finding of guilt of each of the 9 charges except charge #1(h), which alleged that appellant had appropriated a surplus property water pump for his own use.

Appellant attacks the dismissal on several grounds, but we need consider only one, for its disposition is dispositive of this appeal. The ground which we thus consider springs from a motion made by appellant's attorney before the local Board wherein he moved to disqualify one of the members of the Board, one William Novograd, on the general ground of alleged bias and prejudice against appellant. The local Board, by a vote of 3 to 0 (Board member Novograd not participating in the vote), denied the motion to disqualify. The Commissioner, in his Decision, affirmed this action of the local Board, holding that there was not sufficient cause for the disqualification of the said Board member.

At the outset of the hearing before the local Board, appellant's counsel made the motion to disqualify and proceeded to introduce testimony of various witnesses as to the alleged bias and prejudice of Mr. Novograd against appellant. Among the grounds alleged were that Mr. Novograd was a principal actor in the investigation of appellant's conduct; that he actually drafted several of the charges against appellant; that he had evidenced an habitual aloofness toward appellant; that Novograd had frequently urged appellant to help Novograd's clients in getting business with the school Board; that Novograd was over-zealous in examining vouchers which were under appellant's jurisdiction; that Novograd had said at one time with respect to appellant that "you grate on my nerves" and, finally, that, as proved by the testimony of one Frankel, a previous attorney for appellant, Novograd had actually prejudged the case and had expressed bias, prejudice and ill will towards appellant so that he could not have judged the evidence with that objectivity and impartiality which fair play, due process and justice demand.

The trial of the charges arose at a time when the statutory scheme provided that the local Board could investigate, file its own charges, prosecute the same and still had the duty of acting as judge on those very charges (R. S. 18:5-51, as amended L. 1938, c. 78, P. 193, § 1). That system had given rise, for many years, to repeated cases wherein it was charged, in effect, that the local Board, or one or more of its members, had been prosecutor, judge and jury. Thus it was frequently claimed that a finding of guilt was tainted with bias and prejudice. After long last, the essential defect of this system was corrected by the enactment in 1960 of the "Tenure Employees Hearing Act", L. 1960, c. 136, N. J. S. A. 18:3-23, *et seq.* Under the latter Act, the possibility of bias inherent in the old system has been eliminated by providing for the filing of the charges by the local Board, a certification of same to the Commissioner of Education for hearing, the hearing of such charges before the Commissioner himself or before the hearer deputized by him, 60 days after which the Commissioner himself is to make the decision. However, the "Tenure Employees Hearing Act" did not become effective until after the dismissal by the local Board herein. There thus remains for this Board, perhaps for the last time, the task of endeavoring to determine whether the record below evidences that kind of bias or prejudice which would warrant the disqualification of the Board member Novograd, at the same time recognizing the public duty of a member of a local Board, such as he, to investigate alleged derelictions in the local system and, if warranted, to prosecute them.

We reject most of the charges upon which alleged bias of Novograd is said to be evidenced for the reason that their basis in the record rests largely in the subjective opinion, reaction or impression of appellant Hoek that Novograd was actually prejudiced against him. We do not consider that his alleged aloofness towards appellant, his statement that appellant grated on his nerves, his assiduous examination of the vouchers, and other incidents of alleged dislike of appellant, are sufficient to establish grounds for disqualification, even if they be true. We also agree with the Commissioner that the record does not support the charge that Novograd had any personal financial interest (*vis-a-vis* his clients) in obtaining dismissal of appellant. Neither do we consider the fact that Novograd investigated the charges, drafted and filed them against appellant is sufficient for disqualification. In *Mackler v. Board of Education of City of Camden*, 16 N. J. 362 (1954), our Supreme Court held that the mere making of a complaint does not disqualify a Board member where its making is a formality of office and no personal interest is shown. We also consider that "personal interest" in this respect does not mean an interest in bringing out such facts as may tend to warrant dismissal of the employee. Indeed, industrious attention to possible evils in a school system and vigorous investigation of the same is the duty of a Board member, and for assiduous dedication to such matters a Board member is to be commended. The Supreme Court said, speaking through Mr. Justice Oliphant, in *Mackler*:

"Our concern, then, in the instant case is as to whether or not anything can be discovered from the record showing any private interest in the outcome of the case on the part of Mr. Pierce and Mr. Sherman or any evidence of malice or ill-will on their part toward the defendant, and we find none."

It was because the Supreme Court found no such evidence “of malice or ill-will”, in the legal sense, that the claim of disqualification of the Board member in that case was denied.

In the instant case, however, there is evidence, uncontradicted, which, in our opinion, taints the judgment of the local Board to the degree that reversal is necessary. One of the witnesses produced by appellant on his motion to disqualify before the local Board was one Frankel, an attorney who had previously represented appellant Hoek in this matter. He testified that prior to the hearings Novograd had contacted him and endeavored to persuade him to have appellant resign. This attempt was indeed after Frankel had ceased his representation of Hoek. Nevertheless, Frankel testified that Novograd said to him: “You know that there are criminal charges, that there may be an indictment.” He said that there was some discussion between them as to whether there would be a statement by the Board upon Hoek’s resignation to the effect that the consequent withdrawal of the charges should not be construed as meaning exoneration. Frankel further testified that Novograd said to him “I control things on that Board now.” Finally, he recounted his telephone conversation with Novograd as follows:

“But then he went on and said this, that ‘Unless Mr. Hoek resigns, that I intend at the next meeting on January 14th, to move for his suspension.’ He said, ‘You know, I feel a great responsibility as a member of the Board, *and this man Hoek is a thief, and I don’t trust him, and he exercises a great deal of authority on that Board,*’ and he said, ‘Now, I want you to talk to Hoek, but don’t mention this matter of suspension unless you feel that you reach a point with him where he is inclined to consider a resignation.’” (Emphasis added).

Confronted with this serious allegation, that prior to the hearing he had expressed a conviction that appellant was “a thief”, Mr. Novograd did not contradict the testimony of Frankel. The only defense by Mr. Novograd was an unsworn statement by him wherein he stated that he had not chosen to cross-examine Mr. Frankel because he considered his presence as a witness as “a betrayal of the common confidence in confidential communication between attorney and attorney.” He further stated that the point of his conversation with Frankel was not unusual since it consisted of an effort to save time and expense of all parties concerned and it was to this end that the discussion of resignation came about. As Novograd was delivering this statement there was some interruption by Frankel wherein he challenged Mr. Novograd to make his statement under oath. Mr. Novograd went on to say, with reference to Frankel’s testimony, that “he at no time in his testimony stated that I had said to him that I was convinced of the defendant’s guilt nor indicated that there would not be a fair trial in the event the matter could not be settled.” He further stated that he considered it would be improper for him to take the stand and testify.

We differ with the contention that Mr. Novograd’s unsworn statement was sufficient answer to the testimony of Frankel for several reasons. First, the telephone conversations between Novograd and Frankel were not in the area of confidential communications “between attorney and attorney”. Indeed, we do not pass upon whether, even in that context, there is a privilege. In any event, Novograd was not acting as attorney, but was in

the position of a judge, and, whatever customary confidential character there may be in conversations of attorney with attorney, such confidence cannot be conceded to Mr. Novograd. He was about to pass judgment in a case against Hoek which involved, as one of the "central, determinative fact(s)" see *James v. State of New Jersey*, 56 N. J. Super. 213, 218 (App. Div. 1959), whether Hoek had converted school property to his own use. While it was true Frankel did not, in *haec verba*, testify that Novograd was "convinced of the defendant's guilt", we can read Novograd's statement that appellant was "a thief" in no other way than that he was then convinced, before trial, of Hoek's guilt on at least those charges which implied that Hoek had taken school property for his own use.

Lastly, we can ascribe no credit, in the resolution of this legal question, to Novograd's statement that there had been no indication by Frankel "that there would not be a fair trial in the event the matter could not be settled." It may well be that Mr. Novograd possesses those qualifications which gave him the capacity to disregard the conviction on his part that Hoek was "a thief" and still pass impartially and objectively upon the evidence presented before him. We cannot say, as a matter of certainty, that Mr. Novograd did not, in the exercise of his subjective judgment, actually cast his vote for dismissal in a totally impartial and unprejudiced fashion. Indeed, we must concede that upon a review of the whole record, Mr. Novograd afforded every opportunity to appellant to produce witnesses, he patiently gave his attorney more than ample opportunity to argue objections and other points, and it appears that his rulings on objections were not unfavorable to appellant. In other words, if we were to determine the question of disqualification by the appearance of the transcript of the record (other than Frankel's testimony) in the conduct of the trial, we would be led to the conclusion that the trial was impartial. However, no matter what the surface appearance of the transcript may show, it is impossible for us to determine the truth of the question as to whether the subjective processes of Mr. Novograd's mind in adjudging the evidence were truly impartial and uninfluenced by his stated conviction that in his opinion, Hoek was "a thief". As was said by the Appellate Division in *James v. State of New Jersey*, *supra*, at 217:

" \* \* \* The question is not whether the magistrate *actually* resorted to his firsthand information in assessing the *merits of the case*. The *evil resided in the possibility of his consciously or unconsciously doing so*.

"Here the magistrate's knowledge or impression of defendant's physical state was something that lay outside the record. Defendant had no opportunity to test its trustworthiness, or to explain or rebut it. Under the circumstances, to permit the conviction to stand would offend every standard of fair play and amount to depriving defendant of due process. *Cf.* our recent decision in *Susquehanna Transit Commuters Ass'n. v. Board of Public Utility Com'rs.*, 55 N. J. Super. 377, 408 *et seq.* (App. Div. 1959); and cases there cited." (Emphasis added).

Thus we do not hold, or find, that Mr. Novograd "actually" rested his judgment on his stated conviction that appellant was "a thief" in assessing the merits of the case, but we do hold that the evidence presented through Frankel's testimony demonstrates the evil that resided in the "possibility of his consciously or unconsciously doing so." We rest our judgment also on

the further language in the *James* case that “a judge should not preside over a trial where he possesses privately acquired knowledge of the central, determinative fact of the case . . .” and that, as the court therein stated, “. . . it is of the very essence that justice avoid even the appearance of injustice; otherwise courts and judges stand suspect.” The language quoted is equally applicable to a member of a Board of Education who is passing upon the tenure rights of a Board employee as it is to the courts and judges.

The Commissioner, in his decision, suggests that the rule of stern necessity “might be” extended to apply to situations where there is possibility of a tie vote in the event that one member of the Board were to be disqualified. He implies that if Novograd were to be disqualified below, leaving 4 members, the vote on charges against appellant would have been a tie and there would be no way of breaking that tie. The suggestion is untenable. The rule of stern necessity applies only when the result of disqualification would be that no hearing could be held. *Rinaldi v. Mongiello*, 4 N. J. Super. 7, 12 (App. Div. 1949) and cases therein cited. Such would not be the result here because upon Novograd’s disqualification there would remain 4 qualified members of the Board and that would constitute a quorum. See *Pyatt v. Mayor and Council of Dunellen*, 9 N. J. 548, 557 (1952). The coincidence that the vote was 3 to 2 for dismissal and discounting Novograd’s vote would result in a tie vote, is of no significance. Assuming disqualification would merely have the effect of discounting Novograd’s vote, then there would be no effective judgment of the Board of Education finding the charges “true in fact” as was required by the applicable tenure section at the time of the trial. *N. J. S. A.* 18:5-51. Beyond that, however, the taint of Novograd’s disqualification permeates the entire Board so that the action of the whole Board is voidable by reason of his disqualification alone. *Pyatt v. Mayor and Council of Dunellen*, *supra* at 557.

We therefore order that the decision of the Commissioner of Education be reversed and that appellant’s dismissal as a result of the hearing before the local Board of Education be likewise set aside.

We feel constrained to add some further observations. By our decision herein, we have expressed our conviction that a tenure employee should be afforded a trial, before dismissal, wherein all the appearances, and essence, of justice, fair play and impartiality be retained. By this decision, it is not to be understood that we are passing in any way upon the question as to whether the charges made were supported, or not supported, by the proofs. Neither are we passing upon the question as to whether appellant was, or was not, a fit employee, or whether he should, or should not, be retained as Secretary-Business Manager of the Asbury Park school system. Our prime objective of assuring him a fair trial has led us to the conclusion that the dismissal heretofore made should be set aside. Our decision, however, is without prejudice to the right of the local Board, or any other proper person, to file charges and prosecute them for hearing pursuant to the “Tenure Employees Hearing Act” before the Commissioner, if it is deemed, in the public interest, that such charges should be brought. Under that procedure, the vice in the former system of prosecution and hearing by the local Board will not be present, and the Commissioner, or his deputized Hearer, rather than reviewing the written record as he did below, will have an opportunity to observe such witnesses as may testify before him. The proofs here are

peculiarly in that area where credibility of witnesses is crucial and the long-recognized aid of personal observation of witnesses would be available in determining that credibility. We likewise add that, if such reinstatement of charges is deemed in the public interest, the charges can be framed with more clarity and specificity than those below and the hearing can proceed without the prolixity which characterized the record below.

For the reasons herein stated the Commissioner's decision of June 14, 1960 is reversed.

September 6, 1961.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued June 18, 1962—Decided June 21, 1962.

Before Judges Goldmann, Freund and Foley.

*Mr. Joseph N. Dempsey* argued the cause for appellant.

*Mr. Edward W. Currie* argued the cause for respondent.

The Attorney General joined in respondent's brief.

PER CURIAM

The Board of Education of Asbury Park appeals from a determination of the State Board of Education reversing a decision of the State Commissioner of Education which upheld respondent Hoek's dismissal as secretary-business manager of the Asbury Park school system, on charges heard and determined by the local board of education pursuant to *R. S. 18:5-51*, as amended by *L. 1938, c. 78*. (Hearings on charges preferred against any employee of a board of education who is under tenure in any office, position or employment covered by *Title 18 of the Revised Statutes* must now be conducted in accordance with the Tenure Employees Hearing Act, *L. 1960, c. 136; N. J. S. A. 18:3-23 et seq.*, which became effective October 5, 1960, after Hoek's dismissal on April 22, 1958.)

Following an investigation of the Asbury Park school system by a committee of the board of education, 14 charges were preferred against Hoek in August 1957. Board member Novogrod then preferred 17 additional charges on October 21, 1957, followed by 9 more on January 14, 1958 and 1 on January 29, 1958. These additional charges were accepted by the board for hearing. The board opened its hearings on February 25, 1958 and concluded them on April 21, 1958. At the very outset respondent, through his attorney, moved to disqualify Novogrod by reason of his malice, ill will and prejudice toward respondent, his personal interest in having him dismissed, his sitting in judgment upon charges which he personally had brought, and his pre-judgment of the validity and seriousness of the charges. Novogrod participated in the hearings on the motion for disqualification, although he did not take part in the board conference preceding the vote on disqualification, nor did he vote on the question.

The board refused to disqualify Novogrod by a vote of 3-0, a fourth member abstaining. It then proceeded to hear the charges. Of the 41 (14 by

the board and 27 by Novogrod), all but 17 were dropped at some time during the proceedings. The 17 comprised one charge that had been brought by the board and 16 by Novogrod. The board found appellant guilty of 9, all of them brought by Novogrod. Novogrod cast the deciding vote in 7.

There is no need to detail the 9 charges on which Hoek was found guilty. They may generally be described as alleging conversion of foodstuffs and other property of the board of education to his own use or the use of others; failure to declare in his inventory certain surplus foods and their destruction without justification; falsification of the board minutes so that they did not properly reflect the action allegedly taken by the board at a meeting; employment of maintenance and cafeteria help without board approval; directing the use of school property for the benefit of one of the board members, without authority; and directing a board employee to obtain a motor vehicle license for a third party, on school time and without authority.

The State Commissioner of Education agreed with the local board's finding of guilt on eight of the nine charges. He also determined that Novogrod was not disqualified from participating in the hearings.

Although respondent Hoek, on appeal to the State Board of Education, attacked his dismissal on several grounds, the Board determined that it need consider only one of them, deeming it dispositive of the appeal. That ground was Novogrod's disqualification to participate in the local board hearings because of possible prejudgment of the case.

The now generally accepted gauge of administrative factual finality is whether the factual findings of the administrative agency are supported by substantial evidence. The decision of the State Board of Education reflects a careful consideration of the disqualification hearings record. We have read that record and find ourselves in complete agreement with the conclusion reached by the State Board. We need not consider Novogrod's deep involvement in the Hoek matter, as exemplified by his personally conducting an investigation into the affairs of the secretary-business manager's office, interviewing witnesses, and his preparation and bringing of additional charges after the local board had acted. (We recognize that the bringing of charges by a board of education member does not in itself disqualify him from participation in hearing the charges, *Mackler v. Camden Board of Education*, 16 *N. J.* 362 (1954), although we question whether such a member can sit in judgment with a mind wholly unconditioned by charges personally brought. *Cf. N. J. S. A.* 18:5-51, permitting charges to be filed by any person, whether a member of the school board or not.) We conclude that the State Board's decision is well supported by substantial evidence; like the Board, we find uncontradicted evidence that Novogrod was disqualified from hearing the Hoek charges because, whether consciously or unconsciously, he pre-judged the case.

The most damaging evidence against Novogrod came from two attorneys, Abraham Frankel and Harry Green, witnesses produced by Hoek on his motion for disqualification. Frankel, who had represented Hoek until January 8, 1958, testified that Novogrod had phoned him the next afternoon, January 9, regarding a rumor that he was withdrawing from the case. Frankel confirmed the fact and told Novogrod that Edward W. Currie, Esquire, now

represented Hoek. Novogrod said that he felt Hoek ought to resign; he told Frankel, "If you knew what I have in my file against Mr. Hoek, why then you would understand why I am suggesting this." He went on to say, "You know that there are criminal charges, that there may be an indictment." When Frankel asked Novogrod when he wanted Hoek to resign, he replied, "As of February 1st," and insisted upon that date. Novogrod suggested that Frankel speak to Hoek to determine his attitude about resigning. Later in the conversation Novogrod said that unless Hoek resigned, he intended to move for his suspension at the next board meeting on January 14. Then he said:

"You know, I feel a great responsibility as a member of the board, and this man Hoek is a thief, and I don't trust him, and he exercises a great deal of authority on that board."

Frankel again reminded Novogrod that he no longer represented Hoek, but promised he would talk to him that evening. Frankel did speak to Hoek, and Hoek said he had no intention of resigning.

Green had been attorney for the board of education before the Hoek hearings. He testified that sometime in December of 1957 Novogrod had suggested that an attempt be made to obtain Hoek's resignation, effective immediately, and he would then withdraw the charges and make an appropriate statement. Novogrod had said, in effect, that if Hoek did not resign, the probabilities were that the matter would come up before the grand jury. Green further testified that he had had several telephone conversations with Novogrod in an attempt to find a plan acceptable to Frankel, then representing Hoek, that would result in a resignation. Novogrod had agreed to Green's suggestion that Hoek be permitted to resign without prejudice, and instead of resigning immediately, be given until January 31, 1958 to do so. Asked to describe Novogrod's attitude toward Hoek, Green said:

"It is hard to characterize. I would say he was opposed to Mr. Hoek. I don't see how I can put it any other way. As to what motivated it, or whether it sprang from ill will or malice or something like that, I can't tell. He was opposed to Mr. Hoek."

At the conclusion of the testimony of the witnesses produced on Hoek's motion for disqualification, Novogrod said he wished to make a statement. In the course of that statement, Frankel, who was present at the hearings, insisted that Novogrod be placed under oath, like the other witnesses. Novogrod resisted the demand, and the board sustained him.

We find it significant that Novogrod did not contradict Frankel's testimony regarding the telephone conversation when Novogrod is alleged to have said, "Hoek is a thief, and I don't trust him." He dismissed Frankel's testimony with the observation, "I would not cross-examine him as I consider his very presence as a witness a betrayal of the common confidence in confidential communication between attorney and attorney." Nor did Novogrod meet Green's testimony head-on.

The State Board concluded that it could read Novogrod's statement that Hoek was a thief "in no other way than that he [Novogrod] was then convinced, before trial, of Hoek's guilt on at least those charges which implied

that Hoek had taken school property for his own use.” Although the State Board could not determine to a certainty “whether the subjective processes of Mr. Novogrod’s mind in adjudging the evidence were truly impartial and uninfluenced by him stated conviction that in his opinion Hoek was ‘a thief,’ ” it held that the evidence presented through Frankel’s testimony demonstrated the evil that resided in the “possibility of his consciously or unconsciously doing so.” Since Novogrod was sitting in judgment, the State Board found it “of the very essence that justice avoid even the appearance of injustice,”—referring to *James v. State*, 56 *N. J. Super.* 213, 217, 218 (*App. Div.* 1959). We join in these conclusions.

The State Board found that the taint of Novogrod’s disqualification permeated the entire membership of the board of education, so that the action taken by the board was voidable by reason of his disqualification alone. Such is the law. *Pyatt v. Mayor, etc. of Dunellen*, 9 *N. J.* 548, 557 (1952). It therefore reversed the decision of the State Commissioner of Education and set respondent’s dismissal aside. The State Board emphasized that in so doing it was not to be understood as passing in any way upon the question of whether the charges leveled against Hoek were supported by the proofs. Nor was it passing upon the question of whether Hoek was a fit employee, or should be retained as secretary-business manager. In conclusion it said:

“\* \* \* Our decision, however, is without prejudice to the right of the local Board, or any other proper person, to file charges and prosecute them for hearing pursuant to the ‘Tenure Employees Hearing Act’ [*L. 1960, c. 136; N. J. S. A. 18:3-23 et seq.*] before the Commissioner, if it is deemed, in the public interest, that such charges should be brought. Under that procedure, the vice in the former system of prosecution and hearing by the local Board will not be present, and the Commissioner, or his deputized Hearer, rather than reviewing the written record as he did below, will have an opportunity to observe such witnesses as may testify before him. The proofs here are peculiarly in that area where credibility of witnesses is crucial and the long-recognized aid of personal observation of witnesses would be available in determining that credibility. We likewise add that, if such reinstatement of charges is deemed in the public interest, the charges can be framed with more clarity and specificity than those below and the hearing can proceed without the prolixity which characterized the record below.”

Accordingly, we find that the State Board of Education did not, as appellant contends, err in finding that Novogrod was disqualified and that his presence at the hearings on the charges tainted the entire proceedings and denied respondent a fair trial.

The second point raised by appellant in its brief is that assuming the State Board was correct in reversing the decision of the State Commissioner of Education, it erred in not remanding the entire matter to the local board of education for final hearing, citing *Laba v. Newark Board of Education*, 23 *N. J.* 364 (1957), and *Lowenstein v. Newark Board of Education*, 35 *N. J.* 94 (1960), in support. *Laba* was decided before the passage of the Tenure Employees Hearing Act in 1960, and therefore has no pertinence. The reference to what was said in *Lowenstein* (at page 118) regarding a remand to the local board of education, is dictum since the Supreme Court itself

undertook to bring the case to a final conclusion because of the six years of controversy and litigation that had attended the case.

Whatever the argument made by appellant in its brief, its counsel agreed at oral hearing that the matter should go back to the local board for the filing of charges by it or any other proper person, and the prosecution of those charges before the State Commissioner of Education under the Tenure Employees Hearing Act, if the local board deemed it in the public interest that charges be brought. Counsel for appellant conceded that this was the preferred procedure, and he informed the court that he had so agreed before the State Board.

A hearing before the State Commissioner on charges that might be brought by the local board or any person (see *N. J. S. A.* 18:5-51; *L.* 1960, c. 137, sec. 1) would eliminate the vice which inhered in the former practice, authorized by *R. S.* 18:5-51, as amended by *L.* 1938, c. 78, of the board being at one and the same time investigator, prosecutor and judge. The procedure now called for by the Tenure Employees Hearing Act was initiated and supported by the New Jersey Education Association. See 32 *N. J. E. A. Review*, pp. 178 and 220 (1958-59); 33 *N. J. E. A. Review* 251 (1959-60); and see the Statement attached to *Senate Bill No. 54* and *Assembly Bill No. 104*, introduced in the 1960 Legislature, and which became *L.* 1960, c. 136.

It seems clear from the concluding quotation of the State Board's decision, quoted above, that it left the way open for the filing of new charges, or at the least the reinstatement of charges, deemed in the public interest, which charges could be framed "with more clarity and specificity" than those considered by the local board.

As was said in *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 *N. J.* 372, 381 (1954), a remedial and procedural statute is ordinarily applicable to procedural steps in pending actions, absent a clear indication of a legislative intent *contra*. Such a statute is given retrospective effect insofar as it provides a change in the form of remedy or provides a new remedy for an existing wrong. *Cf. Wildwood v. Neiman*, 44 *N. J. Super.* 209, 214 (1957), where we observed that our courts have consistently held that where a statute deals with procedure only, it applies to all actions and proceedings—those which have accrued or are pending, as well as those yet to be brought.

We therefore affirm the State Board's determination that the setting aside of respondent Hoek's dismissal was without prejudice to the right of the Asbury Park Board of Education, or any other person, to file charges and prosecute them for hearing before the State Commissioner of Education, pursuant to the Tenure Employees Hearing Act, if it is deemed in the public interest that such charges be brought.

Affirmed.

75 *N. J. Super.* 182.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

On petition for rehearing.

Argued October 1, 1962—Decided October 16, 1962.

Before Judges Goldmann, Freund and Foley.

*Mr. Joseph N. Dempsey*, attorney for petitioner-appellant

Board of Education of Asbury Park.

*Mr. Edward W. Currie*, attorney for respondent Hoek.

PER CURIAM

Appellant board of education sought a rehearing following the coming down of our opinion on June 21, 1962 (75 *N. J. Super.* 182) affirming the determination of the State Board of Education. We denied the application in view of the board's petition for certification pending in the Supreme Court. By order entered September 17, 1962 that court held the petition and remanded the matter so that we might deal with the application for a rehearing.

In his petition counsel for the board urged that the best interests of his client and of justice required a rehearing so that he might clarify his position in regard to the appropriate remand procedure. In the course of our opinion we had said:

“Whatever the argument made by appellant in its brief, its counsel agreed at oral hearing that the matter should go back to the local board for the filing of charges by it or any other proper person, and the prosecution of those charges before the State Commissioner of Education under the Tenure Employees Hearing Act, if the local board deemed it in the public interest that charges be brought. Counsel for appellant conceded that this was the preferred procedure, and he informed the court that he had so agreed before the State Board.” (75 *N. J. Super.*, at page 130)

Counsel for appellant contends that we misinterpreted his position. He says that at no time did he mean to infer that it was a matter of indifference to him or his client as to whether the matter was remanded to the board or to the State Commissioner of Education. Appellant's brief on rehearing states:

“\* \* \* Counsel did say before the State Board of Education and again at oral argument before the Superior Court, Appellate Division, that, as an *academic* matter, the Tenure Employees Hearing Act provided a more suitable procedure for trials of this nature than did its predecessor. Likewise, counsel stated that if a remand must be had, he would have no objection to the charges being heard before the State Commissioner of Education in the first instance *as long as* such a procedure was without prejudice to appellant's rights as to respondent's compensation claim for back pay in the event the respondent is eventually found guilty under the charges stated. \* \* \*” (Italics counsel's)

The board asks that

“\* \* \* the mandate be modified so that the new trial may be brought, either before the local Board of Education or before the Commissioner of Education, without the necessity of the plaintiff Board bringing new charges and thus perhaps recognizing the defendant in office and entitling him to compensation before decision on the merits can be obtained, and even though both agencies who have examined the merits have found the defendant unqualified to hold public office.”

We have reconsidered that part of our opinion which deals with the remand, and this in the light of the briefs and oral argument on rehearing. Although the participation of Novogrod in the local board of education's hearings on the charges tainted the entire proceedings and denied respondent a fair trial, the charges still remain. They have a continuing viability. They still await resolution.

The Asbury Park board may, therefore, file the pending charges (or as many of them as it deems in the public interest) with the State Commissioner of Education, and prosecute them before him as soon as reasonably possible. We consider this to be the only correct procedure, not only because of the existing Tenure Employees Hearing Act (*N. J. S. A. 18:3-23 et seq.*), but because the local board has already considered the charges and made up its mind as to Hoek's guilt. The board should not, as we said in our earlier decision, be at one and the same time investigator, prosecutor and judge. The fresh approach called for by the statute will insure a maximum measure of justice for respondent.

Our earlier decision dealt only with the correctness of the State Board of Education's determination that respondent's dismissal was invalid because of Novogrod's disqualification to participate in the local board hearings. We did not and do not now have before us the question of any possible salary claim respondent might assert. We may not therefore be considered as having dealt with that question in any respect whatever.

76 *N. J. Super.* 448.

ANN KOPERA,

*Petitioner-Appellant,*

v.

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE,  
ESSEX COUNTY, et al.,

*Respondents.*

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Decided January 10, 1963.

PER CURIAM.

Our previous opinion in this case, reported in 60 *N. J. Super.* 288, remanded the case to the Commissioner of Education for findings of fact and conclusions of law.

Pursuant to that remand, the Commissioner filed an opinion entitled "Decision Of The Commissioner Of Education On Remand." In it he set forth the facts, which he found were substantially unchallenged, and concluded upon those facts "(1) that the evaluation scale adopted by the West Orange Board of Education, including the procedures devised to administer it, was adequate to determine whether a teacher is entitled to an increment based on meritorious service; (2) that these procedures were properly and fairly administered in evaluating appellant's work; (3) that there was no charge or proof of bad faith on the part of those who had any part in the withholding of appellant's increase; (4) that the underlying facts were not substantially challenged; and (5) that there was a reasonable basis for those who made the evaluation to justify their conclusions and for the Board of Education to withhold the increase on the basis of the evaluation."

We invited the petitioner and respondents, if they so desired, to file supplemental briefs addressed to the Commissioner's decision on remand, and to appear for oral argument, but all parties declined the invitation.

We have examined the Commissioner's opinion on remand with care. We find that it supplies all that we requested, and makes it incontrovertibly clear that petitioner was properly denied an increment for the school year 1956-57.

Affirmed. No costs.

PLAINFIELD COURIER-NEWS COMPANY,  
A CORPORATION OF THE STATE OF NEW JERSEY,

*Petitioner-Respondent,*

v.

BOARD OF EDUCATION OF THE WATCHUNG HILLS  
REGIONAL HIGH SCHOOL DISTRICT,

*Respondent-Appellant.*

Decided by the Commissioner May 18, 1960.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of the Watchung Hills Regional High School District (hereinafter called the "Board") from the Decision of the Commissioner of Education wherein he directed the Board (1) to permit "citizens and taxpayers" of the district to inspect the Minutes of proceedings of the Board and to make notes therefrom; (2) to include the names of employees in any action taken affecting the employee; and (3) to discontinue the practice of requiring any promise as a condition for inspecting the Minutes and making notes from them. Said Decision was the result of an appeal to him by the Plainfield Courier-News Company, a corporation of the State of New Jersey (hereinafter called the "Newspaper"), publisher of a daily newspaper, the Plainfield Courier-News, which circulates in the Watchung Hills Regional High School District. It is not a resident, citizen or local taxpayer in the said district. However, its newspaper, the Plainfield Courier-News, has been approved by the respondent Board as a

vehicle for the publications of legal notices of said Board and, as a corporation of New Jersey, pays its corporate taxes under the provisions of *N. J. S. A. 54:10A-1* to the State of New Jersey, out of which sum the State appropriates certain monies which are applied to the support of the public schools, including the schools of the respondent Board's district.

The Newspaper complained before the Commissioner that it had requested permission to examine the Minutes of the Board, including the Minutes containing the salary paid to each and every person employed by the Board, including the teachers, at a time when it would not interfere with the work of the office of the Board; that the Board had refused that request; and that the Minutes of the Board are kept in such form that a reading thereof does not properly indicate what has taken place at the meetings of the Board. The Newspaper also complained that the Board has a practice that, when it has given permission to a citizen of the district to examine the Minutes, the Board has made a condition for said inspection that the citizen must promise that it will not make the salary list public. It therefore prayed for an order from the Commissioner directing that:

A. The Appellant may inspect the Minutes of the Board of Education and make notes from said Minutes.

B. That the Minutes be kept in such form that a reading thereof will set forth what took place at said meetings, so that the same may be understood without any reference to any code, initials or extrinsic references or knowledge.

C. That the said Board of Education be ordered to discontinue the practice of compelling any taxpayer of said district or the Plainfield Courier-News as a condition for inspecting the Minutes and making notes from the same from making any promise or condition that the same will not be made public.

In its answer, the Board contended, in substance, that:

(1) The Newspaper has no interest or right to obtain the relief sought because it is neither a resident, citizen or taxpayer of the Board's district.

(2) That Minutes of the meetings of the Board are not public records which are subject to inspection.

(3) That it has voluntarily furnished the representatives of the Newspaper with salary schedules, salary rates and salaries paid to personnel, but it takes the position that it has a right to refuse to divulge to the Newspaper or to permit the Newspaper to take from the Minutes of the Meetings the individual salaries paid to any certain named teachers, the newspaper publication of which is neither necessary, proper, nor in the best interest of the public welfare.

(4) That the identification in its Minutes by title and payroll account number of the person with whom employment contracts are entered into is sufficient. In this respect, however, in its brief before the State Board of Education, it contends that its Minutes do show the teachers' names and the salaries paid to them, as well as the payroll account numbers, and therefore it does not here argue the Commissioner's finding that the identification

merely by title payroll account number is not sufficient identification. This point therefore need not be decided at this level.

On appeal to this Board, the local board argues that the Commissioner, in his decision, entirely disregarded the defense raised by the local board that the Newspaper does not possess sufficient standing to obtain the right to examine the Minutes because it is not a resident, citizen or taxpayer of the district. The local board's argument points out that the Commissioner's decision, while directing the local board to permit "citizens and taxpayers" to examine and make notes from the minutes, fails to meet the contention as to whether the Newspaper itself has the right, for indeed it is not a resident, citizen or taxpayer. We agree with this argument to the extent that the Commissioner's decision did not meet that issue.

We, therefore, come to the question as to whether the Newspaper, circulating within the district of the Board, has sufficient "standing" as the concept is usually called. It is true that many of the cases cited by the local board are instances wherein the courts held that residents, citizens and taxpayers have the right of inspection of public records. However, we, as a body which has the function and obligation to establish a policy based consonant with the public interest in the context of public education, should look for and establish guideposts which carry out that purpose, rather than basing our decision upon mere technicalities. We think our inquiry should be directed simply to the question as to whether it is in the public interest that the particular person or corporation seeking access to the Board's records should have that access.

We are mindful of the line of cases wherein, in differing contexts, the courts have applied a sometimes strict requirement that a party must have possessed a certain interest, usually as a citizen, resident or taxpayer in order to justify his institution of an action concerning the acts of a public body. However, it is not the law, as the Board here contends, that the *sine qua non* is that the party be either a citizen, resident or taxpayer. *Walker v. Stanhope* (1957), 23 *N. J.* 657, and cases cited therein. And, as said Justice Jacobs in the latter case, our courts have in the more recent case "displayed further evidence of their broad approach to the problem" (*idem.*, p. 662 and cases cited) and that "it takes but slight private interest, added to and harmonizing with the public interest" (*idem.*, quoting from *Hudson Bergen County Retail Liquor Stores Ass'n. v. Board of Com'rs. of City of Hoboken*, 135 *N. J. L.* 502, 510 (*E. & A.* 1953)) to constitute sufficient standing. Once the public interest is established, only a slight additional private interest is required and that, coupled with public policy considerations provides the requisite standing. *Vide Terwilliger v. Graceland Memorial Park Ass'n.* (1961), 35 *N. J.* 259, 268.

In addition, we feel that, as the body established by law with a prime purpose of establishing policy with respect to public school matters, with general supervision of public instruction in the State (*N. J. S. A.* 18:2-1), and as the Appellate tribunal reviewing the decision of the Commissioner it is our duty to define, in the area of examination of minutes of a local board, what we consider is in the public interest and whether there is sufficient private interest to warrant inspection by the Newspaper here involved. Thus, we do not consider that cases in other areas, involving requirements of direct

legal interest to maintain an action, are binding on us in the field of public administration of a school board. Cf. *Bergen County v. Port of N. Y. Authority, et al.* (1960) 32 N.J. 303. The requirements for proper standing vary, depending upon the type of case in which the question is raised. See *Terwilliger v. Graceland Memorial Park Ass'n, supra* at p. 268. Considering that the decision in *Bergen County v. Port of N. Y. Authority* is not binding in the area here involved we nevertheless feel free to here apply the more liberal philosophy expressed by the dissents of Justice Jacobs, in the same case, (*idem.* pp. 316-322) wherein he stated at p. 319:

“When dealing with proceedings by plaintiffs other than taxpayers, our courts have displayed comparable liberality in rejecting attacks on their standing, particularly where the public interest coincided with the desire of the plaintiffs to obtain just and expeditious determinations on the merits. \* \* \* \*”

Thus, while we recognize that the Newspaper's private interest here may be said to be limited to the circulation of its newspaper in the District involved, (but with the added attribute that it is an official medium of legal advertisements of the board) we consider that “slight private interest” as a sufficient contact to “open the door” to the Minutes here involved. But it is opened not for the Newspaper's private interests but for the public which truly has a “right to know” what official action is taken as recorded in the Minutes. The company's desire to inspect the Minutes coincides with the public's interest. The Minutes record the actions of this public body. The official actions of a public body should never be shielded from public scrutiny. While it is true that publication of a particular teacher's salary is, in a very real sense, “personal” to him or her, it is also a matter of concern to the public which pays that salary and which is, in the broad sense, entitled to know that teachers who perform commendable service are paid as well as they should be, as well as to know whether, if at all, some teacher, underserving, is not worthy of his or her compensation. Those in public service must yield their personal privacy to the public interest, at least in this regard. But, it is said, such exposure is proper to an interested resident, citizen or taxpayer, but not to a newspaper. There is no showing of abuse by the Newspaper here concerned, nor is it to be presumed that the information thus to be published is to be used for any purpose other than public information of facts which, as we have said, is properly a matter of public concern. It is, of course, to be hoped that the newspaper will not publish merely for the sake of prying into personal affairs or for unnecessary exposure thereof. But, if the right to publish is clear and consistent with public interest, we should not, by prior restraint, control the journalistic tastes of the newspaper. The dissemination is to the public which supports the school district. Because it is wider in dissemination than that to a single citizen, resident or taxpayer creates no vice, but rather enhances the value of the information in furtherance of the public interest—the “right to know” matters properly of its concern.

It being conceded that the inspection requested shall not impede the work of the board or its employees, and being subject to reasonable regulation as to convenience, etc. we conclude that the Company publishing the Plainfield Courier-News is, in the public interest entitled, through its agents,

to inspect the Minutes or proceedings of the Board and to make notes therefrom.

We also affirm the decision of the Commissioner wherein he directed the respondent Board to include the names of employees in any action taken affecting the employee; and to discontinue the practice of requiring any promise as a condition for inspecting the minutes and making notes from them.

So ordered.

April 4, 1962.

ANN A. QUINLAN,

*Petitioner-Respondent,*

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

*Respondent-Appellant.*

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 23, 1961—Decided March 9, 1962.

Before Judges Conford, Freund and Labrecque.

*Mr. Joseph V. Cullum*, argued the cause for the respondent-appellant.

*Mr. Melvin Gittleman* argued the cause for the petitioner-respondent (*Messrs. Capone & Gittleman*, attorneys).

The opinion of the court was delivered by LABRECQUE, J. S. C. (temporarily assigned).

This is an appeal from a determination and judgment of the State Board of Education ordering the reinstatement of petitioner Ann A. Quinlan as a clerk in the employ of respondent Board of Education of the Township of North Bergen.

On December 9, 1948 petitioner was appointed "a clerk in the Public School System" by the Board of Education of the Township of North Bergen. She continued to serve in that capacity until January 3, 1956 when by resolution dated December 8, 1955 she was appointed "Clerk-Attendance Officer in the Public School System." On February 1, 1958 the then board adopted a resolution dismissing her "for reasons of economy." In the resolution she was referred to as an "attendance officer in the Public School System" rather than as a clerk-attendance officer.

Petitioner subsequently filed a petition of appeal to the Commissioner of Education alleging that her appointment as clerk-attendance officer was supplemental to and not in substitution for her original appointment as clerk, and that thereafter she continued to perform the duties of a clerk as well as those of an attendance officer. The legal significance of her contention is that as a holder of a "secretarial or clerical position" for three years she would enjoy tenure during good behavior, *N. J. S. A.* 18:6-27, whereas an attendance

officer has no such tenure. She alleged that her dismissal was not made in good faith for reasons of economy but was in reprisal for her activity and support of a referendum to change the defendant board of education from a Chapter 6 to a Chapter 7 board, and thus was motivated by political considerations. She prayed that the resolution dismissing her be set aside as illegal and contrary to law, that she be reinstated to the position of clerk and that her tenure rights be fixed and declared.

A hearing was conducted before the Assistant Commisisoner of Education at which the plaintiff was the sole witness. She testified that she was appointed a clerk in 1948 and as a clerk-attendance officer in December 1955 effective January 3, 1956. She performed her duties until discharged on February 1, 1958. She asserted she worked both as a clerk and as an attendance officer. She estimated her work was divided "half and half." She did any clerical work she was asked to do. On one occasion she substituted for two days when another clerk was ill. She would often be called by Mr. Egan, her supervisor, to look up records in the vault or to locate high school records. She helped a Miss Gilligan in the office.

In support of her claim that reasons of economy did not motivate her dismissal, she testified that in the late fall of 1957, she had engaged in the campaign to change the board of education from a Chapter 6 to a Chapter 7 board. She offered three resolutions, two of them dated August 12, 1958 appointing two additional clerks (Principal's) in the school system, and one dated September 12, 1957 appointing a clerk in the office of the Superintendent of Schools. It was further made to appear that she had previously applied for a position as attendance officer; that after her appointment as clerk-attendance officer she had received a schedule referring to her as an attendance officer; that she was on the same salary schedule as other attendance officers in the system; that she had joined in a request for an increase in the attendance officers' salaries, and that in a letter to the School Superintendent she had signed as "Attendance Officer, Lincoln School No. 5." She asserted that she considered her appointment of December 8, 1955 as "clerk-attendance officer" to be a promotion.

The Commissioner of Education concluded that in order for petitioner to prevail she was required to show that her duties were preponderately those of a clerk and in the absence of such proof he held that she was not protected by tenure. He thus found it unnecessary to consider the contention that her dismissal was not in good faith for reasons of economy. She thereupon appealed to the State Board of Education, which reversed the Commissioner and ordered plaintiff "reinstated as a clerk as of February 1, 1958, at such salary as she was receiving as clerk prior to her appointment as clerk-attendance officer, effective January 3, 1956." The present appeal followed.

The two questions presented for our determination are:

- (1) Whether petitioner had tenure of office at the time of her discharge, and
- (2) Whether in such case she was discharged in good faith for reasons of economy.

Although not conceded by the respondent board, we have no difficulty in concluding that at the time of her appointment as clerk-attendance officer,

petitioner had tenure of office in her position as clerk. *N. J. S. A.* 18:6-27 gives tenure during good behavior and efficiency to all persons holding clerical positions under any Board of Education after three consecutive years of employment. She had thus qualified for tenure by her service as clerk from 1948 to 1955. Thereafter the board was precluded from dismissing her except for inefficiency, incapacity, unbecoming conduct or other just cause, and then only after written charges and a hearing thereon. We therefore turn to consideration of her status at the time of her discharge.

It is conceded that *R. S.* 18:14-43, providing for tenure for attendance officers for city school districts, did not apply to petitioner, but it is asserted that the tenure rights which she had earned as a clerk were not terminated by her subsequent appointment to the hybrid position of clerk-attendance officer; that such appointment was not in substitution for her original appointment as clerk, and thus that her tenure as a clerk continued notwithstanding.

On the contrary, the respondent board contends that even though petitioner may have had tenure in her position as a clerk, her acceptance of the appointment as clerk-attendance officer and her subsequent acquiescence in respondent's alleged treatment of her as an attendance officer amounted to a relinquishment of her status as a clerk with its concomitant tenure of office.

On this question, the State Board determined factually that she had been serving as both clerk and attendance officer and therefore continued to retain her tenure as a clerk. In so doing, the board held:

"In our view, the record indicates that from the time of her appointment as a clerk-attendance officer until her discharge, petitioner served as both a clerk and an attendance officer. If she functioned primarily as an attendance officer, she did so under orders, and not of her own volition as such. Her testimony was to the effect that 'whatever I was asked to do in the school system, I did.' The predominance of her function as an attendance officer was not a situation of her making, but depended upon the decision of her superiors. In her dual official capacity, she could have fulfilled the duties of either or both offices, depending upon her orders. She was not appointed as an attendance officer, but as a clerk-attendance officer and when she accepted the appointment, she manifested herself as being ready, willing and able to perform in either or both offices. \* \* \* By accepting the appointment, she agreed not only to undertake the duties of an attendance officer, but also to continue to perform the duties of a clerk. The manner in which her working time was allotted to the two positions was not her decision or concern. The Board could have acceded to her express request by appointing her as an attendance officer exclusively. But it chose to preserve her status as a clerk, and to give her the additional post of attendance officer. If most or all of her subsequent activity concerned the latter office, she was simply following her instructions. She might as readily have spent all of her time as a clerk if her superiors had felt that her services were more urgently required in that capacity. Thus, within the limitations of her instructions, she continued to serve as a clerk. Upon her dismissal as an attendance officer, she was entitled to resume her clerical duties by virtue of her tenure rights in that position."

In reviewing the determination of an administrative agency our power to make independent findings of fact where necessary is beyond question. *R. R. 4:88-13*, 1:5-4(b) and 2:5; *Cullum v. Bd. of Education of Twp. of North Bergen*, 15 *N. J.* 285, 294 (1954). But the determination of the agency carries with it the presumption of correctness and on review of the facts we will not substitute our independent judgment for that of the board where its findings are supported by substantial evidence, *i. e.*, such evidence as a reasonable mind might accept as adequate to support a conclusion. *In re Public Service Electric and Gas Co.*, 35 *N. J.* 358, 376 (1961); *In re Greenville Bus Co.*, 17 *N. J.* 131 (1954); *Maple Hill Farms, Inc. v. Div. N. J. Real Estate Comm.*, 67 *N. J. Super.* 223, 226-227 (*App. Div.* 1961). It is not our function to weigh the evidence, to determine the credibility of witnesses, to draw inferences and conclusions from the evidence and to resolve conflicts therein. *Hornauer v. Division of Alcoholic Beverage Control*, 40 *N. J. Super.* 501, 504 (*App. Div.* 1956). When an administrative agency has acted within its authority, its actions will not generally be upset unless there is an affirmative showing that its judgment was arbitrary, capricious or unreasonable. *East Paterson v. Civil Service Dept. of N. J.*, 47 *N. J. Super.* 55, 65 (*App. Div.* 1957). Generally the test of factual finality is whether the finding of the agency is supported by substantial evidence. *In re Larsen*, 17 *N. J. Super.* 564, 576 (*App. Div.* 1952) (concurring opinion). Our review of the record below should therefore be confined within the pattern of these decisions.

We conclude that there was adequate support for the State Board's finding that petitioner had tenure in her position as a clerk which was not terminated by her subsequent appointment as clerk-attendance officer. Her initial appointment as a clerk, her acquisition of tenure and her subsequent advance to clerk-attendance officer were all established without serious contradiction. Her assertion that thereafter her duties differed from those of the other attendance officers and that she performed the duties of a clerk as well as those of an attendance officer, stands uncontradicted either by her superiors or her co-workers. The record before us is devoid of any evidence that it was the intention or in contemplation of either the petitioner or the board at the time of her 1955 appointment, that she should be divested of tenure or be considered the holder of a position not attended by tenure. Prior to her appointment, she had applied for the position of attendance officer, which did not carry tenure. It would have been a simple matter to have appointed her to that position, if it was intended that that was the position she was to fill. But this was not done and her appointment as a clerk-attendance officer bespeaks an intention by the board in office at the time that she should retain the employment incidents of a clerical position and not be relegated exclusively to those of the unqualified position of attendance officer. We are not here confronted with a situation where an employee under tenure leaves her position to accept one which carries no tenure. *Lange v. Bd. of Ed. of Borough of Audubon*, 26 *N. J. Super.* 83 (*App. Div.* 1953). It rather appears that the board elected to retain its right to have her continue to perform clerical duties as well as those of an attendance officer, the board to determine the proportion of each. By accepting the appointment she indicated her willingness to perform in either or both capacities. She could not thereafter be deprived of her tenure by the unilateral action of the board.

*Cf. Seidel v. Bd. of Education of Ventnor City*, 110 N. J. L. 31 (Sup. Ct.), aff'd. 111 N. J. L. 240 (E. & A. 1933).

The State Board was not impressed, nor are we, by the fact that petitioner was listed in a work schedule for attendance officers dated December 17, 1957, or that she was referred to in a resolution of the board on December 12, 1957 as an attendance officer. By both of these purely administrative actions the attendance duties were distributed among those acting as attendance officers, including the petitioner. That she would be referred to as an attendance officer in such circumstance was wholly natural. The same reasoning would apply to a letter by her referring to her attendance duties or in connection with that phase of her position, in which she referred to herself as an attendance officer.

The respondent board urges that the State Board erroneously required it to assume the burden of proof as to petitioner's tenure. The board found that it was not disputed that petitioner had attained tenure as a clerk in 1955. After finding that she had served both as a clerk and as an attendance-officer thereafter, it went on to say:

“\* \* \* Respondent Board argues that petitioner's testimony was ‘vague’ and that it is the petitioner's burden to establish her case by a clear preponderance of the evidence. We deem her testimony to establish, at least, *prima facie* support for her contention that she actually performed the duties of a clerk since working under the title of clerk-attendance officer. *We further feel that, in the context of a claim by the Board of Education that one with conceded tenure as a clerk has in fact ‘relinquished’ or ‘waived’ that tenure, the burden of proof should be upon the Board of Education and not upon the petitioner.* As the Commissioner observed in his opinion below, the superintendent, principals and other officials who might have testified as to her clerical duties were not called. We think that it was the burden of the respondent Board to go forward and produce testimony of such officials or others who might have been able to controvert the testimony of the petitioner that she continued to perform clerical duties after she held the title of clerk-attendance officer.” (Emphasis added)

The respondent relies, in its brief, upon the italicized portion of the foregoing excerpt.

The rule applicable required the plaintiff to carry the burden of proof of such facts as were necessary to entitle her to the relief prayed for. *Kopera v. West Orange Bd. of Education*, 60 N. J. Super. 288, 297 (App. Div. 1960); 42 *Am. Jur.*, *Public Administrative Law*, § 131, p. 466 (1942); *cf. Chirichella v. Dept. of Civil Service*, 31 N. J. Super. 404, 409-410 (App. Div. 1954). This duty of persuasion upon the whole case never shifts, *Hughes v. Atlantic City, &c., R. R. Co.*, 85 N. J. L. 212, 216 (E. & A. 1914), although, in another sense the duty of going forward with evidence may shift as one side or the other satisfies the judge that the evidence suffices to make out a *prima facie* case in his favor. *Id.*; 9 *Wigmore, Evidence* (3d ed. 1940), § 2487, p. 278; 20 *Am. Jur.*, *Evidence*, § 133, p. 136 (1939).

We are satisfied from the record that the parties, the Commissioner of Education, and the State Board recognized this rule. In any event the

respondent was in no wise prejudiced by the statement in question. *R. R. 1:5-3(b)*, 2:5; *Nordco, Inc. v. State*, 43 *N. J. Super.* 277 (*App. Div.* 1957); *J. Abbott & Son, Inc. v. Holderman*, 46 *N. J. Super.* 46 (*App. Div.* 1957). The board was merely pointing up the fact that respondent, which had it within its power to produce testimony in contradiction of petitioner, had failed to do so. We are satisfied that the quality of petitioner's proofs was adequate to meet the burden of proof imposed upon her.

Respondent next urges that in finding that petitioner had tenure as a clerk, the State Board gave undue consideration to her title and disregarded the duties required of her, citing *Phelps v. State Board of Education*, 115 *N. J. L.* 310 (*Sup. Ct.*), aff'd. 116 *N. J. L.* 412 (*E. & A.* 1936) and *Lange v. Bd. of Ed. of Borough of Audubon*, *supra* (26 *N. J. Super.* at p. 83). We find neither of these cases to be controlling. In *Phelps*, the teacher-clerk was found to have been performing *only* clerical work while in *Lange* the petitioner had not been employed as a principal, in which position she claimed tenure, from 1927 to 1951. In the present case following her appointment as clerk-attendance officer, petitioner continued to perform clerical duties. We are satisfied that, in the decision appealed from, the nature of the work done was adequately considered and was a crucial factor in the board's determination that the petitioner had not lost her tenure as a clerk. *Cf. Viemeister v. Bd. of Education of Prospect Park*, 5 *N. J. Super.* 215 (*App. Div.* 1949).

It is next urged that in holding that petitioner continued to have tenure, the State Board failed to give due weight to the factual findings of the Commissioner of Education, citing *Harrison v. State Board of Education*, 134 *N. J. L.* 502 (*Sup. Ct.* 1946). That case involved a factual review by the Supreme Court based upon the record below and affirmed the court's duty to make an independent determination of the facts while giving consideration to the opportunity of the trial body to observe the parties and their witnesses. Petitioner concedes that the Assistant Commissioner of Education who heard the case was appointed pursuant to *N. J. S. A.* 18:3-2(e) but denies that the Commissioner's decision of February 10, 1960, which had been appealed from, was actually his. We need not pass upon this latter contention since we find no merit to the respondent's argument in any event. We do not read the statute as requiring the State Board to be bound by the factual findings of the Commissioner of Education although when the factual proofs are produced before him due consideration should be accorded the fact that he had an opportunity to observe the parties and their witnesses. *Cf. Harrison v. State Board of Education*, *supra*, p. 504; *Laba v. Newark Board of Education*, 23 *N. J.* 364, 382 (1957). Appeals to the State Board are part of the legislative plan whereby it is made the final administrative tribunal upon which rests the ultimate duty of deciding school law controversies. *In re Masiello*, 25 *N. J.* 590, 605 (1953). Thus, it is not precluded from making its own independent findings of fact.

We further find that, far from disregarding the factual findings of the Commissioner, the State Board gave them due consideration. It differed with him only as to the rule of law applicable. Thus in his decision he held:

“ \* \* \* to prevail in this matter, petitioner must show that her duties are preponderately those of a clerk. Accordingly the crucial question is whether she is primarily an attendance officer or a clerk.”

He thereupon held that she was primarily doing the work of an attendance officer and hence was not entitled to tenure.

The State Board in its decision held that while her clerical duties were not the major part of her work, the restrictive rule invoked by the Commissioner did not apply and that, since her uncontradicted testimony established that she had been performing duties both as a clerk and as an attendance officer, she had not relinquished or waived her previously vested tenure incident to her holding of her clerical position over a three year period. We are satisfied as to the correctness of this legal conclusion. To hold otherwise would be to permit a local school board to control the rights of employees who had tenure by restricting the amount of work covered by tenure which it assigned to them. Such is not the purpose or intendment of the statute nor is it consistent with the liberal support which this and other statutes granting tenure should be accorded. *Cf. Viemeister v. Bd. of Education of Prospect Park, supra*, (5 *N. J. Super.* at p. 218). We rather take the view that where an employee holding a position covered by tenure is promoted to a position which encompasses his former duties and additionally requires the performance of services which are not covered by tenure, and he thereafter continues to render services in both capacities, his right in his tenure position continues until terminated in accordance with the statute. *N. J. S. A.* 18:6-27.

It is next urged that the decision of the State Board is a nullity because one of the members who voted with the majority was not present at the oral argument which preceded the adoption of its decision. Pursuant to *N. J. S. A.* 18:3-15 the Board referred consideration of the appeal before it to its legal committee. The committee thereafter submitted its report, copies were furnished to the parties and a date was fixed for hearing and oral argument on the report. It is conceded that Mr. Slater, one of the members, did not attend the oral argument. He was, however, present and voted with the majority when the Board's decision was adopted by a vote of 8 to 1. While respondent concedes that the statute itself contains no requirement that a hearing on the report be held, it relies upon *City of Asbury Park v. Dept. of Civil Service*, 17 *N. J.* 419 (1955) and *Redcay v. State Board of Education*, 128 *N. J. L.* 281 (*Sup. Ct.* 1942) as holding that when such a hearing is had, only those present at the hearing may vote.

We find neither of the cases cited to be applicable. In *Redcay* the hearing of the appeal had been referred to the law committee of the State Board and it had been heard by three of the four members thereof. It was conceded that at the meeting of the board at which the appeal was decided, six of the ten members were present. Of these, two had been members of the law committee which had heard the appeal; one had been a member of the law committee but had not heard the appeal although he had studied the report and concurred therein; and the remaining three members had neither heard argument on the case nor made any study of the briefs or proofs. A somewhat similar division took place at the motion to reopen the board's prior decision. In remanding the case to the board, the court held, at p. 285:

“The value or helpfulness of the recommendations and conclusions of the ‘Law Committee’ could only be determined if and when the members of the State Board who voted to adopt them had in the exercise

of fair play, read and considered the proofs, the briefs and oral arguments made.”

In *City of Asbury Park v. Dept. of Civil Service, supra*, the court was dealing with the propriety of the hearing procedure followed by the Civil Service Commissioner. There the testimony of some of the witnesses had been heard by one member of the commission while that of the remaining witnesses had been taken before two other members of the commission. The court there observed that the controlling statutes, *R. S. 11:1-10* and *11:25-2*, required that the hearing be conducted by the full commission, or at least by a quorum and held the decision to be a nullity since none of the three commissioners who participated had heard all of the testimony.

Here the State Board did not take testimony. The record below is devoid of any concession by the petitioner or of any proof which would sustain a finding that Slater had not read and considered the proofs and the briefs filed. Aside from this, respondent suffered no prejudice by Slater's participation since the vote was 8 to 1 and no question is raised as to the validity of the participation of the remaining seven members. We are not impressed by respondent's suggestion that if Slater had been present at the oral argument, he might have been persuaded as to the validity of respondent's claim, and thus might have in turn, persuaded his colleagues at the final vote, and we find no authority for it. All that was required was that the report of the legal committee be furnished to the parties, and that they be afforded an opportunity to object to it and to be heard thereon. *In re Masiello, supra, p. 605*. Of the total board membership, nine heard the oral argument and seven of these, in addition to Slater, adopted the decision before us. This constituted an adequate compliance with the requirements of fair play and due process.

It is finally urged that the State Board's finding that petitioner was not dismissed for reasons of economy is invalid because based upon its erroneous assumption that the burden of proof thereon rested upon the respondent. It held:

“The local Board also claims that Mrs. Quinlan's position was abolished for reasons of economy. This is a plea of ‘confession and avoidance’ and, again, it is the burden of the Board to sustain it. *Hefter v. Bradbury (Sup. Ct. 1935) 115 N. J. L. 82* at 83.”

The rule of law applicable was to the contrary and the burden of proof as to dismissal in bad faith was at all times upon the petitioner. *Chirichella v. Dept. of Civil Service, supra, p. 408*; *Greco v. Smith, 40 N. J. Super. 182, 189 (App. Div. 1956)*. We conclude, however, that by this holding no error prejudicial to the respondent resulted. *R. R. 1:5-3(b), 2:5*; *Nordco, Inc. v. State, supra*; *J. Abbott & Son, Inc. v. Holderman, supra*. Petitioner more than sustained the burden of proof required of her. Her testimony was uncontradicted to the effect that, shortly prior to her dismissal, she had taken part in a political campaign to abolish the respondent as a Chapter 6 board and substitute for it a Chapter 7 board. It was conceded that during the early part of that fall the board had hired another clerk and that six months following the petitioner's discharge, it had hired two additional clerks. These facts tended to negative any claim that the dismissal was genuinely for reasons of economy, assuming, *arguendo*, that the “reasons of economy” cited had reference to petitioner's duties both as a clerk and as an attendance

officer. As to this we are by no means certain, especially in view of the failure of respondent to set it up specifically in its filed answer or to explain it testimonially. In an issue involving the board's good faith in dismissing petitioner for reasons of economy, and considering the *prima facie* showing she made in that regard, we cannot help but attribute significance to the complete failure of the board to have its representatives take the stand and explain the alleged economy basis of the dismissal, especially where it apparently took place at the reorganization meeting of the board, and others were hired as clerks in the school system both before and after her dismissal. We are constrained to hold that the State Board's conclusion that the dismissal was not in good faith for reasons of economy was supported by the uncontradicted evidence adduced.

Affirmed.

73 *N. J. Super.* 40.

RUTH M. SCHROEDER,

*Appellant,*

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,  
OCEAN COUNTY,

*Respondent.*

Decided by the Commissioner July 22, 1960.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by a teacher under tenure from a decision of the Commissioner of Education affirming her dismissal by the Lakewood Board of Education.

Appellant, Ruth M. Schroeder, holds a Permanent Teacher's Certificate, qualifying her to teach in New Jersey High Schools. She was employed in the Lakewood High School without interruption from September 14, 1933 to December 15, 1956 as a teacher of English, Latin and French. She was granted a leave of absence, without pay, extending from December 15, 1956 to September 1, 1958.

Early in 1956 a conference was held among a number of the members of the Lakewood Board of Education, and the Appellant. Appellant's mother was present. The subject of the meeting was a supervision report relating to Miss Schroeder which caused concern to the Superintendent. During the summer and fall there were further conferences between the Superintendent and Miss Schroeder. The Superintendent, Hilman H. Harker, attempted to convince Miss Schroeder that it would be wise for her to seek a leave of absence. She was not receptive to the suggestion.

On November 26, 1956 the Board of Education adopted a resolution to the effect that "Miss Schroeder be requested to take a leave of absence beginning immediately and terminating September 1958 and to submit to a medical and psychiatric examination by doctors designated by the Board of Education to determine fitness to resume teaching." Although reluctant to apply for leave, on December 12, 1956, Appellant requested, in writing,

that she be granted a leave until September 1, 1957, a shorter period than that suggested by the Board. Further conferences and correspondence resulted in Appellant's acceptance of the Board's original proposal.

On April 19, 1958 Appellant's personal physician wrote to the Board of Education to the effect that she was physically able to resume her teaching duties the following September.

On May 13, 1958, Mr. Hilman H. Harker wrote to Miss Schroeder as follows:

"Your employment was discussed by the Board of Education at a meeting held several weeks ago and the Board has directed that prior to the consideration of your contract for the coming school year you must submit to an examination by a medical doctor and a psychiatrist chosen by the Board of Education.

This letter is to advise you to report for a medical examination on Wednesday, May 31st, at 9:00 a.m. to

Dr. William W. Weissberg  
Elizabeth Medical Group  
310 West Jersey Street  
Elizabeth, New Jersey

As soon as an appointment has been made with the psychiatrist I will advise you.

The Board felt that it was desirable to have these examinations take place with doctors who live outside of town and would be better able to render an unbiased report of their findings which would be fair to you and to the Board of Education.

I hope you will find it convenient to keep the medical appointment next week."

Two days later Mr. Harker wrote to Miss Schroeder directing her to report to Dr. J. B. Bradley, of Trenton for psychiatric examination on May 22.

The examination by Dr. Weissberg was held on May 21 and the examination by Dr. Spradley on May 22. On May 23, 1958 Dr. Spradley reported the results of his examination to the Board physician, in writing. His conclusion was as follows:

"I feel that Miss Schroeder should be given an opportunity to return to her occupation as a teacher. The probabilities are that there will be no repetition of the difficulties and problems which she presented earlier. However, she should be given more than the usual amount of supervision for the first few months and should there be any evidence of a relapse into the former unstable state her services should be terminated promptly. I consider the prognosis as guardedly favorable."

On May 24, 1958 Dr. Weissberg reported his results to the Superintendent of Schools by letter. His conclusion was:

"There is nothing in this examination which might disqualify this person on the basis of organic illness. If psychiatric evaluation is not

abnormal I would not disapprove of Miss Schroeder returning to her teaching position.”

On May 31, 1958 Appellant wrote to the Board of Education requesting re-employment. In this letter Miss Schroeder stated:

“I am asking the Board of Education to give me an opportunity to prove that I will with more stable outlook upon life never again betray the confidence placed in me or neglect the responsibility entrusted to me.”  
(Tr. 104)

In her testimony she denied ever having betrayed the confidence of the Board or neglecting her responsibilities. She explained that the letter was an expression of contrition which she felt was desired by her employer.

On June 24, 1958 the President of the Board of Education informed Miss Schroeder by letter that the Board had decided on June 9, 1958, after discussing the medical reports and her letter that “on the basis of the information available to us at this time the Board does not feel it can employ you as a teacher in the Lakewood High School faculty.”

At a special meeting of the Board of Education held on November 3, 1958, the following charges were preferred against Miss Schroeder:

- “(1) The said Ruth Schroeder has during her employment as a teacher in the Lakewood Senior High School neglected the responsibilities entrusted to her as a teacher and has failed to carry out her duties in a proper and efficient manner;
- (2) The said Ruth Schroeder has reported to teach on various occasions while physically and emotionally unfit to do so and has at such times been incapable and unfit to properly perform the normal duties assigned to her;
- (3) The said Ruth Schroeder has become extremely untidy in her dress and in her personal appearance, setting a bad example and being a poor influence upon her pupils in her class, all of which constitutes conduct unbecoming a teacher.”

Hearings on the charges were held on ten dates between December 1, 1958 and January 15, 1959. The testimony of 44 witnesses covers the 1040 pages of the record. Except for some testimony dealing with the disqualification of a Board member (of which more hereafter) all of the testimony and documentary evidence dealt with the actions of Miss Schroeder from 1953 through 1956. The hearings resulted in conviction on the first two charges and acquittal on the third. The penalty was dismissal.

In our view of the case, it is unnecessary to here embark upon a detailed analysis of the testimony. Suffice it to say, there was evidence that on four or five occasions in 1956 and on several occasions during 1953 and 1954 there were incidents involving Miss Schroeder. There is conflict in the testimony as to whether the incidents may be blamed on temporary illness, an emotional upset, or serious mental unbalance and excessive drinking. It must be noted that the evidence on the latter point is markedly conflicting.

It may be readily concluded from the testimony that the appellant was a teacher with above average aptitude for her work. The Superintendent of

Schools, her principals, the head of her department, the school librarian, fellow teachers, satisfied parents and present and former pupils all echoed praise for abilities in her profession. Miss Schroeder presented no problem as to attendance. In fact, she had accumulated 35 days of sick leave to the time of the commencement of her leave of absence.

It is also apparent from the record that Miss Schroeder has suffered several personal tragedies and was subject to a home life with her widowed mother which produced severe stress. Her family physician testified that she was going through menopause at the time of the incidents upon which the charges are based.

The State Board of Education believes that the appellant should be reinstated to her position as a teacher in the Lakewood School system. Her leave of absence was granted with at least the implied assurance that she would be returned to her position if she were found to be physically fit at the end of the leave. That this assurance was implicit, is shown by the fact that the Board did actually arrange appointments with two physicians. Both of these men, one a psychiatrist, found no reason to advise against the employment of Miss Schroeder. Their conclusions were buttressed by the opinion of appellant's personal physician.

When faced with the reports of the physicians, the Board of Education evidently still had sufficient misgivings to cause it to seek reasons other than current medical opinions to dismiss Miss Schroeder. These hearings resulted.

There is a fundamental lack of fairness in Miss Schroeder's being dismissed under the circumstances here. Although we are satisfied that the Lakewood Board acted with complete good faith in the performance of its duties, it placed Miss Schroeder in a most unenviable position. As things worked out, there was no way she could win. Had she failed to take the leave of absence in 1956, she would undoubtedly have faced disciplinary proceedings. When she passed the physical examinations she nonetheless found herself subject to the very proceedings she had good reason to believe she had avoided. We believe that in view of the special circumstances of this case, it is unduly harsh for appellant to lose the rights she acquired during the many years she ably served the Lakewood School system. Equitable considerations dictate otherwise. *Evaul v. Board of Education*, 35 N. J. 244 (1961).

Had the evidence on the charges on which Miss Schroeder was convicted been impressive, it would have given us great pause. However, we feel that the evidence offered was insufficient to lead us to the view that the ultimate good of the school system required dismissal. Although we recognize that there is a possibility that there will be future difficulties involving appellant, we do not believe that this possibility is sufficient to compel a contrary result. In fairness, we think appellant should be given an opportunity to prove herself. We are not unmindful of the suggestion by Dr. Spradley that Miss Schroeder be given careful supervision. If fault then be found, further proper procedures are open to the Board.

Our conclusion renders unnecessary consideration of appellant's other grounds of appeal. We have examined them and find them to be without substance. We particularly note that the hearings held by the Board of

Education were conducted fairly and decorously. The charges of bias and prejudice against a board member have not, in our opinion, been borne out.

Counsel for both parties are to be complimented for their intelligent and helpful approach to the matters in dispute.

November 1, 1961.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued September 17, 1962—Decided October 25, 1962.

Before Judges Conford, Gaulkin and Kilkenny.

*Mr. Mark Addison* argued the cause for appellant.

*Mr. Thomas J. Muccifori* argued the cause for respondent Ruth M. Schroeder (*Messrs. Ewart, Lomell & Muccifori*, attorneys).

No appearance for the State Board of Education.

The opinion of the court was delivered by GAULKIN, J. A. D.

Following a hearing upon three charges hereafter discussed, made under *N. J. S. A.* 18:13-17, the Lakewood Board of Education (Lakewood) found Miss Schroeder, a teacher under tenure, guilty of two of the charges and dismissed her. She appealed to the Commissioner of Education who affirmed the dismissal, although he found her not guilty of one of the two charges. She then appealed to the State Board of Education, which reversed the Commissioner and ordered her reinstatement. Lakewood now appeals from the judgment of the State Board. We affirm.

Miss Schroeder had been a teacher in the Lakewood High School since 1933. It is conceded that she was an above average teacher and until at least 1950 there had been no complaint about her conduct. During the 1950s, and especially during 1953 to 1956, there occurred various episodes which Lakewood believed were due to Miss Schroeder's excessive consumption of alcoholic beverages. She denied, and has always denied, that she drank to excess. She claimed that what appeared to be intoxication was due to the emotional disturbance caused by the death in battle of her younger brother, a surgeon whose education she had financed, and the care of her aged mother with whom she lived, superimposed upon her own menopause and ill health. During 1953 to 1956 her superiors in the school system endeavored to help her to correct whatever it was that was causing the objectionable episodes, but without success. Finally, in November 1956, Lakewood demanded that she take a leave of absence. At first she demurred and then, in December 1956, she offered to take a leave of absence to September 1957. Lakewood refused, insisting that it be to September 1958, and she finally agreed. The minutes of the Lakewood Board of Education show the following action:

“Dr. Zwebin moved that Miss Schroeder be requested to take a leave of absence beginning immediately and terminating September 1958 and to submit to a medical and psychiatric examination by doctors designated by the Board of Education to determine fitness to resume teaching.

“Seconded by Mrs. Horner.

“Carried.”

Lakewood admits the leave of absence was suggested and granted in the hope that Miss Schroeder "would pull herself together." In short, there can be no doubt that when Miss Schroeder took the leave of absence Lakewood meant to take her back if she recovered by September 1958, and Miss Schroeder so understood the arrangement.

In April 1958 Dr. Buermann, Miss Schroeder's personal physician, wrote Lakewood that:

"I have been physician in attendance of Miss Schroeder for the past thirty years, and since she was relieved of her duties, I have been treating her and keeping her under observation.

At this time I believe that Miss Schroeder is perfectly physically able to take up her work on the teaching staff for the coming period in September."

Lakewood replied on May 13, 1958 as follows:

"Your employment was discussed by the Board of Education at a meeting held several weeks ago and the Board has directed that prior to the consideration of your contract for the coming school year you must submit to an examination by a medical doctor and a psychiatrist chosen by the Board of Education.

This letter is to advise you to report for a medical examination on Wednesday, May 31st, at 9:00 a. m. to

Dr. William W. Weissberg . . .

As soon as an appointment has been made with the psychiatrist I will advise you.

The Board felt that it was desirable to have these examinations take place with doctors who live outside of town and would be better able to render an unbiased report of their findings which would be fair to you and to the Board of Education.

I hope you will find it convenient to keep the medical appointment next week.

Sincerely,

*Hilman H. Harker*  
Superintendent of Schools"

On May 15 Lakewood wrote Miss Schroeder "to report for an examination on Thursday morning, May 22nd at ten o'clock to Dr. J. B. Spradley. . . . The Board of Education of Lakewood Township has directed that you submit to a psychiatric examination by the above named doctor on the above date. . . ."

Miss Schroeder was examined by both doctors at the times and places fixed by Lakewood. Dr. Weissberg reported, in part:

"She appeared anxious and tense and is apparently greatly worried about her position. She is taking occasional tranquilizers prescribed by a local physician. She denies excess smoking or alcoholic intake.

Physical examination was negative except for a mild tachycardia of 96 with no other alteration in the rhythm.

\* \* \*

There is nothing in this examination which might disqualify this person on the basis of organic illness. Psychiatric evaluation is not abnormal I would not disapprove of Miss Schroeder returning to her teaching position . . .”

On March 23, 1958 Dr. Spradley reported what he found during his examination and concluded:

“Miss Schroeder was much impressed and concerned by her forced leave of absence and apparently has given considerable thought and gained some understanding of her behavior pattern that led to the School Board’s action. She is now confident that improvement in the mother’s health and a better understanding of the problems of the two with the help of the drug, which she now agrees to take regularly, will enable her to once again function with an efficiency acceptable to the school authorities.

I feel that Miss Schroeder should be given an opportunity to return to her occupation as a teacher. The probabilities are that there will be no repetition of the difficulties and problems which she presented earlier. However, she should be given more than the usual amount of supervision for the first few months and should there be any evidence of a relapse into the former unstable state her services should be terminated promptly. I consider the prognosis as guardedly favorable.”

In spite of these not unfavorable reports, Lakewood wrote Miss Schroeder on June 24, 1958 as follows:

“At the regular meeting of the Board of Education on June 9th the recent reports from your medical examination and psychiatric examination were discussed, also your letter to the Board of Education was read.

On the basis of the information available at this time, the Board does not feel it can employ you as a teacher on the Lakewood High School faculty.

Very truly yours,

Stanley B. Peters  
President  
Board of Education”

If Lakewood had any derogatory information when this letter was written, other than it had when the leave of absence began, the record does not disclose it. In short, so far as the record discloses, Lakewood either had a change of heart or it was not satisfied by the reports of Doctors Spradley, Weissberg and Buermann, and by Miss Schroeder’s own letter requesting reinstatement, that she was capable of resuming her post.

As we have pointed out, when the leave of absence began Lakewood was willing to reinstate Miss Schroeder as a teacher if and when “she pulled herself together.” What caused Lakewood to dismiss her instead does not appear,

but on November 3, 1958 Lakewood preferred the following charges against her, and fixed a date for hearing them:

“1. The said Ruth Schroeder has, during her employment as a teacher in the Lakewood Senior High School, neglected the responsibilities entrusted to her as a teacher, and has failed to carry out her duties in a proper and efficient manner.

2. The said Ruth Schroeder has reported to teach on various occasions while physically and emotionally unfit to do so, and has at such times been incapable and unfit to properly perform the normal duties assigned to her.

3. The said Ruth Schroeder has become extremely untidy in her dress, and in her personal appearance, setting a bad example and being a poor influence upon the pupils in her classes, all of which constitutes conduct unbecoming a teacher.”

In response to the demand of Miss Schroeder’s counsel for particulars, Lakewood specified that these things happened on eleven given dates between November 9, 1953 and December 6, 1956 “and at various other times during the school years between 1951-52 and the end of December 1956.”

Hearings on the charges began before the Lakewood Board of Education on December 1, 1958 and continued intermittently on nine additional days, the last session being held on January 15, 1959. On January 21, 1959 Lakewood found Miss Schroeder “guilty of the First and Second Charges against her and acquitted of the Third Charge against her” and ordered that she “be and hereby is dismissed.”

The Commissioner, upon the appeal to him, did not hear any witnesses, but decided the case upon the record of the hearings before the Lakewood Board of Education. As to the first charge he held

“It is the opinion of the Commissioner that the record will not support a finding that the appellant did not give efficient instruction in the subject-matter to the classes assigned to her. The Superintendent of Schools testified that there was no question as to her competency as a teacher when she was physically fit. Both the former and the present high school principal testified that she was above average as a teacher of college preparatory pupils and there was also testimony by the present high school principal that she was an above average teacher in subject-matter. The head of the English department testified that she was a conscientious and excellent teacher. The school librarian and teacher-counselor also testified favorably as to her competence as a teacher. Fellow teachers, satisfied parents, present and former pupils took the stand to express their appreciation of her teaching.”

The Commissioner seemed uncertain whether the scope of his review was to “search the record to find whether there was a rational and reasonable basis for the dismissal and whether there was substantial, competent, and relevant evidence to support the finding of guilt” or whether “he must weigh the evidence and make an independent finding of fact . . .”. However, he did not make independent findings of fact but concluded “that an examination of

the testimony reveals that there was substantial evidence to prove that appellant's actions were as charged . . ." in charge number two, and that these actions justified Lakewood "in not permitting appellant to resume her teaching." The substance of the Commissioner's reasons for the latter conclusion are summed up in the following portions of his opinion:

"The Commissioner does not consider it necessary to find that appellant was actually intoxicated. To demonstrate unfitness, it is sufficient to find that she came to school with the odor of alcohol on her breath. The Commissioner holds that the evidence did not establish that she was incompetent as a teacher of subject-matter. But a teacher is more than an instructor in subject matter. She is also an exemplar.

\* \* \*

Without raising the question of the propriety of a teacher's drinking alcoholic beverages in moderation, the Commissioner believes that parents and taxpayers have a right to expect that teachers will not report for duty with the odor of alcohol on their breath.

\* \* \* Even if it were proved that the medicine did cause the odor of alcohol, appellant would be subject to censure for neglecting to take measures to remove the odor before reporting for duty . . . [A] good reputation is essential for a teacher. Appellant's testimony reveals that she knew there were rumors about her. It was her responsibility not only to avoid evil but also the appearance of evil so as not to destroy her usefulness as a teacher. Like Caesar's wife, a teacher ought to be above suspicion. A teacher should not, of course, be allowed to be a victim of idle gossip, but she, herself, should not contribute to rumors by her carelessness."

We need not decide whether these considerations might have constituted valid reasons to dismiss her in 1956, for Lakewood had indicated by its own actions in 1956 that it believed Miss Schroeder's usefulness as a teacher had not been destroyed and that the scattered incidents over the period of five or six years had not been of such impact upon the students, the parents, the school system or the public as to require her dismissal. On the contrary, Lakewood indicated that she would be welcomed back if she recovered.

Having taken that position and having induced Miss Schroeder to take a lengthy leave of absence, during which, presumably, she sought no other permanent employment since she expected to return to teaching in September 1958, it was unfair to make her stand trial and face dismissal in 1958 because of matters which allegedly occurred from two to eight years prior thereto. Lakewood had given her conditional absolution for her pre-1956 conduct. The only question that remained open for Lakewood to investigate when she sought to return was whether she met the condition—i. e., was she then fit to resume teaching?

It was essentially for these reasons that the State Board held, in effect, that even assuming Miss Schroeder's actions up to December 1956 had been as charged, since Lakewood had not considered those actions sufficiently serious to dismiss her at the time but instead had given her the opportunity to "pull herself together," and had held out to her "at least the implied assurance that she would be returned to her position if she were found to be

physically fit at the end of the leave . . . there was a fundamental lack of fairness” when, in spite of the reports of its own doctors, Lakewood dismissed her years after the episodes without giving her a chance to prove in the classroom that she had recovered.

The State Board held:

“We believe that in view of the special circumstances of this case, it is unduly harsh for appellant to lose the rights she acquired during the many years she ably served the Lakewood School system. Equitable considerations dictate otherwise. *Evaul v. Board of Education*, 35 N. J. 244 (1961).

Had the evidence on the charges on which Miss Schroeder was convicted been impressive, it would have given us great pause. However, we feel that the evidence offered was insufficient to lead us to the view that the ultimate good of the school system required dismissal. Although we recognize that there is a possibility that there will be future difficulties involving appellant, we do not believe that this possibility is sufficient to compel a contrary result. In fairness, we think appellant should be given an opportunity to prove herself. We are not unmindful of the suggestion by Dr. Spradley that Miss Schroeder be given careful supervision. If fault then be found, further proper procedures are open to the Board. ”

Thus, we have here a situation in which the highest tribunal in the hierarchy administering the Education Act has decided that, even assuming the charges were proved, the facts did not, under all of the circumstances and following the lengthy leave of absence without pay, justify her dismissal three years later.

When the highest agency administering an act fixes a penalty thereunder we yield to its expertness, and we do not override its judgment unless its action is plainly arbitrary, discriminatory, oppressive or otherwise palpably unjust. *Borough of East Paterson v. Department of Civil Service*, 47 N. J. Super. 55 (App. Div. 1957); *Dutcher v. Department of Civil Service*, 7 N. J. Super. 156 (App. Div. 1950). Cf. *Fanwood v. Rocco*, 59 N. J. Super. 306, 317 (App. Div. 1960), affirmed 33 N. J. 404 (1960). In the case at bar we find ourselves in complete agreement with the conclusion of the State Board that Miss Schroeder should not have been dismissed, but should have been given a fair chance to prove herself by performance in the classroom.

Like the State Board, we are of the opinion that no purpose would be served by reviewing the voluminous and conflicting testimony as to the period prior to the leave of absence for we shall assume, for present purposes, without so deciding, that the evidence would have been sufficient to support a dismissal had she been dismissed in 1956 instead of being given a leave of absence. Lakewood undoubtedly believed in 1956 that Miss Schroeder was then incapable of carrying on her duties as a teacher and was a disturbing influence in the school but, as we have pointed out, it is plain that it also thought she was not beyond redemption, that she had been a very good and valuable teacher, that she might be able to pull herself together, and, if she did, that the school system could and would take her back with benefit to the school system and the students. To that end Lakewood gave her the 21-month leave of absence.

Therefore, when the charges were brought against her in 1958, under *N. J. S. A.* 18:13-17, the issue was not whether she had been guilty of conduct unbecoming a teacher (as it might have been had the charges been brought instead of giving her a leave of absence) but whether she was then—in 1958—incapable of resuming her duties as a teacher. The burden of proving that was upon Lakewood. The episodes prior to December 1956 were, of course, admissible in evidence on that issue but, in the absence of evidence of drinking to excess in the two years that had elapsed, the evidence of the 1950-1956 episodes was not sufficient to carry Lakewood's burden to prove 1958 incapacity.

In addition to denying that she ever imbibed to excess, Miss Schroeder testified that after December 1956 she drank absolutely nothing except perhaps an occasional small glass of wine. The only testimony to the contrary was by Dr. Gibson, Miss Schroeder's dentist. He was called by Lakewood as a rebuttal witness, and was the last witness on the very last day of the hearings. He testified that on a day in April 1958 when she came to him for treatment, she was, in his opinion, under the influence of intoxicating liquor. However, he admitted that she had been his patient since 1957; that "on previous occasions Miss Schroeder had been I would say rather reserved, dignified"; and on the day he thought she was intoxicated he nevertheless worked on her teeth. He explained the highly unusual circumstance of his testifying against his patient without her consent or prior knowledge by saying that he "read in the local newspapers regarding this particular hearing" and "felt that there was a moral responsibility involved" upon him to come forward and tell. However, on cross examination he admitted that he was a friend of Mr. Peters, the President of the Lakewood Board of Education, who presided at the hearings, and visited at his home.

In spite of this testimony, the State Board concluded that Miss Schroeder should be given another chance, and we agree. Even if true, this was the only episode in the two years after December 1956 proved by Lakewood; and that episode happened not under circumstances comparable to teaching but in her dentist's office. In addition we are exceedingly dubious of the reliability of this testimony. Ordinarily, we would give great weight to the fact that the Lakewood Board of Education saw and heard the witness and found him credible. In the case at bar we find ourselves unable to do that. Lakewood preferred the charges against Miss Schroeder before it even knew of Dr. Gibson's testimony. The incident alluded to by him was not referred to in the charges or in the bill of particulars. Lakewood's counsel presented the case against Miss Schroeder. Lakewood used Dr. Gibson's testimony in an effort to overcome the favorable medical reports; he was the only one who could testify to drinking after December 1956; he was a friend of the President of the Lakewood Board; and he was called at the last minute. All that, plus the testimony itself, and the highly unusual picture of a doctor coming forward to volunteer testimony against his patient makes his testimony, to say the least, of doubtful weight. As we have said, the burden was upon Lakewood to prove that Miss Schroeder was unfit to resume teaching. We conclude that this questionable testimony about this one episode is not sufficient to render arbitrary or unreasonable the State Board's judgment that Miss Schroeder should be reinstated.

Miss Schroeder argues also that she was not given a fair trial; that Lakewood prejudged her case, determined to get rid of her and went through the motions of charges and a hearing merely to conform to the law. There was some evidence of such prejudgment. Since we affirm for the reasons above stated there is no need to pass upon this contention.

Affirmed. No costs.

WILLS BUS SERVICE, INC.,

*Appellant-Respondent,*

v.

THE BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL  
HIGH SCHOOL DISTRICT, IN THE COUNTY OF ATLANTIC  
AND STATE OF NEW JERSEY,

*Respondent-Appellant.*

Decided by the Commissioner May 26, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

Appellant Board of Education advertised for bids for leasing to it of 4 automobile buses for use in school transportation for a period of 10 months of each of the 4 years from September 1, 1960, to June 30, 1964. Bids were received on March 18, 1960 from Wills Bus Service, Inc. (hereinafter referred to as "Wills") in the sum of \$9,390 per year for the 4-year period, and from Nationwide, Inc. (hereinafter referred to as "Nationwide") for \$11,560 for the same period. On April 11, 1960, appellant Board rejected the bid of Wills, alleging that the bid did not conform to the specifications. The contract was thus awarded to Nationwide for the total sum of \$46,240 for the 4-year period specified. On May 10, 1960, the Secretary of the Board of Education notified Wills by letter of the action of the Board and returned the certified check which accompanied its bid. Wills thereupon appealed to the Commissioner of Education, contending that it had complied with the specifications, that its bid was lower than the bid of Nationwide, and sought to have the award to the latter set aside and that the local Board be directed to accept the bid of Wills.

After taking testimony and consideration of briefs and argument, the Commissioner, under date of May 26, 1961, set aside the contract which was awarded to Nationwide on the ground that the local Board of Education was entirely without authority to "lease" buses. The Decision of the Commissioner was based upon an analysis of the pertinent statutes with respect to the authority of the Local Board in this context. He held in effect that the power of a local Board to "lease" is limited to the leasing of school buildings under the provisions of *R. S. 18:7-73* where provision is made that such leasing can be done only after previous authority given to the Board by the local voters of the district. He rejected the contention of the local Board that, since it has the power to "purchase" school buses without advertising for bids, there was implicit in that grant of authority the power to "lease" such apparatus without advertising for bids.

Appellant Board of Education here argues that the Commissioner was in error. It cites *R. S. 18:7-76* as the source of its authority to lease buses. That statute reads as follows:

“The board may insure school buildings, furniture, and other school property, and receive and hold in trust for the district any and all real or personal property for the benefit of the schools thereof.”

Appellant argues that the use of the words “receive” and “hold in trust \* \* \* all real and personal property for the benefit of the schools thereof” are to be construed as granting the power to lease.

The foregoing section of the statute was enacted as *L. 1948, c. 162*, P. 90, § 2, and became effective June 12, 1948. Prior to that amendment, it read as follows:

“The board may insure school buildings, furniture, and other school property, and receive, *lease*, and hold in trust for the district any and all real or personal property for the benefit of the schools thereof.” (Emphasis added.) *L. 1903 (2d Sp. Sess.)*, c. 1, § 86, p. 32.

It is noted that when the amendment of 1948 was adopted the word “lease” was omitted. This can only be construed to have been a conscious and purposeful omission by the Legislature with the intent that the grant theretofore existing (i.e., to lease personal property) was being withdrawn. With respect to the appellant’s contention that the right to purchase implies the right to lease, we feel that the express use of the word “lease” under *R. S. 18:7-73*, with respect to school buildings and, its purposeful omission in *R. S. 18:7-76* demonstrates legislative intent to the contrary. In addition, the power to “purchase” involves a transfer of ownership and passing of title. Thus, in *Smull v. DeLaney*, 25 *N. Y. S. 2d* 387-393, 175 *Misc.* 795, it was held that authority to a City Board of Transportation to “purchase” necessary materials and supplies for a transit system, does not authorize leasing of omnibus equipment.

We further agree with the Commissioner that even though the question of the power to lease was not raised by the parties in the appeal to him, he nevertheless had the duty to set aside this leasing contract under his “primary responsibility \* \* \* to make certain that the terms and policy of the school laws are being effectuated.” See *In re Masiello*, 25 *N. J.* 590 (1958) and *Laba v. Newark Board of Education*, 23 *N. J.* 364 (1957).

February 7, 1962.

DECISION OF THE SUPERIOR COURT, APPELLATE DIVISION

IT APPEARING to the Court by the Stipulation filed in the stated cause, that all of the questions raised upon the appeal therein are moot, and the parties in interest having stipulated that the appeal shall be dismissed;

IT IS ON THIS 28th day of August, 1962, on motion of Edward W. Champion, Attorney for the Appellant, the Board of Education of the Greater Egg Harbor Regional High School District, in the County of Atlantic, ORDERED that the said appeal be and the same is hereby dismissed without prejudice and without costs to any party.

For the Court

SIDNEY GOLDMANN,  
S. J. A. D.

PERRY ZIMMERMAN,

*Appellant,*

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK AND  
EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

*Respondent.*

Decided by the Commissioner November 9, 1960.

DECISION OF THE STATE BOARD OF EDUCATION

While we agree with the Commissioner's disposition of this appeal, we prefer to base our affirmance somewhat more narrowly. In our view, the problems presented here are rooted in the fact that this petitioner, a non-tenure teacher at the time of his original dismissal in 1955, found common legal cause with two tenure teachers for purposes of the litigation culminating in *Laba v. Newark Board of Education*, 23 N. J. 364 (1957). An appreciation of the precise reason therefor dispels all confusion.

When the petitioner was discharged by order of the local board on June 23, 1955, he did not have tenure, but only a one-year contract due to expire on June 30, 1955. The order rendered his dismissal effective as of May 20, 1955. At the time of his discharge, as now, *N. J. S. A.* 18:13-11 provided:

“When the dismissal of any teacher before the expiration of a contract entered into between the teacher and a board of education shall, upon appeal, be decided to have been *without good cause*, the teacher shall be entitled to compensation for the full term for which the contract was made; but it shall be optional with the board of education whether the teacher shall or shall not teach for the unexpired term.” (Emphasis added.)

Although the statute appears primarily designed to protect the contractual rights of nontenure teachers, it correlatively empowers local boards to dismiss such teachers for any reason whatever, whether with or without cause, provided only that teachers discharged “without good cause” must be compensated for the full terms of their contracts. Thus the cause of this petitioner's dismissal in 1955 was then significant only to the issue of whether he was entitled to compensation for the period commencing on May 20, 1955, the effective date of his dismissal, and June 30, 1955, the expiration date of his contract of employment. Under the clear terms of the statute, he had no other grievance on appeal. We have no doubt that if petitioner's appeal from his 1955 dismissal had been heard individually, it would have been decided in that context.

In fact, however, this appeal was heard in conjunction with those of Dr. Lowenstein and Mrs. Laba, teachers who were dismissed at the same time and on the same grounds. Unlike this petitioner, his companions then enjoyed tenure, and therefore could not have been dismissed without “just cause”. *N. J. S. A.* 18:13-17. Notwithstanding this basic distinction in status, all three appeals presented the identical issue of “just cause”, or “good cause”, and they were therefore heard and decided together. The objective

of Zimmerman's appeal, however, necessarily differed from that of his co-appellants. A tenure teacher is entitled to reinstatement upon a showing that his discharge was without "just cause", *N. J. S. A.* 18:13-17, while a non-tenure teacher, upon the same showing, is entitled only to compensation for the unexpired term of his contract of employment. *N. J. S. A.* 18:13-11. It is clear that both the Commissioner and the Supreme Court were well aware that although the ultimate legal issue raised by Zimmerman's appeal was identical with the question raised by the appeals of his colleagues, Zimmerman was at best entitled to different and limited relief:

"Both Dr. Lowenstein and Mrs. Laba duly acquired tenure protection under the New Jersey School Laws. See *R. S.* 18:13-16; *R. S.* 18:13-17. Mr. Zimmerman \* \* \* had not acquired tenure protection when he was dismissed by the board. However, in view of the terms of *R. S.* 18:13-11, all of the parties and the State Commissioner have, *for present purposes*, not differentiated his case from the others." (Emphasis added.)

*Laba v. Newark Board of  
Education, supra*, 23 *N. J.* at 370.

On this basis, the Supreme Court in *Laba* affirmed the Commissioner's remand of all three proceedings for further inquiry in consonance with the principles established in the appellate litigation. Notwithstanding the fact that Zimmerman's 1954-1955 contract had long since expired, and of course had not been renewed, the local board in 1957 chose to conduct further investigation and hearings with respect to his fitness to teach in the public school system. Whether such further proceedings were worthwhile in relation to the stakes involved, i.e., five or six weeks' salary, is a matter of local wisdom beyond the range of effective comment on our part. In any event, a preliminary inquiry led to the filing of "supplementary charges" against Zimmerman, which charges in fact constituted entirely new ones pertaining to his conduct after the expiration of his contract of employment. Hearing on these new charges led to an order of the board entered June 24, 1958, which dismissed petitioner effective May 20, 1955. The matter is before us on appeal from the Commissioner's affirmance of this order.

We have said that when petitioner was originally dismissed in 1955, he was not entitled to challenge the dismissal as to cause for the purpose of winning reinstatement. *N. J. S. A.* 18:13-11. We now find that nothing has since occurred to enlarge his rights in this respect. On this appeal, he argues in effect that the local board, by electing to pursue the inquiry as to him after the *Laba* decision, has conferred some sort of *de facto* tenure upon him. We find the contention specious for the reasons set forth by the Commissioner.

Finally, we agree with the Commissioner that since the petitioner was in fact dismissed on the basis of entirely new charges relating to his conduct after the termination of his contract of employment, he is entitled to the amount of compensation that would have been due him from the effective date of his discharge, May 20, 1955, to the expiration date of his contract of employment, June 30, 1955.

The judgment of the Commissioner is affirmed in all respects.

December 6, 1961.

DECISION OF THE SUPREME COURT OF NEW JERSEY

Argued April 23, 1962.

Decided June 29, 1962.

*Mr. Seymour Margulies* argued the cause for petitioner-appellant, *Messrs. Levy, Lemken & Margulies*, attorneys.

*Mr. Jacob Fox* argued the cause for respondents.

The opinion of the Court was delivered by SCHETTINO, J.

Appellant, Zimmerman, seeks reinstatement as a teacher with tenure in the Newark school system. His case was originally reviewed in *Laba v. Newark Board of Education*, 23 N. J. 364 (1957). But unlike the two other teachers involved in that case, Zimmerman had not achieved tenure status at the time he was dismissed, as of May 20, 1955. He now argues primarily that we should order the Board to re-employ him even though his annual teaching contract expired on June 30, 1955 and was not renewed. In his view he is entitled to tenure because continued employment would have taken place but for the fact that he invoked before a congressional subcommittee the protection afforded by the Fifth Amendment. He further argues that he is now entitled to tenure because he was actually employed for three consecutive calendar years required by R. S. 18:13-16. In the alternative he asserts that he was employed for three consecutive academic years and that the period of litigation following his third academic year should be considered as a recognition by the Board of his continued status as an employee at the beginning of the required fourth academic year. The Board is estopped to deny this, he says, as it continued its investigation of him subsequent to his dismissal.

A brief summary of the events is as follows. Zimmerman and defendant Board of Education agreed by a writing on June 30, 1952, that he would begin teaching in the system on September 1, 1952. Similar agreements were made in the two succeeding years and he was considered a "satisfactory" teacher. On May 19, 1955, Zimmerman invoked the Fifth Amendment privilege against self-incrimination when he was called to testify before a subcommittee of the House Un-American Activities Committee in Newark. The questions he refused to answer were related to his Communist Party membership and association both past and present. After notice of suspension and based solely upon the charge that Zimmerman refused so to testify, the Board resolved on June 28, 1955 to dismiss him as of May 20, 1955. Zimmerman was successful in having that resolution reversed by this court in *Laba* but he was not granted reinstatement. Instead, our opinion in that case recognized that a person "who is now a member of the Communist Party or who is now subject to its ideologies" should be dismissed (23 N. J. at 388) and that "the teachers' conduct before the Congressional subcommittee reasonably calls for a fitness inquiry during which the teachers have a duty of cooperation and an affirmative burden in the establishment of their fitness." 23 N. J. at 392.

The defendant Superintendent of Schools interviewed Zimmerman on May 16, 1957. Counsel for Zimmerman was present but was limited to the

role of providing advice to Zimmerman when asked. Based upon the testimony at this hearing the Superintendent filed a report with the Newark Board of Education along with seven "supplementary charges." Substantially for the reasons cited in the charges, the Superintendent recommended that Zimmerman "be not restored to his employment," but that if the Board were to re-instate Zimmerman until the end of the 1954-55 school year, the Superintendent recommended that Zimmerman should not be re-employed thereafter.

Board hearings on the charges were held in November and December, 1957. Zimmerman's counsel was permitted to take part in the proceedings by examination and cross examination of witnesses. The Board, by resolution dated June 24, 1958, found him guilty of five of the supplemental charges and again dismissed him as of May 20, 1955. It expressly stated that it did not draw any inferences as to Zimmerman's then present membership or subservience to the Communist Party.

On appeal the State Commissioner of Education in part reversed the Board, holding that Zimmerman was entitled to his salary for the period between May 20, 1955 and June 30, 1955, citing *Lowenstein v. Newark Board of Education*, 33 N.J. 277 (1960), and in part affirmed, upholding defendant's refusal to re-employ Zimmerman. Zimmerman appealed to the State Board of Education which affirmed the Commissioner's determinations. Zimmerman appealed from the refusal to order re-instatement beyond the end of the 1955 academic year. While his appeal was pending before the Appellate Division, we certified the cause on our own motion.

No appeal was taken by the Newark Board of Education from the order for payment of salary for the period from May 20, 1955 to June 30, 1955. We shall consider, therefore, only the tenure claim.

It has been said that the purposes of an educational system are to further the best interests of the community at large, the teachers and especially the school children. Both the appointment of school teachers and the determination regarding their term of office are, subject to constitutional restrictions, within the power and control of the Legislature. Historically the employment relationship between a school teacher and the municipal school body has been one of master and servant, one subject to termination at will. Absent statutory provision a teacher was in a position similar to that of any other public employee whose employment was not protected by statute, *i.e.* his employment was subject to contract or the pleasure of his employer. 4 *McQuillin, Municipal Corporations* § 12.250, p. 305 (3rd ed. 1949); 78 *C. J. S. Schools and School Districts* §§ 152-201 (1952). See *Vitarelli v. Seaton*, 359 U.S. 535, 539, 3 L. Ed. 2d 1012, 1016 (1959); Forkosch, *Administrative Law* § 116, pp. 177-78 (1956). In fact it was the right of *either party, i.e.* the school administration or the teacher, subject to the below limitations to terminate service before statutory tenure rights became effective. *Ahrensfield v. State Board of Education*, 126 N.J.L. 543 (E. & A. 1941). We note in passing that such an unprotected employee relationship is not uncommon in our State today for many public employees are still in such an unprotected and uncertain employment status. *New Jersey Civil Service Commission, Department Civil Service, Fifty Fourth Annual Report, 1960-1961*, p. 16.

In *People v. Chicago*, 278 Ill. 318, 116 N. E. 158, 160 (1917) the court stated the historically prevalent view:

“A new contract must be made each year with such teachers as [the board] desires to retain in its employ. No person has a right to demand that he or she shall be employed as a teacher. The board has the absolute right to decline to employ or to re-employ any applicant for any reason whatever or for no reason at all. The board is responsible for its action only to the people of the city, from whom, through the mayor, the members have received their appointments. \* \* \* Questions of policy are solely for the determination of the board, and when they have once been determined by it, the courts will not inquire into their propriety.”

Today, the powers of a board of education in appointment, transfer or dismissal are not so broad. They are limited by the Fourteenth Amendment of the United States Constitution. For example, in *Morris v. Williams*, 149 F. 2d 703, 708-09 (8 Cir. 1945) the court held that a custom or usage of a school board in discriminating against Negro teachers of Little Rock in respect to salaries solely on account of color violates the Fourteenth Amendment. The board's powers are also limited not only by the terms of the contract of employment but also by the New Jersey Constitution, by the Teacher's Tenure Act, and by other statutory provisions such as the Law Against Discrimination, R. S. 18:25-1 *et seq.* Cf. *Downs v. Board of Education, Hoboken*, 12 N. J. Misc. 345, 348 (Sup. Ct. 1934), affirmed on opinion below, 113 N. J. L. 401 (E. & A. 1934). Except as provided by the above limitations or by contract the Board has the right to employ and discharge its employees as it sees fit. Cf. *Halfacre v. Board of Education of School Dist. No. 167*, 331 Ill. App. 404, 73 N. E. 2d 124 (1947).

In New Jersey, as well as elsewhere, today legislatures have provided that teachers may, by satisfying certain conditions, acquire permanent tenure so as to be subject to dismissal only for cause and in the manner provided by law. Such statutes changed the unlimited common-law right of boards of education to contract with teachers. In principle, civil service benefits and protection were accorded teachers by the legislatures. The objectives are to protect competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone an adequate probationary period, against removal for unfounded, flimsy, or political reasons.

The defendant Board contends that tenure statutes should be construed strictly and in favor of school boards on the ground that such statutes create a new liability on the part of such boards and that the statutes should be given a construction which is most favorable to the general public, not a construction which will subordinate the paramount rights and welfare of the general public and of school children to those of the teachers. For emphasis it asserts that a teacher's tenure is subordinate to the fundamental public policy of obtaining a better education for children. (*Jacobs v. School District of Wilkes-Barre Township*, 355 Pa. 449, 50 A. 2d 354, 357 (1947)) and that policy should guide a board's exercise of power to grant or deny re-employment to a probationary teacher at the end of a pre-tenure employment. The fear is expressed that the statute will be interpreted to deprive school administrators of their power and responsibility for the administration of schools.

As we have already emphasized, teacher tenure is a statutory right imposed upon a teacher's contractual employment status. In order to acquire the status of a permanent teacher under a tenure law and with it the consequent security of permanent employment, a teacher must comply with the precise conditions articulated in the statute. *Moriarity v. Board of Education of Garfield*, 133 N. J. L. 73 (Sup. Ct. 1945), affirmed 134 N. J. L. 356 (E. & A. 1946); *Ahrensfield v. State Board of Education, supra*; 78 C. J. S., *Schools & School Districts* § 180, p. 1014 (1952).

In our State tenure status may be secured by a teacher only after employment for the probationary periods specified in R. S. 18:13-16 as follows:

"The services of all teachers \* \* \* of the public schools \* \* \* shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years \* \* \*.

"An academic year, for the purpose of this section, means the period between the time school opens in the district after the general summer vacation until the next succeeding summer vacation."

Once a teacher acquires tenure status, he cannot be dismissed "except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause" and certain procedural prerequisites are required. R. S. 18:13-17. See also R. S. 18:3-23, *et seq.*

Inherent in the tenure legislation is the policy that a Board's duty to hire teachers requires more than merely appointing licensed instructors; it demands that permanent appointments be made only if the teachers are found suitable for the positions after a qualifying trial period. In essence this constitutes a "proving out" period. In another context, we said in *Cammarata v. Essex County Park Comm'n.*, 26 N. J. 404, 412 (1958):

"It is difficult to evaluate the character, industry, personality, and responsibility of an applicant from his performance on a written examination or through cursory personal interviews. Knowledge and intelligence do not alone [suffice] \* \* \*. The crucial test of his 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."

The same thoughtful philosophy applies with manifold emphasis to the selection of school teachers. See *Morris, supra*, 149 F. 2d at 708.

I

With the above authorities in view, we consider appellant's contentions. He contracted with the defendant on June 30, 1952, to begin teaching on September 1, 1952. In his view recognition of his employment status up through June 30, 1955 would constitute "employment" for the required period. In practice many, if not most, teachers are hired far in advance of the time they are to begin teaching. Contracts are frequently entered into during one academic year anticipating an employment relationship at the commencement of the following academic year. Thus, if appellant's interpretation of the word "employment" were to be adopted, tenure would be acquired in many instances before the teacher had completed teaching for three academic years. That interpretation would also shorten the length of the minimum probationary period specified in terms of "academic" years as the latter is defined in the last paragraph of *R. S. 18:13-16*, quoted above. Such a reading would clearly detract from the statutory purpose.

Our former Supreme Court had occasion to interpret the word "employment" contained in *R. S. 18:13-16* under similar circumstances and held contrary to the position urged by Zimmerman. *Carroll v. State Bd. of Education*, 8 *N. J. Misc.* 859 (*Sup. Ct.* 1930). There a teacher signed a one year teaching contract (and the Board approved it) on July 15, 1926, to begin teaching on September 7, 1926. Two subsequent annual teaching contracts were also entered into and each contained a provision that either party could terminate the agreement upon 30 days' notice. The board served notice on July 15, 1929, that it would terminate the relationship as of August 15, 1929. The court held that "employment" had not originally commenced until September 7, 1926, and therefore, the teacher had not been employed for three calendar years. Compare *Chalmers v. State Board of Education*, 11 *N. J. Misc.* 781 (*Sup. Ct.* 1933).

We agree with this interpretation. Consequently, appellant was not employed for three calendar years prior to June 30, 1955, within the meaning of the statute. It follows that he is not entitled to tenure on that theory.

II

Zimmerman's next contention is based upon the testimony of the principal of the school in which Zimmerman taught. In the opinion of that witness "tenure" would normally follow automatically where a teacher had received satisfactory ratings for three academic years. Up to the point of the House subcommittee hearings, Zimmerman had received such ratings. But the argument overlooks the nature of the employment relationship between a teacher and the Board.

Except for statutory conditions, a teacher is retained solely on a contract basis during his probationary employment. At the expiration of an annual contract period, the employment relationship ceases to exist unless a new contract has been entered into. While some states provide for automatic re-employment or renewal of contract unless contrary notice is given, our statute does not so specify. And except to the extent of constitutional or statutory limitations, there is no legal duty on the part of a board to

re-employ a teacher at the end of a contract term. *Brooks v. School Dist. of Moberly, Mo.*, 267 F. 2d 733, 739 (8th Cir. 1959), cert. den. 361 U. S. 894, 4 L. Ed. 2d 151 (1959); *Rees v. Murray City Board of Education*, 6 Utah 2d 196, 310 P. 2d 387, 388 (1957); *Bourne v. Board of Education of City of Roswell*, 46 N. M. 310, 128 P. 2d 733 (1942); *Knickerbocker v. Redlands High School Dist.*, 49 Cal. App. 2d 722, 122 P. 2d 289, 291 (1942); *Chase v. Mason*, 216 App. Div. 562, 216 N. Y. S. 205 (1925), aff'd 244 N. Y. 545, 155 N. E. 890 (1926).

Accordingly, unless Zimmerman by an affirmative act of the Board was re-employed subsequent to June 30, 1955, he cannot be said to have been employed for three consecutive academic years "together with employment at the beginning of the next succeeding academic year." R. S. 18:13-16. This statutory step had to take place, for, "it is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met." *Ahrensfield, supra*, 126 N. J. L. at 544.

We hold that Zimmerman is not entitled to tenure status upon this ground.

### III

If in 1955 after the 1954-1955 academic year the Board had decided to continue Zimmerman in its employ but stated in the resolution of employment that such employment should not constitute tenure, there can be no doubt that Zimmerman nevertheless would have tenure by operation of the statute. Recognition by the Board of an employment relationship continuing until 1957 would entitle Zimmerman to tenure.

Zimmerman contends that this is precisely what the Board did here, that the Board is now estopped to contend otherwise because it continued to hold hearings after June 30, 1955 and that, moreover, after each successive hearing the Board dismissed him as of May 20, 1955, the day after he relied upon his constitutional privilege before the House Committee. He concludes that he has been dismissed in violation of his tenure rights under R. S. 18:13-16 essentially because he invoked his constitutional privilege.

Defendants counter by pointing out that all of the proceedings leading to the dismissal reviewed in *Laba* were completed before the end of the 1954-1955 school year. A schedule of these proceedings would indicate that notification of suspension was given on May 19, 1955; charges were filed on May 23, 1955; the determination to dismiss was made on June 23, 1955, effective May 20, 1955; and the formal resolution and findings are dated June 28, 1955. Defendants say they preferred charges and held formal hearings not because appellant was under tenure but because it was necessary to determine whether there was good cause for dismissing Zimmerman for the then academic year, 1954-1955. Defendants conceded that if there was not good cause shown for the dismissal during the academic year, Zimmerman was entitled to his salary until the end of his contract term, R. S. 18:13-11, although he would not be entitled to continue as a practicing teacher in the school system.

Defendants further contend that Zimmerman himself caused the proceedings to extend beyond the 1954-1955 academic year by appealing from the action of the Board. An employment status after that academic year should

not be spelled out, they urge, merely because further hearings were necessitated by such appeals and by suggestions of this Court. In their view, inasmuch as the Board was merely inquiring whether Zimmerman should be denied employee status for the remainder of his contract term, it would be anomalous to spell out of the entire proceedings an intention on defendants' part to recognize a continuing employee relationship after the 1954-1955 academic year.

We need not decide whether recognition of a continuing employment relationship might be implied under some circumstances. Compare *R. S. 18:13-5*, *R. S. 18:13-6* and *R. S. 18:13-7*. Here, the evidence does not support an inference of such recognition. Indeed the proof is to the contrary and the Board expressly denied any such intention.

In its brief filed in *Laba* the Board made the following statement (*page 2*):

“Appellant Zimmerman did not have ‘tenure’ (*R. S. 18:13-16*) as did appellants Laba and Lowenstein. His employment had about six weeks to go at the time of his suspension on May 19, 1955 and his dismissal involves his status from that date to the end of the 1954-1955 school year. Throughout the proceedings, however, it has been assumed that his employment *for that six weeks period* was subject to termination only under circumstances applicable if he had tenure (*R. S. 18:13-17*).” (Emphasis added.)

And we expressly recognized in *Laba* that Zimmerman was in a different category than the other two defendants there who were at that time protected by the tenure laws. (*23 N. J. at p. 370*):

“[Mr. Zimmerman] began teaching in the public school system in 1952 and had not acquired tenure protection when he was dismissed by the Board. However, in view of the terms of *R. S. 18:13-11*, all of the parties and the State Commissioner have, *for present purposes*, not differentiated his case from the others.” (Emphasis supplied.)

These statements clearly limit the effect of that proceeding.

In the proceedings which followed *Laba* defendants repeatedly denied any employment relationship between Zimmerman and the Board. At the end of his report dated May 16, 1957 the defendant Superintendent stated:

“Note: Attention of the Board of Education is called to the fact that Mr. Perry Zimmerman had not acquired tenure as of the date of his suspension on May 19, 1955, and would not have acquired tenure even if he had remained in active teaching service to the end of the school year. Had that been the case, he would have completed only three years of teaching service. In order to acquire tenure it is necessary to have had more than three years of teaching service. Should the Board of Education determine for any reason to re-instate Mr. Perry Zimmerman for the period from May 19, 1955, to the end of the 1954-1955 school year,—the only period involved in the Board’s previous dismissal action,—the Superintendent wishes to make it clear that he does not recommend the re-employment of Mr. Perry Zimmerman for any further or additional period of time that would result in his acquisition of tenure in the Newark public school system.”

When on September 24, 1957 the Board ordered "further proceedings" in accordance with the "decision of the Supreme Court and the mandate thereon entered on February 4, 1957," it was careful to include the following in its resolution:

"RESOLVED that the within resolution shall not be deemed to extend to the said Perry Zimmerman any employment or tenure status with the Board for any period beyond the 1954-1955 school year when the period of his probationary employment expired."

And the Board's resolution of June 24, 1958 setting forth its findings and conclusions on the supplementary charges contains the provision that:

"The adoption of this resolution is not intended to constitute an acknowledgment that Mr. Zimmerman had any employment or tenure status with the Board, and shall not be deemed to extend to him any such status, for any period beyond the 1954-1955 school year, when the period of his probationary employment expired."

In view of these observations and disclaimers it would be patently unreasonable to spell out any implied recognition of an employment relationship.

The above statements also make it clear that the Board did not waive its right to deny Zimmerman's employee status. Nor can we sustain Zimmerman's argument that the Board is now estopped to deny an employment relationship. Even if we were to assume that the facts might give rise to an inference that the Board recognized Zimmerman as an employee, the doctrine of "estoppel" urged by Zimmerman requires an element of justifiable reliance upon the acts of another and resulting injury brought about by such reliance. Here the Board continually asserted that Zimmerman was dismissed on May 20, 1955 and repeated its disclaimer of any employment relationship after the 1954-1955 academic year. On these clear facts we think that Zimmerman could not justifiably rely on the Board's actions in the belief that his continuing employment was recognized by the Board.

The decision of the State Board of Education is affirmed; no costs.

WEINTRAUB, C. J. (Concurring).

I agree with the result reached in the opinion of the Court but for the reason stated in "I" below.

It having thus been found that Zimmerman did not have tenure, we need not, for the purposes of this case, consider the manner in which the proceedings were handled, but since for the reasons in "II" below I believe our mandate on the prior appeal was grossly disregarded, I think we should say so, lest what happened here be repeated in another matter.

## I

As a general proposition, powers vested in local government must be exercised reasonably and the judiciary will review local action for arbitrariness. *Hertz Washmobile System v. South Orange*, 41 N. J. Super. 110, 132 (Law Div. 1956), affirmed 25 N. J. 207 (1957). The question is whether probationary employments are beyond that proposition.

The Legislature intended wide latitude in the employing authority to determine fitness for permanent employment. It is clear that public employment may not be refused upon a basis which would violate any express statutory or constitutional policy. A simple example would be discrimination for race or religion. But I am not sure such specific limitations are the only restraints. If the employing agency, for an absurd example, thought blondes were intrinsically too frivolous for permanent employment, a court would find it difficult to withhold its hand.

But if we may inquire into "unreasonableness," it would seem to follow that there must be a "reason," *i. e.*, "cause" for refusal to continue the teacher into a tenure status. That course has its difficulties. It would not mean the court would not recognize a wide range of "reasons" or would lightly disagree with the employer's finding that the "reason" in fact existed. But it would follow that upon demand the teacher would be entitled to a statement of the grounds, with the right to a hearing and to a review as to whether the grounds are arbitrary in nature or devoid of factual support. But see *Vitarelli v. Seaton*, 359 U. S. 535, 539, 3 L. Ed. 2d 1012, 1016 (1959); *cf. Cafeteria and Restaurant Workers Union v. McElroy*, 367 U. S. 836, 6 L. Ed. 2d 1230 (1961). Such individual inquiries could involve some practical problems in the administration of a school system.

I think the question might well be left for another day, since here the reason was given and I cannot say it is arbitrary in nature or unfounded in fact.

It is clear the Board would not continue Zimmerman because he pleaded the Fifth Amendment before the House subcommittee when his connection with communism was the subject of inquiry. As we held in *Laba v. Newark Board of Education*, 23 N. J. 364 (1957), the assertion of a federal constitutional right does not constitute "cause" for the dismissal of a teacher with tenure. Nor can that assertion support an inference that the teacher is disloyal. Here, however, we are dealing with a refusal to accord permanency to a probationary employee.

The question is whether it is unreasonable to refuse to employ an individual because he claimed the privilege from self-incrimination. Like it or not, the fact is that many people do draw from the claim of the privilege the very inference which legally may not be drawn. Even some who are tutored in law will privately draw the inference or harbor a doubt, albeit they understand that in public matters they must be faithful to what the *Constitution* commands. And as to many laymen, the plea of the Fifth Amendment does envelop a teacher in suspicion or worse. He becomes a controversial figure.

Thus the issue is whether a school board may refuse to employ a teacher so situated when to employ him may involve the board in a controversy with an appreciable segment of the public. The question is not whether as an individual I would applaud a different decision. Rather the question is whether as a judge I can denounce that decision as arbitrary. I do not see how I can. I believe the Board, taking into account the climate of the times and the fears, however unwarranted, of the parents of students, could conclude it is the course of prudent management to employ someone else. That, it seems to me, was the decision the Board made. The Board went too far when

it attempted to terminate the existing annual contract of employment because of the claim of privilege, but I cannot say it exceeded its discretionary power when it refused to reengage him thereafter.

## II

Our holding that Zimmerman did not have tenure makes academic the finding of the Board that, if he had tenure, there nonetheless was cause for dismissal. But the way in which the matter was handled so palpably violated the principles laid down in *Laba* and was so fundamentally unfair that we should not let it pass without an expression of disapproval.

In *Laba* we held that the plea of self-incrimination before the House subcommittee justifies an inquiry before the local Superintendent with respect to present loyalty. We said that in the inquiry the teacher must cooperate, and that if he refuses to answer pertinent questions so that a decision as to present loyalty cannot be made, he may be dismissed for refusing to answer. Thus the *target issue* is present loyalty, but the teacher may be dismissed without a decision on the *target issue* if it cannot be reached because he *blocks* the inquiry *by silence*. In the words of *Laba* (23 N. J. at 389) :

“\* \* \* If after the inquiry it appears that the teachers are now members of the Communist Party or are now subject to its ideologies and disciplines \* \* \* or that they have *willfully refused to answer* pertinent questions fairly submitted by their administrative superiors \* \* \* then there would seem to be ample basis for board action within the broad and valid statutory standard embodied in R. S. 18:13-17.” (Emphasis added.)

Zimmerman appeared before the Superintendent. He answered *every question* put to him. Nonetheless, the Superintendent made no finding upon the *target issue* of present loyalty. Nor did the Superintendent find (and he could not) that Zimmerman *refused to answer* any question. Rather the Superintendent filed supplementary charges that:

- (1) Zimmerman “failed to fulfill his duty of cooperation” in the interview.
- (2) He “failed to give frank and full disclosures as to past association with the Communist Party and affiliated organizations.”
- (3) He “deliberately failed to accord to the Superintendent of Schools the frankness and cooperation which were due to the Superintendent” in the inquiry.
- (4) He “failed to fulfill the affirmative burden which was his \* \* \* in the establishment of his fitness to teach.”
- (5) “The aggregate responses of the said Perry Zimmerman and his general demeanor and conduct in the said interview, evidenced a conscious purpose to evade, equivocate, and confuse.”
- (6) “Many of the responses \* \* \* were incredible, indirect, or otherwise inadequate from the standpoint of forthrightness due from him in an inquiry to determine his fitness to teach.”

(7) He, "by his aggregate responses and by his total conduct in the said interview, impeded a fair and conscientious inquiry by the Superintendent of Schools to determine" whether he is or was a member or subject to the ideologies and discipline of the Communist Party; "and was guilty of insubordination and conduct unbecoming a teacher."

Appended was a list of references to the transcript of the interview to which the Superintendent called "particular attention."

Upon these nebulous charges a hearing followed before the School Board. It was an aimless affair, and understandably so, since there was nothing to aim at. The Board, after alluding to a series of responses to the Superintendent's questions, joined in the characterizations embodied in the charges leveled by the Superintendent. The Board added some more of its own in the resolution it adopted after the hearing had ended, *i. e.*, that Zimmerman before it "evidenced resentment of and hostility to the entire inquiry, and a lack of forthrightness and candor."

The Board did disavow so much of charge No. 4 above as "implies that it was Mr. Zimmerman's legal burden to prove his fitness in the within proceedings" and hence "Charge 4 is dismissed." In this single respect, the Board was eminently correct, since *Laba*, although it referred to a teacher's "burden" to cooperate, did not impose upon him the burden of proving fitness upon the pain of loss of tenure if he failed to persuade the interrogator. And since no testimony was taken as to Zimmerman's "demeanor" before the Superintendent, the Board concluded that so much of charge No. 5 as rests thereon "is dismissed." The Board added that it "has drawn no inferences as to present affiliation with or subservience to the Communist Party." Nor, as we have said, did the Superintendent make any finding on that issue.

*Laba* was perfectly plain in its mandate. The *target issue* of present loyalty was to be decided, unless *and only unless* the teacher *wilfully refused to answer*. Zimmerman having answered, it was the plain duty of the Board to make a forthright decision of the *target issue*. It did not. Instead it devised a new basis for dismissal. It held that if the answers given impressed it as "evasive" or "incredible" (whatever that means in this context), it follows there was a lack of "cooperation" constituting cause for destruction of tenure rights.

The quality of the answers given was simply a factor to be weighed in deciding the *target issue* of present loyalty. When in *Laba* we held that a *wilful refusal to answer* would constitute a basis for dismissal, I understood it to mean precisely that and nothing else. A refusal to answer blocks the inquiry. Here the inquiry was not blocked in the least. Indeed the Board did not find, and could not find, that the hearing was thwarted. The closest expression in that regard was its concurrence in the hazy charge (No. 7) of the Superintendent that Zimmerman "by his aggregate responses and by his total conduct in the said interview, impeded a fair and conscientious inquiry by the Superintendent." What specific answers so "impeded" the inquiry, we are not told. The most I gather from the rambling resolution is that the Board believed "The conclusion is inescapable that both at the interview and at the Board's hearing the whole truth as to Mr. Zimmerman's past affiliation with and his reported withdrawal from the Communist Party was

not disclosed by him." How that "inescapable" conclusion was reached and how it "impeded" a decision upon present loyalty, are not revealed. The thinking of the Board is hidden in a bushel of words.

It is one thing to discount testimony as evasive or incredible and hence unequal to evidence on the other side of an issue; that is routine in the process of resolving factual disputes. It is quite another thing to charge that such testimony constitutes an act of misconduct and then to adjudge the witness guilty upon nothing more than the same appraisal of the questioned testimony. That is what happened here, and it cannot be obscured by calling the alleged misconduct a "failure to cooperate." That mode of condemnation is foreign to our concept of justice.

Even *perjured* testimony "need not necessarily \* \* \* obstruct or halt the judicial process. For the function of trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses." *In re Michael*, 326 U. S. 224, 227-28, 90 L. Ed. 30, 33 (1945); see *People ex rel. Valenti v. McCloskey*, 6 N. Y. 2d 390, 160 N. E. 2d 647 (Ct. App. 1959), appeal dismissed 361 U. S. 534, 4 L. Ed. 2d 537 (1960); *People ex rel. Valenti v. McCloskey*, 8 N. Y. 2d 959, 168 N. E. 2d 853 (Ct. App. 1960).

It may well be that *perjury* constitutes an independent cause for dismissal. But, if so, perjury must be charged, and wilful falsity must be proved. Here there was no charge of perjury, and no evidence whatever was offered to prove that any answer was in fact untrue. Rather the Superintendent and the Board simply concluded that, in their wholly subjective evaluations, some of the answers were "incredible" or "evasive." *Ergo*, there was "cause" for dismissal. I cannot agree that the tenure status of public employees may be destroyed by a process so vague and arbitrary.

We all know that some people cannot see too clearly when loyalty is in issue and especially when, as here, a man admits he was once a member of the Communist Party. Indeed the danger is real that the administrative hearing will be but the guise for a predetermined result. The basis for discharge the Board here devised would be obviously intolerable if a tenure-employee were charged with something less befogging than communism. If the inquiry related, for example, to "moonlighting," I would think that no one would fail to see the injustice of a dismissal, not because of "moonlighting," but because the hearer thought some answers were "incredible" or "evasive." These are faceless words. A public employee is entitled to charges that can be nailed down and made the subject of a visible inquiry.

FRANCIS, J. (Concurring).

I agree with the opinion of the Court that Zimmerman did not have tenure status when his teaching contract expired on June 30, 1955, and that the Board of Education was under no obligation to rehire him for the school year beginning September 1955.

In ordinary circumstances it is not the practice to comment on concurring opinions. They are not precedents and they are binding on no one. Frequently, however, they put forward constructive ideas or suggestions which merit sponsorship if and when the problem discussed is directly in

issue. But when such an opinion criticizes a public agency unjustly, particularly when the criticism is not necessary to determination of the basic issue involved in the case, conventional considerations must be put aside. From my study of the record, I am convinced that the Superintendent of Schools and the Board of Education acted in the utmost good faith and did their conscientious best to follow the earlier opinions of this Court. But more than this; I believe the decision of the Superintendent and the Board was warranted on the evidence. Also, having in mind the sensitive area in which public school teachers work and the malleable minds they are engaged to develop, I am satisfied that the final action of the Board was in accord with the public interest. See *Adler v. Board of Education*, 342 U. S. 485, 493, 96 L. Ed. 517, 524 (1952).

On May 19, 1955, Perry Zimmerman, Estelle Laba and Robert Lowenstein, teachers in the public school system in Newark, New Jersey, were called to testify before a sub-committee of the House Un-American Activities Committee. On being questioned as to present and past membership in the Communist Party they declined to answer, relying on the protection provided by the Fifth Amendment of the United States Constitution against possible self-incrimination. Four days later, they were dismissed by the Board of Education. This Court sustained a reversal of the dismissal by the State Commissioner of Education, holding that resort to the Constitutional guaranty to avoid such questioning could not of itself justify discharge of a teacher. It was declared, however, that such a plea warranted an inquiry into past and present affiliation with the Communist Party, or adherence to its ideologies and disciplines in order to determine "present" or "current" loyalty to the United States Government. Accordingly, a remand was ordered to the Board of Education for that purpose. *Laba v. Newark Board of Education*, 23 N. J. 364 (1957).

Some observations in *Laba* should be recalled for purposes of reorientation. Speaking of the danger of Communist Party members as teachers in the public school system Justice Jacobs, speaking for the Court, said:

"The matter may no longer be viewed simply as one of academic freedom of thought and expression, for it has actually become one of self-preservation; we are convinced that Communism is an alien concept which is dedicated to the overthrow of our form of government, by force if necessary, and seeks to deprive us of the very basic constitutional liberties which we all hold so dear; \* \* \*." 23 N. J. at 388.

That view is not peculiar to New Jersey. The United States Supreme Court referred to it as "the long and widely accepted view." *Barenblatt v. United States*, 360 U. S. 109, 128, 3 L. Ed. 2d 1115, 1129 (1959). Moreover, in our sister state, Pennsylvania, the Supreme Court took judicial notice that the Communist Party is a subversive organization which conspires to teach and advocate the overthrow of the government of the United States by force and violence. *Appeal of Albert*, 372 Pa. 13, 92 A. 2d 663 (1952).

The opinion in *Laba* continued:

"We have no doubt that in examining into their continued fitness to teach the Newark school authorities may interrogate the appellant school teachers with respect to their present and past associations with the

Communist Party and affiliated organizations and are entitled to frank and full disclosures." At page 388.

And:

"In the instant matter the teachers' conduct before the Congressional sub-committee reasonably calls for a fitness inquiry during which the teachers have a duty of cooperation and an affirmative burden in the establishment of their fitness." At page 392.

*Laba* quoted with apparent approval the opinion of the Association of American Universities that "invocation of the Fifth Amendment places upon a professor a heavy burden of proof of his fitness to hold a teaching position and lays upon his university an obligation to reexamine his qualifications for membership in its society." It referred also to the report of the Association of American Law Schools' Committee on Academic Freedom and Tenure, "composed of distinguished legal scholars," to the effect that "a faculty member's invocation of the Fifth Amendment would not 'in and of itself' constitute ground for dismissal but was sufficient to call for a general fitness inquiry by his educational institution." At page 375.

On the remand, therefore, Zimmerman had a heavy duty of *cooperation* in the inquiry. Justification for interrogation did not rest alone on his use of the Fifth Amendment before the Congressional Committee. He was aware that the public policy of this State as established by the Legislature is opposed to appointment or retention of teachers in the public school system who believe in or advocate the overthrow of the State or Federal Government by force or violence. *N. J. S. A.* 18:13-9.1, 9.2; 41:1-3; 2A:81-17.1. He knew also that before entering the public service as a teacher in 1952 he had answered a loyalty questionnaire under oath which, among other things, asked if he had ever become "a member of any society or group of persons which teaches or taught or advocates or advocated that the government of the United States of America, or of any state or political subdivision thereof, should be overthrown, or overturned, or changed by force or violence, or any unlawful means?" His sworn answer to this was: "No," although admittedly he had been a member of the Communist Party at least from 1946 until the latter part of 1948. See *Laba, supra* at page 373.

Moreover, since, unlike Mrs. Laba and Lowenstein, he did not have tenure, as this Court unanimously agrees, his hearing took on a twofold aspect. His contract of employment terminated on June 30, 1955. Therefore, for purposes of determining rights under that contract, the issue of "current" or "present" loyalty or membership in the Communist Party or adherence to its aims and disciplines, within the meaning of *Laba*, related to the period from May 19, 1955 to June 30, 1955. Secondly, although the matter was not expressly stated in such terms, both Zimmerman on the one hand and the Superintendent of Schools and the Board of Education on the other, were conscious that, in fairness, a decision should be made whether to continue or to reengage him as a teacher in the system. On this latter phase of the matter obviously a much broader interrogation might justifiably be pursued.

The rehearing was held on May 16, 1957. I agree with the Board of Education that it was fairly and conscientiously conducted by the Superintendent. At its conclusion he found, among other things, that Zimmerman

(1) had failed to fulfill his duty of cooperation in the inquiry, (2) had failed to give frank and full disclosures as to past association with the Communist Party, (3) had evidenced a conscious purpose to evade, equivocate and confuse, (4) had given many responses which were incredible, indirect and otherwise inadequate, and (5) that by his aggregate responses and his total conduct in the interview he had impeded a fair and conscientious inquiry to determine whether when he was suspended on May 19, 1955, he was or since that date had been or now is a member or subject to the ideologies and discipline of the Communist Party.

In response to the Superintendent's questions and to those propounded later by the Board of Education, Zimmerman admitted that he joined the Communist Party in 1946, but asserted inability to recall whether the Party solicited his membership or whether he sought out the Party. He paid dues to the Party but could not recall whether by check or cash ("Not the slightest recollection."). He alleged inability to recall whether he carried a card as a member of the Party. During the 1946-1948 membership period he claimed to have very little idea of Communist Party theory, although at the subsequent hearing before the Board of Education he indicated that he had attended at least 50 Communist Party meetings while a member and that its program and purposes were discussed at them. On being asked if, when he joined the Party, he knew that one of its objectives was the overthrow of the government of this country by force, he said: "The answer is that I still do not believe that is part of the Communist Party program to do this which you state. The answer is no." Further, he said his experience with the Party revealed nothing that would establish incompatibility between membership therein and teaching in the public schools.

Zimmerman testified also there was no incompatibility between his membership in the Party in 1946 through 1948, and his sworn answer in the loyalty questionnaire that he had never been a member of any society or group of persons "which teaches or taught or advocates or advocated that the government of the United States of America \* \* \* should be overthrown, or overturned, or changed by force or violence, or by any other unlawful means." He asserted that had he been asked if he had been a member of the Communist Party, he would have answered affirmatively. But since he did not know, on joining the Party or after attending more than 50 meetings at which its program was discussed, or at any time, that such was the purpose of the Party, he considered the negative answer under oath to be proper.

On leaving the Party he remembered that he gave no formal resignation. But he could not say "with the slightest degree of accuracy" when he last paid dues. In any event, he regarded the subject of so little consequence as not to warrant an effort to recall or find out. In passing, it may be noted that he characterized the Superintendent's interview as "savage," and with respect to the later hearing before the Board of Education he said he considered "this free wheeling inquisition itself an insult." In its findings, the Board commented upon Zimmerman's "low regard for his obligations at the Superintendent's interview," and that throughout his testimony before it "he evidenced resentment of and hostility to the entire inquiry, and a lack of forthrightness and candor." The Board declared "the conclusion to be inescapable that both at the interview and at the Board's hearing the whole truth as to Mr. Zimmerman's past affiliation with and his reported withdrawal

from the Communist Party was not disclosed by him, \* \* \*.” I agree with the Board that his entire testimony fairly breathes an attitude of insolence and supercilious contempt for the questions that were put to him.

Zimmerman had been a Communist and he had been untruthful about it under oath when he was appointed a Newark teacher. He said he had left the Party in the latter part of 1948. Since he did not plead the Fifth Amendment until 1955, the Board not only had the right but was under the duty to satisfy itself reasonably, through fair interrogation, that he had in fact resigned from the Party in 1948 and no longer adhered to its ideology and disciplines. Zimmerman's duty, in view of his admitted history, was to cooperate fully and frankly in a reasonable endeavor by the Board to determine his loyalty at the time of suspension and thereafter until June 30, 1955.

“Present” loyalty or membership in the Communist Party or adherence to its principles, at the time of the reinterview and back to the end of 1948, were proper subjects of inquiry. Questioning, at least to that extent, would enable the Board to reach a conclusion whether he had left the Party in 1948 and was loyal when suspended in May 1955. Further, since he did not have tenure, and indicated a desire to continue in the teaching profession, it was reasonable for the Board to delve into current loyalty, in the sense of loyalty at the time of the reinterview, so as to put itself in a position to give intelligent consideration to the question of reappointment to the system. In view of the restoration of Mrs. Laba after the reinterview with her, it cannot be said on the record that frank cooperation by Zimmerman would not have produced a similar result if the Board was satisfied that he had quit the Party and was no longer subject to its ideologies and disciplines.

But it would be blinding ourselves to reality to say that only by silence, i. e., refusal to answer the Superintendent's questions, could Zimmerman improperly impede the loyalty inquiry. It is likewise unreal to suggest that because he answered every question put to him, he had co-operated to the extent called for by *Laba*. Obviously, the content of the answer and the honesty of the person giving it are of the essence.

Under the cases throughout the country, a former Communist Party member is not forever subject to discharge from a teaching post in the public school system in which he has tenure because of such membership alone. An honest *mea culpa*, in the sense of an actual withdrawal from the Party and abandonment of its program of overthrow of our Government by force or violence, prior to the Board's inquiry, would remove the bar presented by the policy of our Legislature. Assuming that Zimmerman had done so, the history of these cases in Newark does not support the view that his suspension from May to June 30, 1955, would not have been withdrawn by the Board, or that the Board would not have given favorable consideration to reappointing him prospectively. But the Board was convinced, as I am, in view of his past history, that he did not meet the obligation imposed by his record, of cooperation with the inquiry, that he did not act in good faith during it, and that by his attitude and demeanor, as well as by his incredible answers, he wilfully prevented and frustrated the Superintendent's and the Board's attempt to ascertain his loyalty in 1955 and at the time of the reinterview.

In my judgment, therefore, analysis of all the facts revealed by the record fully supports the conclusion reached by the Superintendent and the Board of Education.

I am authorized to say that Justices Schettino and Haneman join in this opinion.

PROCTOR, J. (Concurring).

The issue in this case is a narrow one, *i. e.*, is the appellant entitled to reinstatement as a teacher with tenure. I agree with the opinion of Justice Schettino that the appellant never achieved tenure status and therefore is not entitled to reinstatement on that basis. Since the answer to this question is dispositive of the case, I see no need for an excursion into tangential areas raised by the arguments.

38 N. J. 65.