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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1991 to December 31, 1991

VOLUME 1

PAGES 1-818

John Ellis
Commissioner of Education

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9597-89
AGENCY DKT. NO. 357-11/89
Department of Education

**WEST ORANGE SUPPLEMENTAL
INSTRUCTORS ASSOCIATION, et al,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF WEST ORANGE,**

Respondent.

Bernard Star, Esq., appearing for petitioners

Stephen J. Christiano, Esq., appearing on behalf of respondent

Record Closed: August 28, 1990

Decided: October 12, 1990

BEFORE MARYLOUISE LUCCHI, ALJ:

This matter was brought as a result of a request of the Commissioner of Education in order to implement the provisions of the Appellate Division's determination in *West Orange Supplemental Instructors Association, et al., v. Board of Education of the Township of West Orange, Essex County* (N.J. App. Div., November 1, 1988, A-5792-86T8), (unreported).

PROCEDURAL HISTORY

This particular portion of the proceeding was transmitted from the Department of Education to the Office of Administrative Law on December 13, 1989 for determination as a contested case pursuant to *N.J.S.A. 52:14F-1 et seq.* A

prehearing conference was held on January 19, 1990, in which a determination was made as to the scope of the hearing required in this matter. It was determined that the action was to determine any back pay, interest, benefits and counsel fees to be awarded petitioners, pursuant to the above Appellate Division's determination in the case previously heard at the Office of Administrative Law. Hearings were scheduled to take place beginning at 9:00 a.m., June 4, 1990 and continuing through June 8, 1990. Additional testimony was also taken on June 14, 1990 at the Office of Administrative Law, 185 Washington Street, Newark, New Jersey. Subsequent to the Appellate Division decision of November 1, 1988, the Supreme Court of the State of New Jersey denied respondent's petition for certification of the judgment in matter number A-5792-86T-8.

Because of an inability of the parties to determine what constituted the appropriate amount of award to each of 13 petitioners pursuant to the decision, the matter was transferred by the Commissioner of Education to the Office of Administrative Law to determine the following issues:

1. What is the specific amount of back pay to be awarded to each petitioner pursuant to the decision.
2. Have petitioners properly mitigated their damages, and what, if any effect, does mitigation have on any award they might receive.
3. Are petitioners entitled to interest (pre- and post-judgment), reimbursement for medical bills and expense, and/or counsel fees pursuant to the Appellate Division decision from the date they were RIFFed until the date of reinstatement with respondent.
4. If Issue 3 is answered affirmatively, what is the specific amount to which each of the petitioners is entitled.

There was also a motion made requesting reimbursement for unrecompensed medical and dental expenses incurred by the supplemental teachers. That motion was denied by this ALJ as being outside the scope of the issues remanded for consideration at this juncture.

OAL DKT. NO. EDU 9597-89

At the close of testimony on June 14, 1990, the record was to be left open until July 7, 1990 in order to accommodate posthearing submissions to be filed simultaneously by both parties. Subsequent to receipt of those submissions on August 13, 1990, this administrative law judge wrote to both parties requesting additional submissions regarding what if any impact certain cases cited in that letter had on the position of the parties. That letter stated that the record would remain open until 15 days from the date of that letter. Submissions were received and the record did in fact close on August 28, 1990.

STIPULATIONS

Both prior to the hearing and during the course of the hearing, both parties entered into a number of stipulations of fact. They are as follows:

1. Shirley Blank
 - a) Would have earned \$185,615
 - b) Actually earned \$34,554
2. Marcia Grossman
 - a) Would have earned \$187,565
 - b) Actually earned \$90,817
3. Rita Zimring
 - a) Would have earned \$189,690
 - b) Actually earned \$71,361.41
4. Florence Berk
 - a) Would have earned \$184,615
 - b) Actually earned \$47,073
5. Esther Kaplan
 - a) Would have earned \$163,190
 - b) Actually earned \$90,516
6. Barbara Davis
 - a) Would have earned \$216,885
 - b) Actually earned \$28,394
7. Constance Afromsky
 - a) Should have earned \$189,630

OAL DKT. NO. EDU 9597-89

	b) Actually earned	\$138,985
8.	Doris Passner	
	a) Should have earned	\$163,190
	b) Actually earned	\$12,330
9.	Edith Ratner	
	a) Should have earned	\$164,180
	b) Actually earned	\$56,512
10:	Rosemarie Siegler	
	a) Should have earned	\$188,370
	b) Actually earned	\$115,339

Further, the board of education acknowledges that these individuals are claiming:

1. Shirley Blank - 151,061
2. Marcia Grossman - 96,748
3. Rita Zimring - 116,983
4. Florence Berk - 137,542
5. Esther Kaplan - 72,673
6. Barbara David - 188,491
7. Constance Afromsky - 50,645
8. Doris Passner - 150,860
9. Edith Ratner - 107,678
10. Rosemarie Siegler - 73,841

The following matters have been stipulated to by the parties that:

1. Constance Afromsky RIF date: 6/83
 Certification: K-8
2. Paula Kolin
 a) Would have earned \$186,565
 b) Actually earned \$39,343
3. Florence Shifman
 a) Would have earned \$163,190
 b) Actually earned \$16,942
4. Rita Peretz
 a) Would have earned \$189,690
 b) Actually earned \$36,880

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Further, the Board of Education acknowledges that these individuals are claiming:

Shirley Blank - 147,222
Florence Shifman - 146,248
Rita Peretz - 152,810

TESTIMONY

On behalf of respondent, Dr. Kenneth King testified in his capacity as assistant superintendent for personnel for the East Orange school district. He testified regarding teacher vacancies which were filled during the years 1983 through 1989. He stated that the figures are approximate but gave them to be as follows:

1983-1984 - total vacancies 42
1984-1985 - total vacancies 45
1985-1986 - total vacancies 53
1986-1987 - total vacancies 67
1987-1988 - total vacancies 72
1988-1989 - total vacancies 67

In his testimony he indicated that the total number comprised those vacancies which were filled in elementary education positions, secondary education positions and special education positions with elementary education positions making up the larger number of those vacancies filled.

He went on to state that East Orange and West Orange geographically touch one another and are therefore close in proximity. He did not however know if the teachers involved in this matter would have been hired by the East Orange school district in any of those positions that were represented by the vacancies filled about which he testified.

Also testifying for respondent was Dr. Eugene Alexander. He is the owner of the G.A. Agency. This is a business which acts as an employment agency for teachers and other level educators. He holds a B.S. and M.S. in school administration and has been a teacher in Yonkers, New York. He also served as a supervisor principal in Rhode Island. He has operated the G.A. Agency for 12 years and states that he is an

expert as to employment for teachers in New Jersey. He stated that he reviewed the answers to the interrogatories of all 13 petitioners in this case. He then went on to describe a chart as to available teaching listings in New Jersey through the G.A. Agency and the number that had been filled. (See R-2 Ev.). With respect to those jobs listed with his agency the hiring officials must give their permission in order to list any job opportunity. Also all teachers sign a contract that the teacher will pay his agency a fee for any employment secured. None of the 13 teachers in this matter registered with the G.A. Agency. He did indicate that the positions listed that were available represent listings through the entire state of New Jersey and were not geographically all within the area near West Orange. However, most of the teaching positions were in the central and northern part of New Jersey.

The witness stated that there were four other teacher employment agencies located within the state of New Jersey. He stated that during the period of June 1, 1983 to May 1, 1989 his agency could have placed special education teachers easily because their listings exceeded the number of candidates available. With respect to those teachers certified in social studies, once again, there were more openings than candidates available. This particular situation was true also of English teachers, business education teachers and reading teachers.

He conceded that it would be essential to meet with each individual candidate to determine if they would be hired to any particular job. One cannot assume that the mere fact of an application would result in the hiring of a particular teacher. He also stated that a low pay scale does not indicate that if a person were more qualified for that position that the individual might be paid more if hired. His office is located in Cranford, which is approximately 25 miles from West Orange. He also indicated that he does not know whether any of the teachers involved in this case applied for any of the positions which had been advertised.

Ms. Solomon, the assistant school business administrator for West Orange for seven years also testified. She stated that Cedar Grove is approximately seven minutes from West Orange and the Livingston school district was contacted by the office to determine if there had been openings. She stated that there were teacher vacancies in Livingston and that Livingston borders on West Orange and is only approximately ten minutes away. She also indicated that teacher vacancies from 1983 to 1989 existed in Millburn which is approximately 20 minutes from West

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Orange. She indicated that information had been received that there had been vacancies in the South Orange-Maplewood school district which is approximately 15 to 20 minutes by car from West Orange. With respect to the Montclair school district she had received information that positions had been opened and Montclair borders on West Orange. She also received information from Cedar Grove as to teacher vacancies between 1983 and 1989 and that location is approximately seven minutes by car from West Orange. Additionally, she produced ads from the period of September 1984 to June 1989 mostly from the Star-Ledger as to vacancies for teachers.

She admitted that she has no way of knowing if the 13 teachers involved in this case would have been hired by any of these school districts. She also acknowledged that she does not know whether or not any of the 13 teachers or all of the 13 teachers applied in any or all of these towns. She also did not know what the salary ranges were although she stated that hiring would depend upon the qualifications of the individual and not strictly upon the salary for the individual position.

Shirley Blank, one of the 13 teachers who had been RIFFed in June 1984 testified that she was reinstated in September 1989. During the period when she was no longer employed by West Orange she taught for two years in Montclair between 1985 and 1987 and spent one year in private industry. She was a resource room and supplemental teacher and worked 16 to 18 hours per week initially and then her time increased. In 1987 her contract in Montclair was not renewed. She attempted to gain employment but was unable to do so after 1987. In 1989 she made a total of \$144. In 1988 she made \$90 substitute teaching. In 1984 she had collected \$4,056 from unemployment and engaged in a job search. She is elementary and handicapped teaching certified however was not able to find employment. Her unemployment benefits ran out in January 1985 after which she finally began teaching in Montclair. Immediately subsequent to her unemployment ceasing she applied to West Orange once again. She was looking for a job and at that time was 57 years of age. She did not use an employment agency but testified she sent letters, called, and sent application forms. She distinguished that in some cases she sent "letters of interest" and in other cases actually sent applications. She indicated that she had applied to more than three school districts. Although she listed three schools in response to the interrogatories that were propounded.

On cross-examination, she indicated that she never applied to Newark which was the largest school district nor did she apply in East Orange, Orange or Irvington. Her reasons were that the classes were too large and that this would required travel in unsafe areas. She also did not apply to Bloomfield, Belleville or Nutley due to the amount of travel time that would have been involved. She did not apply to South Orange-Maplewood.

In 1985-1986 she was engaged in telemarketing sales which involved biomedical sales to orthopedic doctors. During that period of time she worked 20 to 25 hours per week part time. From the time of her riff she never held full time employment.

As indicated in the stipulations in the period from June 1984 to August 1989 Shirley Blank would have made \$185,615 and her actual earnings were \$34,554 makding a difference of \$151,061, which is what Ms. Blank is claiming in this proceeding.

Ms. Blank also indicated that she sent resumes and called a number of schools including Livingston, Montclair, Millburn, East Hanover Township, Whippany, Parsippany, Montville, Roseland, Essex Fells, West Caldwell, Fairfield, Glen Ridge, Madison, Springfield, Newark Academy, Essex County Educational Services and also availed herself of a placement service at Kean College. These inquiries were made by cover letter and resume and sent to the schools mentioned.

She did testify that during the time frame that she was employed between 1985 and 1987 since she was a contracted teacher she did not apply for other jobs because it was her understanding that contracted teachers were not permitted to search for other jobs while under contract. That understanding was based only on her impression and not as a result of any provisions in her contract with Montclair which she could mention.

The next teacher involved in the case to testify was Marsha Grossman. Ms. Grossman had been RIFFed in June 1984 and in 1985-1986 she served as a substitute teacher for West Orange. From September 1986 to June 1989 she worked full time in Orange as a teacher and during the period of time from 1984 to 1985 she collected

unemployment benefits. During the time she was collecting those benefits she was required to look for employment.

During the pertinent time frame in this case it had been stipulated that she would have earned \$187,565 and that her actual earnings were \$90,817 making her claim at this point \$96,748.

Ms. Grossman stated that she did look for work although she never used an employment agency. She made applications between 1984 and 1986. In those cases some involved sending a resume and also filling out an application. She applied and sent both to the Caldwell school district, East Hanover, Roseland, Montclair, (for which she went to two separate interviews), Belleville, East Orange, Orange. It was by East Orange that she was finally hired. In addition during this time frame she had also sent resumes and applied to Elizabeth, South Orange-Maplewood, Millburn, Cedar Grove, Bloomfield, Verona, Newark, to whom she sent a resume but never received an application to fill out, and Livingston as well as West Orange. She stated that she constantly applied and made inquires. She did not apply to Irvington for a teaching position but also applied to different banks and insurance agencies such as Howard Savings and Prudential for non-teaching relating positions.

The third of the teachers to testify was Rita Zimring who had been RIFFed in June 1983. She was rehired in September 1983 to a part time position which constituted a step down. She was a supplemental instructor and then was once again RIFFed in June 1984. In order to obtain employment she stated she looked for ads in newspapers, called boards of education and that in June 1984 she was hired as a basic skills instructor from September 1984 to June 1987 she worked approximately five to six hours per day part time and in June 1987 she was once again RIFFed. She then collected unemployment benefits. That was until she found employment with the East Orange school district for the period 1987 to 1989 as a basic skills instructor on a part time basis. She stated that over a period of time from 1983 to 1984 she sent resumes and applied to East Orange, Livingston, Clifton, Nutley, Roseland, Parsippany, West Orange and the Essex County Educational Services Commission.

She also indicated that she did not apply to certain districts which included Newark, Orange, Irvington and Bloomfield. She stated that she answered ads which she had seen in the paper and called the districts with which she was familiar.

The witness indicated that she had been RIFFed three separate times by the board of education. First in June 1983. At that time she looked for work and sent out ads and resumes. In September 1983 she received a letter saying she would be a supplemental teacher with less hours. In September 1983 to June 1984 she worked and in June she was once again RIFFed and again answered ads in the same manner she had before. In August 1984 she was notified she would be hired as a basic skills instructor and started at the entry level. She was told she would not receive tenure nor credit for prior service. She was RIFFed again one day before she would be tenured and then worked from 1984 to 1987. In 1987 she once again began looking in the papers and took a position as a basic skills instructor. The pay was lower and she had to start at step one.

The next to testify was Esther Kaplan who had been RIFFed in June 1984. Two months prior to that she had worked as an account manager. From April 1984 until August 1989 she was not employed as a teacher, and in September 1989 she went to the West Orange board of education. She stated she had applied to Newark but never heard from them. In September 1984 she became full time. She also applied in August 1984 to Berkeley Heights, wrote to Newark and sent an application and resume. She stated she was interviewed by the principal at Berkeley Heights.

She went to work for Paul Arnold working 35 hours per week and earned \$16,650.47 in 1986 as a bookkeeper in charge of commissions. She never used an employment agency nor applied for other teaching positions. She started out as a part time employee working approximately five hours and then went on to become a full employee on salary. She was interested in teaching positions however she liked working for Paul Arnold and wanted to keep the job. She sent a resume to East Orange but did not receive employment. She stated that she sent out resumes and applications to approximately one dozen schools but received interviews only in Berkeley Heights and Hillside. In 1984 she sent out resumes to Livingston, Caldwell, Orange, South Orange-Maplewood, Millburn and Verona. After 1984 she did not apply elsewhere since she had obtained employment at Paul Arnold and she felt she needed to be discreet in order not to lose the position that she had obtained. Before this her only teaching experience had been between 1951 and 1954.

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As indicated in the stipulations Esther Kaplan would have earned \$163,190 during the applicable time frame and her actual earnings were \$90,516.84. The amount that she is claiming therefore is \$72,673.16.

The next teacher to testify was Florence Berk who indicated she was RIFFed in June 1984 and has since acted as a substitute in West Orange as well as engaged in bedside teaching. As a substitute she stated she worked almost every day. In 1985 her gross salary was \$2,180.09. In 1986, \$13,670.18. In 1987, \$9,550.33 and in 1988, \$10,039. With respect to the period from June 1984 through August 1989 Florence Berk would have earned \$184,615 and her total actual earnings consisted of \$47,073, making her claim in this matter \$137,542.

She indicated that she never used an employment agency however she did apply to Livingston, and sent a resume as well as Millburn, Verona, the Robert Walsh Business School, the Essex County vocational schools, and the West Orange schools.

She indicated that she did not apply to Newark nor to Irvington and that the majority of her applications occurred between 1984 and 1985. In 1986 she did not make any formal applications. She did state that she had a number of interviews which included two with West Orange High School, one in Verona, two with Robert Walsh Academy and one in Millburn. She is certified in business education, social studies and typing. She stated she also applied for non-teaching positions but did not get those jobs. She also stated that after March 1985 she did not apply for non-teaching jobs.

Barbara Davis, another teacher who had been RIFFed in June 1983 testified that she became a sales manufacturer representative and worked in sales. Her earnings were as follows:

<u>Year</u>	<u>Earnings</u>
1983-84	\$5,214
1984-85	\$1,358
1985-86	\$3,530
1986-87	\$3,967
1987-88	\$4,234
1988-89	\$4,877

She stated she looked for a job but could not find one in teaching and therefore opened a jewelry business in Maplewood in the spring 1984. In January 1985 she opened a boutique. She owned the business and had to put money back into the business in order to build it up. She stated that she has a master's degree and did not use an employment agency in order to get a teaching job.

She stated that originally she applied to 31 school districts and after doing so she gave up looking for teaching positions. Initially, she stated she used a telephone book and sent out a lot of applications.

When she began her jewelry business in spring 1984 it was accomplished through house parties and she worked for Laborsetta, Charmers, Arlene Taste and also sold Mayan belts. At that time she knew that she would work on a commission only. She indicated the problem was that you couldn't interfere with "other's turf." When she was selling she worked approximately eight hours a day and went to shows in order to find out about new products. She opened a store in spring 1984 while still selling commission items. In January 1985 she had a store in Maplewood which was a boutique. She figured to move and have approximately \$25,000 by the third year. However that did not work out. Her income never went up and she continued in non-teaching position. She also added that she at no time applied to the Newark school district.

James Kreger from the West Orange board of education who has served as secretary for the last nine years testified that he supervises the business office and to his knowledge there is no restriction on any employee from seeking other employment. He is aware of teachers who have applied to other districts. He also stated that in hiring the question was not that of salary but of the ability of the particular teacher with respect to those people employed in West Orange.

The next witness was another teacher who had been RIFFed in June 1983 named Connie Afromsky. She was unemployed in July and August 1983 and in September 1983 went to work for Newark. She stated she had sent applications and finally inquired in Newark. As she put it she went to lots of schools seeking employment but picked the "best of the worst." She chose first grade and stated she was hired two days before school started. In 1987 she said there was overwhelming

even called the Newark school district but was told that there were no available openings. She stated she had applied to the West Orange board of education but never heard from them. She also called an individual in the personnel and asked that her file be reactivated but heard nothing further. She did not however send in a resume and an application. What she did send was a letter answering an ad she had seen in the Star-Ledger.

She also applied to the Montclair board of education in 1984 by sending in a resume and an application as well as the Orange board of education. In addition to these she applied to Glen Ridge, Cedar Grove, South Orange, and Irvington by way of resume and application. The rest of the school districts which she contacted were represented mostly by telephone calls to which the response there were no openings in those districts. Places which she called to determine whether or openings existed included Verona, Bloomfield, Livingston and Nutley to which she also sent an application. Additionally she called East Orange, Florham Park, Hillside, Belleville, Newark, Union, Elizabeth, Chatham and Madison to which she also sent an application.

Ms. Passner's unemployment payments ran out in 1985 and shortly thereafter in the summer she took a job at Bloomfield College. After that time she did not apply elsewhere. Additionally she indicated that she never used the services of an employment agency. The job that she did finally obtain at Bloomfield College was in the nature of a tutorial position and as a workshop assistant in the Learning Support Program which began in September 1985. Bloomfield College has an open enrollment and accepts students from urban areas. In the course of their studies they are required to read certain materials, answer certain questions and must pass English courses in order to qualify for graduation. As a result they have to come to be Learning Support Program for workshop. Additionally they appear on a voluntary basis for tutoring. Ms. Passner remained in that position until May 1989 and worked approximately eight months of the year or the extent of the college semester for each year that she worked for Bloomfield College. The work entailed approximately three days a week with varying hours depending upon the number of students that came in. It was not a full-time job.

While working for Bloomfield College Ms. Passner indicated that she did not seek employment anywhere else or do anything to secure other employment

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because she liked the job which she had. She stated she was very happy and felt that she was helping kids who really needed help.

Rosemarie Siegler testified that in June 1984 she was not technically RIFFed but instead transferred from the position which she had to that of resource room teacher. There was no difference in the salaries but she stated that she was on the wrong step in the salary guide. She never applied to other school districts and never applied for any other jobs. She indicated she was not satisfied with what she was getting but was willing to accept it and see how things went. Her status was at that time MA plus 16. She was then on step one and earned between 1984 and 1985 \$17,170. The first contract which Ms. Siegler had signed was dated July 17, 1984 and indicated a salary of \$27,220. A second contract dated August 23, 1984 indicated a corrected salary of \$17,170 on MA-3. This was corrected as being the step upon which she belonged. She stated that this did not take into account her 14 years experience and that she should in fact have earned \$188,370 without a longevity payment of \$800. She testified that within her contract longevity is accumulated at an amount of \$200 for the first year and \$600 for a subsequent year.

She indicated that she never looked at the contract carefully and supplemental instructors were apparently not under the contract of the regular teachers. She was dissatisfied with her pay but not enough so to look for another job. She stated that the amount that she have earned on the salary step which she had originally occupied minus the longevity payments was \$188,370 during the applicable time frame.

Rita Peretz testified that she was originally RIFFed in June 1983. She collected unemployment benefits for a period of 13 weeks and after that worked. She signed up with two different temporary service agencies, Cornell and Manpower and also worked for her husband when not substitute teaching or calling in for temporary services. She worked for Dentco Studios between 1986 and 1989 on a parttime basis. The services she used were Cornell which is located in Livingston and Manpower which is located in West Orange, in order to secure temporary employment. She also applied to three school districts as well as a number of nursery schools.

Those places to which she sent applications and resumes included Irvington, Bloomfield and East Orange. This was during 1983 through 1985. After 1985 she did

not continue applying for teaching jobs since she was by that time employed. After 1983 she never applied for a full-time job in Newark although she did substitute teach there. She also stated that she called other school districts but was told there were no jobs available and as a result did not send resumes to them because they had indicated that they were not hiring. She did not formally apply to South Orange-Maplewood, Caldwell, Essex Fells, Roseland, Verona, and Cedar Grove. She further stated that having been RIFFed on two separate occasions she believed that it would be in her best interest to get her office skills honed to the point that this would not happen to her again because the experiences had been extremely discouraging. In September 1989 she was offered a teaching position in West Orange which she turned down. This was due to the fact that in September 1989 she was unable to return to work due to family commitments after her mother's death a year earlier. She stated she would not be able to start until October 1989 and at that time her sister had broken both kneecaps. Other family members also experienced health problems which included a daughter who is a diabetic and was in an unstable condition during this period of time. After all of these regrettable occurrences the family took a vacation.

During 1988 and 1989 she stated that she took no full-time employment because she was obliged to take care of her ill mother. As a result of this she is not requesting money for the 1988-1989 school year which amounted to \$36,660.

She stated that she substitute taught in Newark in 1983 and 1984 as well as in Bloomfield in 1984 and 1985. She stated that she called most towns in Essex County during 1983 and 1984 and finally applied with the two agencies previously indicated. As a result of those agencies she worked as a temporary employee at Midlantic Bank as a receptionist and then worked on business accounts.

Paula Kolin testified that she was RIFFed in June 1984, and collected unemployment from a period of approximately July 1984 through December 1984. She also collected unemployment from approximately January 1985 to the end of February 1985. It was in September 1985 that she began working for her husband's accounting firm as an accountant's assistant. She also drove her husband to clients in order for him to accomplish his business after he had suffered a heart attack. She worked picking him up and dropping him off as well as sorting and filing forms and taking care of cash disbursements, banking, and photocopying. Along with these

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duties she also made runs to the post office and worked filing magazines and books. This employment was part time in nature and represented 15 to 20 hours per week.

In 1987 she worked part time in October at the Kushner Academy as a teacher. This represented approximately 10 hours per week teaching mathematics. After she had been RIFFed she applied to West Orange and sent "letters of interest" but was told that the position was filled in July 1984. She also filled out an application for Livingston, Verona, Montclair, Bloomfield and South Orange-Maplewood. None of these school districts granted her interviews. She did use an employment agency although the agency was not geared specifically to teachers. She acknowledged that she did not at any time apply to Newark because she was told that it differed with what her prior experience had been and that she might not be able to perform satisfactorily given the climate of the Newark schools. She did finally begin teaching at West Orange High School. She stated she would not have been able to work full time during 1985 because of her husband's heart attack.

She indicated that there were limited opportunities for teachers whose areas of expertise were English and social studies. She had served the West Orange school system for 17 years and had acted as president of the Supplemental Teachers Association. According to her, being RIFFed would be looked upon negatively by other school districts. She did teach at the Kushner Academy from October 1987 to June 1988 as a math instructor.

Florence Shiffman testified that she too had been RIFFed in June 1984. She stated she collected unemployment until the second week in June 1985 and that she bought a business along with her daughter. This was a gift shop and it had been purchased for her by her husband and son-in-law. This business was owned until February 1987 and was sold because it was not doing very well. During the period of time from 1985 through 1987 there was no income derived from this business and she stated she was working full time on the project. In September 1987 she obtained employment at the Joseph Kushner Hebrew Academy part time representing approximately 20 hours per week. She made this application while she was collecting unemployment. She did not continue to apply for teaching positions once she and her daughter had the shop since she considered that to be her employment. She did indicate that in 1984 she applied for full time positions with Montclair,

Verona and Bloomfield College. She did not, however, apply in Newark because she did not feel she could cope with the high school atmosphere in Newark.

She did not apply to East Orange, Orange, Cedar Grove, Livingston, Irvington, South Orange-Maplewood, Belleville, Nutley, Glen Ridge, Caldwell, and Little Falls. She stated that once she had the business she no longer intended to pursue teaching, but that prior to opening the business she had no experience in running any form of business. It was originally called "The Party Place." She worked as previously indicated for the Joseph Kushner Academy and in November 1987 became ill and had to resign. From 1987 to 1988 she could not have worked full time because of health conditions. She did, however, return to the Kushner Academy for the 1988-1989 school year. After being RIFFed she did not at any time use an employment agency and in September 1989 refused a full time position in West Orange. She could have however worked full time in 1988-1989 but could not have worked full time for health reasons during the 1987-1988 school year.

In this case the underlying facts are not in dispute but what remains in dispute is whether or not the facts as elicited through the testimony substantiates sufficient mitigation of damages on the part of the 13 supplemental teachers. In addition to the stipulations of fact and the testimony above I also FIND that:

1. Edith Ratner should have earned \$164,180.
2. Rosemarie Siegler should have earned \$188,370.

Since the underlying facts are not in substantial dispute but merely the interpretation of the facts as to whether or not they constitute mitigation I therefore FIND in addition to the stipulations of fact entered into by the parties the above narrative of the testimony to constitute the operational facts of this case.

LEGAL ARGUMENT

I. Damages

On the basis of the Appellate Decision it has been determined that the supplemental instructors are entitled to compensation to back pay minus any actual

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earnings in mitigation of damages. The question which presents itself on both sides is what constitute adequate mitigation. It is the contention of respondent, the West Orange Board of Education, that the 13 individual teachers failed to fully and properly mitigate their damages for the period subsequent to their having been RIFFed and prior to their reinstatement. Following that position is the theory that they espouse claiming that any awards which might be given to the teachers must be reduced on the basis of their failure to fully and properly mitigate their damages.

The petitioners' position on this is that mitigation certainly an element which must be considered, however, petitioners' claim that every effort must be made to reasonably and fully mitigate damages and therefore the individual teachers are entitled to the difference between the amount which they would have made during the period in which they were RIFFed and the amount that they actually earned while mitigating their damages to the best of their ability working either for other school districts or in private enterprise.

The only real question is which if any, standard can be applied in order to determine what constitutes "adequate mitigation" for the purposes of recovering lost earnings. Although the issue of "adequate mitigation" appears in a number of contexts, an actual definition for it is not found specifically as having been addressed by the New Jersey courts. It is instead that the New Jersey courts apply the well established and long accepted common-law principle of mitigation of damages by an employee. It should be noted that some cases dealing with mitigation deal with other than individual employees such as businesses or corporations.

The general application of the common-law definition of mitigation is found in *Associated Metal, etc., Corp., v. Dickson Chemical, etc.*, 82 N.J. Super. 281 (App. Div. 1964). This case involved a claim of nuisance and applied the common-law definition of mitigation of damages. In this case the court held

"Were this a negligence case (and it is not) even the rule that a plaintiff must attempt to mitigate damages does not require extraordinary or impractical efforts to do so. Reasonable diligence and ordinary care are all that is required of him (15 AM. Jour. Damages (§28, p. 424, 1938). We see no merit in the "avoidable consequences" argument." *Id.* at 307.

The *Associated Metal* case clearly shows that it is required that an individual mitigate his or her damages but in order to do so it is only reasonable efforts which must be made and not those which are extraordinary or impractical for the individual. Turning perhaps to an even more simple source for a workable definition of mitigation of damages is that which is found in Black's Law Dictionary which states as follows:

Mitigation of damages:

"Doctrine of mitigation of damages," sometimes called doctrine of avoidable consequences, imposes on injured party a duty to exercise reasonable diligence and ordinary care in attempting to minimize his damages after injury has been inflicted and care and diligence required of him is the same as that which would be used by a man of ordinary prudence under like circumstances. (Fifth Ed. 1979).

Other cases which have dealt with adequate mitigation have liberally construed that to mean a "honest attempt" to mitigate the damages. *Larkin v. Hecksher*, 51 N.J.L. 133 (Sup. Ct. 1888); *Accord Moore v. Central Foundry Co.*, 68 N.J.L. 14 (Sup. Ct. 1902).

In a case where a wrongfully discharged employee had unsuccessfully attempted self-employment instead of seeking another job the court found for the unemployed worker and held that one did not have to become employed by another person, but did have to make a bona fide effort to employ his time profitably in order to be allowed to recover full damages for the breach. *Passino v. Brady Co.*, 83 N.J.L. 419, 422 (Sup. Ct. 1912). As a result, clearly the definition of mitigation includes any reasonable, honest and bona fide effort to obtain employment whether or not in precisely the same field or deviating into a different field, whether self-employed by another.

More recently in *Roselle v. LaFera Contracting Co.*, 18 N.J. Super. 19 (Ch. Div. 1952), the court held:

As stated by the Court of Errors and Appeals of Maryland in *Atholwood Development Co. v. Houston*, 19 A. 2d 706 (Ct. App. 1941): "the measure of damages in an action for wrongful discharge is prima facie the

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employee's salary for the remainder of the period of employment. But the employer may undertake to mitigate the damages by showing that the employee has earned wages from other employment, or that he could have secured other employment by using proper effort." *Id.* at 28.

The court in *Roselle* also considered other factors in applying mitigation doctrine. For instance the court considered availability of similar employment, among other things:

The record in the case at bar is barren of any proof by the defendants that under the circumstances involved, the particular type and age of the employee and the available sources of similar employment as a superintendent, that the plaintiff did secure other employment or could reasonably have secured other employment. *Id.* at 28.

Other matters which are relevant to the case at hand are also addressed in *Roselle*. The discussion of the employee's duty to mitigate centers around the ultimate issue of the extent of any recovery. Where the breaching employer claims that the amount of damages should be decreased, "the burden of proving facts in mitigation of damages rests with him." *Roselle* at 28. Further, "when there is no showing by the employer that the employee obtained other employment or could have done so by the exercise of diligence the measure of damages is the contract price." 44 ALR 3d 639.

In addition to normal salary and increases to which an employee would have received had he or she not been discharged there is also the question as to whether or not a back pay award is to be decreased by the amount of any welfare grants which might have been received or by any unemployment compensation received. Any award of back pay would be required to be decreased by the amount of any welfare grant received by the individual according to *Newark v. Copeland*, 171 N.J. Super. 571 (App. Div. 1980). With respect however to unemployment compensation, this would not constitute an amount by which a back pay award would be decreased. *Sporn v. Celebrity, Inc.*, 129 N.J. Super. 449 (L. Div. 1974).

Along with the general principles that have been enunciated in this discussion the New Jersey Supreme Court also noted that there has been widespread acceptance throughout the country that "a public employee's claim for back pay may justly be subjected to mitigation in the amount the employee actually earned or could have earned." *Miele v. McGuire* (31 N.J. 339, 350 1960). This shows clearly that the amount of an award to an employee who has been improperly discharged is not automatically subject to mitigation in the amount the employee actually earned but also is subject to mitigation by an amount which could have been earned by that employee.

N.J.S.A. 18A:6-30 provides in pertinent part that any person holding office, position of employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause. . . . In the present case, it would appear that the common-law application of mitigation of damages applies to *N.J.S.A. 18A:6-30*. The Appellate Division addressed this question of whether the doctrine of mitigation was applicable to the predecessor statute which was *N.J.S.A. 18:5-49.1*. This predecessor statute was similar in all relevant aspects to *N.J.S.A. 18A:6-30*. The issue was whether a person holding a position with a local board of education was entitled to full payment of salary for the entire period of an illegal dismissal without mitigation under the predecessor statute. The court found that the Legislature had intended that "all claims made by illegally dismissed persons under *N.J.S.A. 18:5-49.1* be subject to the common-law rule of mitigation of damages." *Mullen v. Board of Education of Jefferson Township*, 81 N.J. Super., 151 (App. Div. 1963). The court in this case based its finding on the common-law principles enunciated in *Miele* (supra).

II. Pre- and Post Judgment Interest.

In this case there has been a request for pre- and post judgment interest on the part of the supplemental teachers. Awards of pre and post judgment interest in education cases may be obtained pursuant to *N.J.A.C. 6:24-1.18*. This states that when a petitioner has sought relief and successfully established a claim to a monetary award the Commissioner may award both pre-judgment and/or post-

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judgment interest. If the claim is successful this regulation also lists the criteria which shall be applied when awarding interest. It states as follows:

1. Pre-judgment interest shall be awarded by the Commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.
2. Post-judgment interest shall be awarded when a respondent has been determined through adjudication to be responsible for such payment, the precise of such claim has been established and the party responsible for the payment of the judgment has neither applied for nor obtained a stay of the decision but has failed to satisfy the claim within 60 days of its award. *N.J.A.C. 6:24-1.18(c)1 and 2.*

In the matter at hand, there has been no showing of bad faith as a result of respondent's denial of petitioners' claim or a deliberate violation of a statute or rule. The denial of the back pay award on the part of respondent was predicated at this juncture of the proceeding upon a dispute over what the precise amount of the back pay should have been with regard to the mitigated damages for each of the supplemental teachers. As a result, I **CONCLUDE** that no evidence has been elicited which fulfills the criteria necessary for an award of pre- and/or post-judgment interest in this case.

III. Attorneys' Fees

Counsel for petitioners has requested an award of attorneys' fees in this matter. Attorneys' fees may be granted pursuant to N.J. Court Rule 4:42-9 in certain actions. In addition to those situations that are outlined in the rule attorneys' fees may also be granted when specifically authorized by statute or regulation. In situations where no specific rule or statute authorizing an award of attorneys' fees exist they are inappropriate. *Perrella v. Board of Education of Jersey City*, 51 N.J. 323, 343-344 (1968). This case denied counsel's fees to a public employee held to be improperly discharged even where his entire back pay was awarded without mitigation.

It is important to note in passing that although attorneys' fees are not appropriate in this case as there is no specific rule or statute providing for them, even had they been appropriate, no affidavit of service addressing the services rendered, any itemization of disbursements or other fees was submitted in this case. Under N.J. Court Rule 4:42-9(b) a requirement exists for enumeration of any and all fees and disbursements. This was not submitted in this case.

CONCLUSIONS

Based upon the Findings of Fact as well as the stipulated facts and applying those to the standard of mitigation in this case, I **CONCLUDE** the following:

1. With respect to Shirley Blank, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result I **CONCLUDE** that Shirley Blank is entitled to an award for back pay of \$151,061.
2. With respect to Marcia Grossman, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$96,748.
3. With respect to Rita Zimring, I **FIND** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$116,983.
4. With respect to Esther Kaplan, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$72,673.16.
5. With respect to Florence Berk, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$137,542.

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6. With respect to Barbara Davis, I **FIND** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that Barbara Davis is entitled to an award for back pay of \$188,491.
7. With respect to Constance Afronsky, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that Barbara Davis is entitled to an award for back pay of \$50,645.
8. With respect to Edith Ratner, I **CONCLUDE** based upon the testimony that during the pertinent period of time she would actually have earned \$164,180. I also **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby have mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$107,678.
9. With respect to Doris Passner, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$150,860.
10. With respect to Rosemarie Ziegler, I **CONCLUDE** that during the pertinent period of time she would have actually earned \$188,370. Based upon her testimony that she did not seek other employment but took a lower paying job and was content with that job, I **CONCLUDE** that she did not make reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigate any damages in this case. As a result, I **CONCLUDE** that Rosemarie Ziegler is not entitled to any award for back pay.
11. With respect to Rita Peretz, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$152,810.

12. With respect to Paula Kolin, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$147,222.
13. With respect to Florence Shifman, I **CONCLUDE** that she has made reasonable and diligent efforts in an honest attempt to gain employment and thereby mitigated any damages in this case. As a result, I **CONCLUDE** that she is entitled to an award for back pay of \$146,248.

Additionally, I **CONCLUDE** based upon the foregoing legal discussion that pre- and post-judgment interest are not appropriate in this case nor is an award for attorneys' fees.

I further **CONCLUDE** that unreimbursed medical and dental expenses were specifically excluded from this case by reason of the Appellate Division decision and therefore are not appropriate for consideration.

ORDER

Based upon the foregoing, it is hereby **ORDERED** that the West Orange Board of Education (respondent) pay the following awards:

1.	Shirley Blank	\$151,061
2.	Marsha Grossman	\$96,748
3.	Rita Zimring	\$116,983
4.	Esther Kaplan	\$72,673.16
5.	Florence Berk	\$137,542
6.	Barbara Davis	\$188,491
7.	Constance Afromsky	\$50,645
8.	Edith Ratner	\$107,678
9.	Doris Passner	\$150,860
10.	Rosemarie Ziegler	0
11.	Rita Peretz	\$152,801
12.	Paula Kolin	\$147,222
13.	Florence Shifman	\$146,248

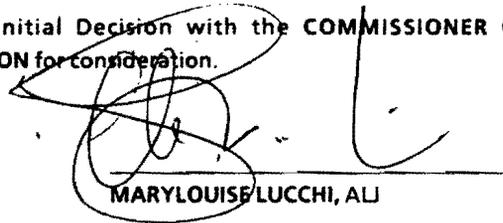
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It is further ORDERED that petitioner's request for pre- and post-judgment interest, attorneys' fees and unreimbursed medical and dental expenses be and hereby is DENIED.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If any party disagrees with this recommended decision, that party may file, within thirteen (13) days from the date on which this decision was mailed to the parties, written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

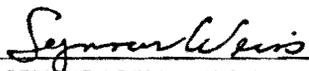
I hereby FILE this Initial Decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

10/12/90
Date


MARYLOUISE LUCCHI, ALJ

Receipt Acknowledged:

10/16/90
Date


DEPARTMENT OF EDUCATION

Mailed to Parties:

Oct. 18, 1990
Date
am


OFFICE OF ADMINISTRATIVE LAW

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WITNESSES

For petitioners:

Shirley Blank
Marcia Grossman
Rita Zimring
Florence Berk
Esther Kaplan
Barbara Davis
Constance Afromsky
Doris Passner
Edith Ratner
Rosemarie Siegler
James Kreger
Ms. Solomon

For respondent:

Dr. Kenneth King
Dr. Eugene Alexander

EVIDENCE

- P-1 Letter from Dorothy Banyas to Rita Zimring dated November 10, 1987
P-2 Letter dated June 23, 1988 to Dr. David Sousa
P-3 Document "Terms of Agreement"
P-4 Contract Rosemarie Siegler, 7/17/84 (ID only)
P-5 Contract Siegler, 8/23/84 (ID only)
P-6Ev. Letter dated 8/17/84 from James J. Krieger
- R-1 East Orange school district letter dated May 24, 1990 from Kenneth King
R-2 GA Agency Corp Chart Available Job '83-89
R-3 GA Agency # of teachers placed by discipline
R-4 "Applications for help" 36 pages
R-5 Teacher Vacancies 83-89 Livingston
R-6 Teacher Vacancies 83-89 Millburn

- R-7 Teacher Vacancies 83-89 South Orange-Maplewood
- R-8 Teacher Vacancies 83-89 Montclair
- R-9 Teacher Vacancies 83-89 Cedar Grove
- R-10 Newark Star-Ledger newspaper teaching positions June 1-8, 1989
- R-11 p. 46 beginning w/question 76
- R-12 p. 47 (F)
- R-13 p. 14 starting question 25, 26 & 27 I
- R-14 (a) p. 86 question 141
(b) 142 (a) to (k)
(c) 142 (a) to (k) cont.
- R-15 p. 62 question #102
- R-16 P. 78 question 128
- R-17 (a) p. 6 question 12
(b) (2) 13(a)
(c) (3) Mountain Lakes
- R-18 (a) page question 167
(b) Rita Peretz - page continued 168
- R-19Ev. p. 94 question 154
- R-20 (a) Letter to Mr. Star dated 8/19/89
(b) Letter to Mr. Star dated 9/5/89
- R-21 p. 22 starting question 38
- R-22 Letter from Lynn Antonacci dated June 11, 1990

- J-1 Teacher List date of RIF and Certification
- J-2 Supplemental Teachers Salary Guide. Date of hire and date of RIF
- J-3 Stipulations
- J-4 Stipulations

Stipulated Exhibits:

- A Supplemental Teachers Salary Guide
- B Agreement between West Orange Education Association and the West Orange Board of Education, 83-85
- C Memorandum of Agreement between the Board of Education of the Township of West Orange and the West Orange Education dated October 13, 1987
- D Agreement between West Orange Board of Education and the West Orange Education Association, 87-90
- E Letter from Barbara Davis dated August 7, 1989 to Mr. Star
- F Letter from Edith Ratner re: West Orange Supplemental Instructors Assoc. vs. Board of Education of the Township of West Orange, Essex County
- G Earnings record, Doris L. Passner
- H Earnings record, Shirley Blank
- I Earnings record, Esther Kaplan
- J Earnings record, Florence Shifman
- K Earnings record, Constance Afromsky
- L Earnings record, Rita Peretz
- M Earnings record, Florence Berk
- N Earnings record, Rita Zimring
- O Earnings record, Marcia Grossman
- P Earnings record, Paula T. Kolin
- Q Earnings record, Rosemarie Ziegler

WEST ORANGE SUPPLEMENTAL	:	
INSTRUCTORS ASSOCIATION <u>ET AL.</u> ,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF WEST ORANGE, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. The "supplement" to the Board's exceptions was not timely filed pursuant to that regulation. The parties' exceptions are summarized below.

I. PETITIONERS' EXCEPTIONS

Petitioners except to the ALJ's conclusion that Rosemarie Siegler was not entitled to any award of back pay because she did not make reasonable and diligent efforts to gain employment and thereby mitigate any damages in this case. They urge that she should not be disqualified from her award just because she was hired by the West Orange Board of Education, and not another district. As to this, petitioners aver that it was reasonable for Ms. Siegler to take the resource room position offered by the Board upon her being rified from her supplemental position and not to look elsewhere for

a position. Such acceptance of the position offered by the Board demonstrates that she did mitigate her damages. (Petitioners' Exceptions, at p. 2)

Petitioners also except to the ALJ's determination to deny their motion for reimbursement for uncompensated medical and dental expenses they incurred. They rely on the arguments submitted in their July 2, 1990 Proposed Findings of Fact and Conclusions of Law, in particular Point IV which argues that the Appellate Court in deciding petitioners' entitlements in this matter should have ruled that they be reimbursed for unrecompensed medical and dental expenses. (Id.)

Petitioners' third exception points out a typographical error on page 5 of the initial decision wherein the name of Shirley Blank is listed rather than that of Paula Kolin. Petitioners are correct with respect to this typographical error which is corrected herein.

In addition to the above, petitioners object to the ALJ's denial of pre- and post-judgment interest and the fact that she did not increase their award of back pay by the amount that each received through unemployment compensation, given that the ALJ ruled that unemployment compensation would not constitute an amount by which back pay would be decreased.

Before addressing the Board's exceptions, the Commissioner will render his decision with respect to petitioners' exceptions. As to Rosemarie Siegler, the Commissioner is in agreement with petitioners that the ALJ erred in determining that Ms. Siegler had no entitlement to an award of back pay because she did not attempt

to get a job in another district upon her assignment to a position as resource room teacher in the West Orange School District following the reduction of force which eliminated her supplemental teacher position.

Had petitioner refused to accept or had she resigned from a teaching position following the reduction in force, she would have forfeited her tenure rights and therefore any entitlements for back pay and emoluments. See Misek v. Board of Education of the Township of Willingboro, Docket #A-4913-79 (App. Div. May 7, 1981) and the State Board of Education decision in Irene Bartz v. Board of Education of the Township of Greenbrook, August 7, 1987. Further, when petitioner became a resource teacher, she had a statutory entitlement to suffer no reduction in salary since she was a tenured teacher. N.J.S.A. 18A:28-5 (See also the State Board of Education decision in Hamilton Township Supplemental Teacher's Association et al. v. Board of Education of Hamilton Township, decided September 3, 1986, Slip Opinion, at p. 15.) Accordingly, the ALJ's determination denying Ms. Siegler's claim for back pay is not adopted by the Commissioner.

With respect to the medical and dental reimbursement issue, the Commissioner is in complete agreement with the ALJ that the medical and dental reimbursement sought by petitioners was excluded by the Appellate Division when affirming the decision of the State Board of Education relative to the types of entitlements owing the petitioners in this matter. Therefore, petitioners' arguments regarding this issue are deemed unpersuasive.

Upon review of petitioners' position regarding pre- and post-judgment interest, the Commissioner affirms the findings and conclusions of the ALJ that there has been no showing that the criteria for the award of such interest contained in N.J.A.C. 6:24-1.18(c)1 and 2 have been met.

Further, upon review of the record and careful consideration of the arguments of the parties with respect to the issue of whether the sum received for unemployment benefits should be deducted from any back pay award ordered for petitioners, the Commissioner determines that such sum shall be deducted. The Commissioner has previously considered and rejected the applicability of Sporn, supra, to back pay awards of teaching staff members employed by public schools in Ujhely v. Board of Education of the City of Linden, 1985 S.L.D. 1329. In the Sporn matter the Law Division Court dealt with a private employer, whereas Ujhely dealt with the issue of mitigation of damages in the public sector. In the Ujhely case, the Commissioner agreed with the Board's argument that the general public would pay twice if the sum of unemployment compensation were not deducted from a back pay award to a public employee. Moreover, subsequent to the Sporn decision, the Appellate Court in Willis v. Dyer, 163 N.J. Super. 152 (App. Div. 1978) allowed a public employer to deduct the sum of unemployment benefits from the plaintiff's back pay award. It stated:

We are satisfied that plaintiff is entitled to a back pay award for the period during which he normally would have been reinstated -- April 19, 1976 through December 31, 1976 -- less such amounts as he received as unemployment compensation during that period.

Although the unemployment compensation benefits plaintiff received are to be deducted by the township from the back pay due him, and in that sense "mitigates" that award, such benefits are not the kind of mitigation contemplated by law which would permit consideration of the allowance of counsel fees in connection with the proceedings below. See Perrella v. Jersey City Bd. of Ed., 51 N.J. 323, 343-344 (1968); Golaine v. Cardinale, 142 N.J. Super. 385, 402-404 (Law Div. 1976). Unlike earnings from other employment, the unemployment compensation benefits received by plaintiff during the period that he is awarded back pay are recoverable by the State from him, or where, as here, they are deducted from the award, from the township. Labor and Industry Dept. v. Smalls, 153 N.J. Super. 411 (App. Div. 1977); Caldwell v. Disability Insurance Div., 145 N.J. Super. 206 (App. Div. 1976).*** (163 N.J. Super. at 164-165)

II. BOARD'S EXCEPTIONS

Initially, the Board excepts to the statement on page 5 of the initial decision which indicates that Rita Peretz is claiming \$152,810 in back pay. It points to Ms. Peretz's admission on the record that she was unavailable for full-time employment during the 1988-89 school year due to her mother's illness and that she was not requesting money for that school year. See page 16 of the initial decision, the amended stipulation of facts (Exhibit J-4, at p. 2) and Peretz's testimony (T 6/7/90 at 28). It is, therefore, the Board's position that the ALJ erred in not reducing Peretz's claim for back pay by the amount she would have earned during the 1988-89 school year, \$36,660.

Upon review of this exception, the Commissioner determines that an error was made by the ALJ and Peretz's back pay claim is not \$152,810 but \$116,150. See Exhibit J-4, p. 2.

The Board strenuously objects to the ALJ's conclusion that 12 of the 13 petitioners made reasonable and diligent efforts to

mitigate their damages against the Board. It cites, inter alia, a 1981 New Jersey Supreme Court decision which addressed the issue of mitigation, stating:

In order to invoke mitigation there must, of course, be available jobs. In their absence, mitigation is not feasible. Further, if positions are available, mitigation will apply if the claimant has not made a reasonable and diligent effort to obtain other employment. Goodman v. London Metals Exchange, Inc., 86 N.J. 19, at 36 (1981).

It is the Board's position that it presented ample evidence of the availability of full-time teaching positions in Essex County and contiguous area during the period under dispute in this matter, 1983-1989. As to this it states:

***It was also elicited from petitioners' own testimony that they, for the most part, never even applied for those positions. Instead, petitioners appeared content to engage in part-time or substitute teaching, or work for their husbands, or operate small businesses from which they derived little or no income. They clearly failed to make reasonable and diligent effort to mitigate.

(Board's Exceptions, at pp. 3-4)

The Board's exceptions set forth a lengthy recapitulation of the testimony of its witnesses regarding the availability of jobs during the period 1983-1989 and cite documentation from the transcripts of the proceedings and the initial decision to support that the ALJ erred in determining that 12 of the petitioners had mitigated their damages for back pay. (Id., at pp. 2-15)

In summary, the Board urges that

***Clearly, based on the above, petitioners made varying efforts to mitigate their damages. Most of the petitioners failed to apply to many of the local school districts (most notably Newark and East Orange). Because of the size of the Newark and East Orange districts, and because of their

proximity to West Orange, it would be logical that any "reasonable and diligent" job search would include applications to them. Also, teaching salaries offered in those districts are comparable to salaries with respondent. If petitioners choose not to pursue work in a particular school district because it is urban or because it is supposedly unsafe, that is their prerogative. However, respondent should not be obligated to compensate petitioners for their selectivity.

It appears from all the testimony and evidence produced at hearing that petitioners, excepting Grossman and Afromsky (the single parents), were content to mostly work part-time, as they had during their days of supplemental teaching. How else can it be explained that 7 of the petitioners (Kolin, Zimring, Davis, Berk, Peretz, Blank and Passner), over six years, failed to secure full-time employment of any nature at any time?

Almost all of the petitioners discontinued their employment searches within a year after their "rifs," about the same time their unemployment compensation expired. Respondent should, therefore, not be ordered to pay petitioners for the period subsequent to the dates on which petitioners ceased seeking full-time work.

By any measure, how can it be said that, for a six year period, 12 of the 13 petitioners fairly and honestly mitigated their damages? How can it be ruled that they made a "bona fide" effort to acquire full-time employment? (Id., at pp. 15-16)

The Board also argues that the ALJ erred in her reliance on Roselle, supra, to determine that the 12 petitioners made diligent efforts to mitigate. It urges that the Court in Roselle found that the defendants failed to provide any proof of available sources of similar employment and consequently it could be determined that the plaintiff had put forth a reasonable effort to secure other employment. As to this, the Board reiterates that it has produced ample proof of availability of full-time teaching positions in the

area of West Orange which paid comparable salaries and which petitioners did not pursue with proper diligence. (Id.)

Upon an extremely careful and thorough review of the record in this matter, the Commissioner is in agreement with the ALJ's analysis of the case law on mitigation which indicates that (1) an individual must exercise reasonable diligence and ordinary care to mitigate damages, Associated Metal, supra; (2) honest attempts to mitigate should be liberally construed; (3) the burden of the facts in mitigation of damages rests with the breaching employer, Roselle, supra; and (4) the amount of an award to a wrongfully discharged employee is also subject to mitigation by the amount which could have been earned by the employee, Miele, supra. (Initial Decision, at pp. 20-22)

The Commissioner does not, however, agree with the ALJ's apparent reliance on Passino, supra, 1912 New Jersey Supreme Court case, and her conclusion that any reasonable, bona fide effort to obtain employment, whether self-employed or employed by another, is sufficient to demonstrate that one has mitigated damages without citation and careful consideration of a far more current and definitive discussion of the issue of mitigation by the New Jersey Supreme Court articulated in Goodman v. London Metals Exchange, Inc., 86 N.J. 19 (1981). That decision states, inter alia, that:

Mitigation depends upon the facts of the case. If the claimant has actually obtained other employment, it is simple enough to credit the employer with the amount of those earnings. Beyond that, there are several complications. In order to invoke mitigation there must, of course, be available jobs. In their absence, mitigation is not feasible. Further, if positions are available, mitigation will apply if the claimant has not made a reasonable and diligent effort to obtain other employment. It is possible that

even though such an effort was made, the claimant may not have been successful finding work. In that situation mitigation would not be appropriate.

Another factor which must be considered is the nature of the other positions available. It has been held in a breach of employment contract context that mitigation depends on the time lost "before similar employment can be obtained by using proper diligence." Larkin v. Hecksher, 51 N.J.L. at 138; Annotation, "Nature of alternative employment which employee must accept to minimize damages for wrongful discharge," 44 A.L.R. 3d 629, 641-643 (1972). Similar employment refers to the nature of the activity, location and rate of compensation.

The first characteristic, the nature of the work, involves flexibility. Professor Corbin in his treatise on contracts recites:

The employee, instead of remaining idle, is expected to get other service of a like character if he can do so by making a reasonable amount of effort. [5 A. Corbin, Corbin on Contracts sec. 1095 at 516 (1964); emphasis supplied]

What employment is "of a like character" should be determined by analyzing the particular responsibilities and skills of the job the person was denied.*** Employment which is unsuitable and demeaning when compared with the job to which the individual was entitled is not comparable. Furthermore, in addition to the nature of the work, comparability of job location and amount of pay may be considered as well. Thus it may be unreasonable to apply mitigation principles when the available job would require the applicant to move his home or to accept a substantial reduction in pay.

An analogous situation exists under New Jersey's Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq., which provides that a claimant is disqualified for unemployment benefits if he does not accept available suitable work.***

However, the degree of comparability required is not static. With the passage of time circum-

stances may dictate that the claimant lower his sights and accept employment with lower pay, with different work, or at a more distant location.

If, after a reasonable amount of time, an employee has been unable to secure closely comparable employment, available employment may be determined by expanding the type of service sought, provided he is suited, or by reducing the salary demanded, or by enlarging the geographical area in which the individual should accept employment. The lower sights principle, however, should not be automatically applied. Its applicability depends not only on the passage of a reasonable period of time, but also on the circumstances peculiar to the individual involved. These circumstances include the other skills or qualifications possessed by the applicant and whether the employee's family status reasonably justifies enlarging the work locale. Other considerations are the amount of the salary reduction, the type of alternative employment, and the impact these factors may have on the individual's future. The lower sights principle is to be applied with caution -- for measured against the policy of promoting production and employment is the counter policy of righting the wrong attributable to an unlawful discrimination³.***

³ We note that an employee who lowers his sights too soon by accepting lower paying work may be subject to a reduction in an amount equivalent to that which he should have accepted. See NLRB v. Madison Courier, Inc., 472 F.2d 1307 (D.C.Cir.1972), on remand 202 NLRB 115 (1973), enforcement den. 505 F.2d 391 (D.C.Cir.1974). In this regard, courts should be particularly careful to resolve doubts in favor of the employee. (emphasis supplied)
(86 N.J. at 36-40)

The court further elaborated on the issue of mitigation to include the standard of review to be employed.

Mitigation, including the lower sights principle, is an affirmative defense and the burden of proving the appropriateness of its application

rests on the wrongdoer, in this case the employer.*** Sandler v. Lawn-A-Mat Chemical & Equipment Corp., 141 N.J. Super. 437, 455 (App. Div. 1976), certif. den. 71 N.J. 503 (1976); Roselle v. La Fera Contracting Co., 18 N.J. Super. 19, 28 (Ch. Div. 1952); 5 A. Corbin, Corbin on Contracts sec. 1039 at 251 (1964). Cf. Sommer v. Kridel, 74 N.J. 446, 457(1977) (burden on landlord to prove he exercised reasonable diligence in attempting to re-let premises). The employer may establish a prima facie case by first showing that comparable employment opportunities were available and, if the lower sights doctrine is applicable, that there were other suitable jobs. The burden of going forward would then shift to the employee who may introduce evidence that comparable employment did not exist, that reasonable and diligent efforts on his part had not been successful, or that the circumstances did not justify acceptance of a dissimilar job. Whether the individual sought a job or not would be irrelevant in the absence of the existence of a position. Contra, NLRB v. Madison Courier, 472 F.2d 1307, 1319 (D.C. Cir. 1972), on remand 202 NLRB 115 (1973), enforcement den. 505 F. 2d 391 (D.C. Cir 1974); Falls Stamping & Welding Co. v. International Union, 485 F.Supp. 1097, 1145 (N.D. Ohio 1979). So, if the proofs show that jobs were not available, mitigation would not be in order. Assuming jobs were available, if the complainant had unsuccessfully expended reasonable efforts and lowered his sights, if appropriate, no reduction in the back pay award would be warranted. The ultimate burden of persuasion rests on the employer.*** (emphasis supplied) (Id., at 40-41)

The Commissioner addressed the issue of mitigation in Zielinski v. Board of Education of Guttenberg, 1981 S.L.D. 759, aff'd State Board 1982 S.L.D. 1600 wherein it was determined that the petitioner engaged in efforts to mitigate damages by seeking teaching positions in the first two years of her wrongful dismissal but not the third year. It was thus determined that efforts to mitigate had to occur with each new school year. This is to be expected because new vacancies rise each new school year.

Thorough examination of the record clearly supports that the Board has established a prima facie case that there were ample comparable employment opportunities in the Essex County area. For example, the testimony of Dr. King (T6/4/90 at 11-12) indicates that there were available hundreds of elementary teaching positions, 73 secondary positions, and 25 special education during the disputed period herein, the 1983-84 school year through the 1988-89 school year. See also Exhibit R-22. In Newark, where figures were available for only three of those school years, 1986-87 through 1988-89, there were nearly 200 elementary and 66 special education positions available. (Exhibit R-22) Moreover, the testimony of one of the petitioners, Constance Afromsky, relates how she walked into the personnel office of the Newark School District two days prior to the opening of schools in September 1983 and was handed a list of "a lot" of schools with openings for full-time elementary teachers. She secured an elementary teaching position immediately. (T6/6/90 at 13-16)

The testimony and exhibits offered by Dr. Alexander, the owner of a teacher employment agency, and Irma Solomon, the Board's assistant school business administrator who gathered additional data on available teaching opportunities in the geographic area, also are supportive of the Board's claim that there were comparable positions available during the disputed period. (T6/4/90 at 20-34, 59-72; Exhibits R-2 to R-8)

The next question to be answered is whether or not petitioner undertook reasonable, diligent efforts to secure available comparable teaching position throughout the duration of

the wrongful dismissal and not just during the period that unemployment compensation was being received. The Commissioner is in agreement with the ALJ that Petitioners Marcia Grossman and Constance Afromsky demonstrated appropriate mitigation of damages in that each obtained comparable employment during the disputed period. So too has Rosemarie Siegler for reasons stated above. Rita Zimring also has demonstrated proper mitigation. Upon being rified from her supplemental position in June 1983, Zimring remained in the employ of the Board as a part-time teaching staff member until 1987. Had she refused the position or resigned from same, she would have jeopardized her tenure rights and back pay award as set forth in Bartz, supra. Upon being rified again in 1987, she secured a position in East Orange with the Essex County Educational Services Commission. Each of the remaining petitioners shall be discussed below.

Shirley Blank was rified in June 1984. She possesses certification as an elementary teacher and teacher of the handicapped, the latter of which she acquired after being rified. The record supports that Blank engaged in some efforts to secure comparable employment through her period of unemployment compensation, June 1984 - January 1985. She testified that she made formal applications to school districts only during 1984 and 1985. (T6/4/90, at 100-101) Her testimony indicates that she applied to 8 of the 21 districts in Essex County. (Id., at 90-91) These districts did not include inner city school districts or districts that she deemed not appropriate to her suburban experience. (Id., at 95-98) She acquired a part-time position in November 1985 in the

Montclair School District as a resource room and supplemental teacher which she held until June 1987. During the five years of wrongful dismissal, Blank had an average annual salary of \$6,910 (Exhibit J-3). In 1988 she earned approximately \$90 and \$144 in 1989. (Id., at 83-84)

Upon careful consideration of the record with respect to Shirley Blank's circumstances, the Commissioner rejects the ALJ's conclusion that Blank exercised reasonable and diligent effort to obtain employment comparable to the position she held in West Orange. Initially, it is stressed that she limited her inquiry to only sufficiently suburban districts. This does not constitute a reasonable and diligent effort to pursue available comparable positions. The fact that she accepted in November 1985 part-time work, in the face of a record which amply supports the availability of employment comparable to that which she held in West Orange, does not support reasonable, diligent effort to mitigate her damages such that her back pay award should not be reduced. Moreover, her efforts to mitigate damages after leaving her part-time Montclair position were patently unreasonable and totally lacking in diligence. (Id., at 100-101)

Accordingly, it is determined that Shirley Blank failed in her responsibility to mitigate damages and therefore she is entitled to back pay from June 1984 to November 1985 only.

Esther Kaplan was rified from her teaching position in June 1984. She is certified in the elementary, business and social studies areas. She unsuccessfully sought employment in nine districts in the area during the summer of 1984 including urban

school districts such as Newark, East Orange and Orange. She acquired a position as an accounting clerk in private industry in the fall of 1984 and remained in such employment until reinstated to a teaching position in West Orange in September 1989. During the five-year period she did not pursue employment in school districts because she did not want to jeopardize the position she held. She earned \$90,516 during her five years of employment as an accounting clerk for a yearly average of \$18,103.

Upon review of Kaplan's circumstances, it is determined that she made reasonable, diligent effort to mitigate her damages. Her average annual salary was more than the amount that the Board accorded to Rosemarie Siegler for full-time, teaching employment in the district in 1984. Further, that annual average is deemed sufficiently comparable to the mandated minimum teacher salary enacted by the Legislature in 1986 (\$18,500) to warrant a determination that she properly mitigated her damages through the attainment of comparable, though different employment.

Florence Berk was also rified in June 1984. She is certified as an elementary teacher, business teacher and social studies teacher. Her testimony indicates that she engaged in what she considered to be a "massive mailing" to districts and formally applied to six districts during the period of June 1984 - March 1985 when her unemployment compensation ran out. Commencing in March 1985 she became a substitute teacher in West Orange until reinstated to a full-time position in 1989. During that period she applied for full-time teaching employment only in West Orange. She did not apply to Newark as her experience was suburban. During the

five-year period she earned \$47,073. (T6/5/90, at 112-140; Ex. J-3) The ALJ awarded her \$137,542 in back pay.

Upon consideration of Berk's circumstance, it is determined that she failed to engage in reasonable, diligent efforts to mitigate her damages. Berk's employment as a substitute teacher does not qualify as employment as a teaching staff member as it was per diem in nature. In deciding to restrict her attempts to find comparable employment to West Orange from 1985-1989, Berk failed in her obligation to mitigate her damages. Her efforts to mitigate her damages during the period June 1984-March 1985 are deemed to be sufficiently reasonable and therefore back pay is limited to this period.

Barbara Davis was rified in June 1983. She is certified as an elementary teacher and reading teacher. During the six years after she was rified she earned \$28,394, including unemployment benefits, which constitutes an average yearly salary of \$4,732. She testified that she contacted 31 school districts in 1983 and 1984 but after an initial phone contact, if the district did not send her an application, she did not continue her efforts to apply unless it was a district in which she would have liked to teach. She declined a part-time teaching position in basic skills in East Orange in 1983 and after 1984 stopped applying to school districts. (T6/5/90 at 145-156) She did not apply to Newark because she was afraid. (Id., at 168) Following her being rified she worked briefly on a part-time basis as a manufacturer's representative and after giving up on education positions in 1984 she became self-employed in her own jewelry business in which she made little or no money.

Upon consideration of Barbara Davis' circumstances, the Commissioner finds and determines that she did not make reasonable and diligent efforts to find comparable employment. Even assuming arguendo that she had justifiably lowered her sights after reasonable efforts to mitigate, turning down a part-time teaching position in 1983 in favor of part-time employment as a manufacturer's representative and self-employment in a jewelry business which yielded only a yearly average income of approximately \$4,000 does not constitute reasonable mitigation.

Accordingly, Davis is not deemed to be entitled to back pay, except for the period of her unemployment compensation, for failure to mitigate her damages.

Edith Ratner was rified in June 1984. She is certified as an elementary teacher. She testified that she never applied to any school district for comparable employment after her unemployment benefits expired in November 1984. (T6/6/90 at 39 and 43) During that period she applied to six districts (id., at 37-38) and for non-teaching jobs such as a receptionist. She earned \$56,512 during the five-year period of her wrongful dismissal, including unemployment benefits, which constitutes an annual average salary of \$11,302.

In August 1985, approximately nine months after ceasing to apply to school districts for comparable employment, her husband, an orthodontist, approached her about working for him doing the duties of a receptionist, keeping the books and managing the office. (Id., at 36 and 45-46) She made no attempts to find a teaching position after beginning work for her husband because her husband told her he

could not do without her as she was the best receptionist he ever had. (Id., at 47)

Upon consideration of Ratner's circumstances, the Commissioner finds and determines that she did not make reasonable and diligent efforts to secure comparable employment in order to mitigate her damages. Failing to seek comparable teaching employment after the fall of 1984 is deemed to be grossly unreasonable and lacking in diligence to mitigate. Even when she secured employment, it was due to her husband approaching her to work for him.

Accordingly, Ratner is found not to be entitled to back pay for failure to mitigate her damages except for the period June 1984 - November 1984.

Doris Passner was rified in June 1984. She is certified as an elementary teacher. During the five-year period of her wrongful dismissal she earned \$12,330, including unemployment compensation benefits, which constitutes an average annual salary of \$2,466. She did not apply for comparable employment in school districts after her unemployment benefits expired in February 1985. All contact with school districts was done in 1984. (T6/6/90 at 60-61) She formally applied to eight districts during her unemployment compensation period and did not apply to 14 of the 21 districts in Essex County. (Id., at 58-60)

In September 1985, Passner became employed as a part-time tutor at Bloomfield College working 10-18 hours a week. She did not pursue employment comparable to that which she held in West Orange because she liked what she was doing. (Id., at 61-64)

Upon consideration of Passner's circumstances, the Commissioner finds and determines that she did not engage in reasonable and diligent efforts to mitigate her damages and therefore is not entitled to back pay except for the period June 1984-February 1985.

Rita Peretz was rified in June 1983. She holds certification as an elementary teacher and teacher of the handicapped. During the six-year period of her wrongful dismissal she earned \$36,880, including 13 weeks of unemployment compensation, which constitutes an annual average salary of \$6,146. Her only employment from 1983-1989 was as an office temporary worker and part-time work for her husband's dental laboratory. She formally applied to only three school districts after her rifting, otherwise depending on phone contact to districts. (T6/7/90 at 5-21) Once her unemployment benefits stopped, she ceased seeking employment comparable to her position in West Orange. (Id. at 34) Interestingly, although she worked for two temporary employment agencies, she did not register with an employment agency for teachers. She turned down an offer to be special education aide in West Orange in 1983 following her rifting in 1983. The Commissioner notes for the record, however, that she was not at that point in time obligated to take such a position because an aide's position is not that of a teaching staff member since a teaching certificate is not required.

Upon review of Rita Peretz's circumstances, the Commissioner finds and determines that she failed in her responsibility to engage in reasonable and diligent efforts to

secure comparable employment as a teacher in order to mitigate her damages. Application to three districts and phone calls to others during the period of unemployment compensation is deemed grossly inadequate effort to mitigate, given the record in this matter which establishes ample opportunities for elementary and special education teachers. Petitioner's choice to lower her sights to part-time office work after her 13 weeks of unemployment compensation should not lead to the result that she receive \$116,150 in back pay award with public funds.

Paula Kolin was rified in June 1984. She holds certification as an English and social studies teacher. During the period of her wrongful dismissal, she earned \$39,343, including unemployment compensation, which constitutes an annual average salary of \$7,868. Her testimony indicates that she did not continue to seek comparable employment after 1984. (T6/7/90 at 49) Her efforts to seek comparable employment included application to six school districts out of 21 in Essex County, the Essex County Educational Services Commission and a private school, Kushner Hebrew Academy. (Id., at 47, Exhibit R-19) Ms. Kolin also testified that she made phone contacts and sent letters of interest to numerous other school districts. She engaged an employment agency but not one for teaching positions. (Id., at 43) She did not apply to Newark because she "could not abide a system of containment" which she defined as being related to discipline problems. (Id., at 44-45, 65-66) She did not reapply to districts contacted in 1984 because she did not think that necessary. (Id., at 65)

In 1985 her husband had a serious heart attack and she began to work part time to assist him in his CPA practice. In 1987

she accepted employment 10 hours a week in the private academy previously mentioned as a math teacher which she had until her husband became ill again in 1988.

Upon review of Paula Kolin's circumstances, the Commissioner determines that she did not engage in reasonable and diligent efforts to seek comparable employment so as to mitigate her damages. Her efforts to secure comparable employment were minimal at best and did not extend beyond 1984. It is therefore determined that she is entitled to back pay only for 1984.

Florence Shifman was rified in June 1984. She is certified in English and social studies. During the five-year period of her wrongful dismissal she earned \$16,942, including unemployment benefits, which constitutes an annual average salary of \$3,388. Her testimony indicates that after her unemployment benefits expired, she did not continue to seek comparable employment. (Id., at 74) During 1984 she applied to two districts. She further testified that if a district did not send her an application after she made a phone contact, she did not follow up with the district. Nor did she go personally to any districts or engage a teacher employment agency. She did not apply to Newark because she did not think she could cope with it nor did she apply to other urban districts in the area such as East Orange. After the unemployment compensation expired in 1984, she ceased applying for teaching positions. (Id., at 74-79)

After her unemployment benefits expired, Shifman ran a gift shop with her daughter. The business was purchased for them by their husbands. She worked at this for two years but earned no

money whatsoever nor did she receive any money when it was sold in 1987. She had no experience in running a business prior to undertaking the venture. (Id., at 72-79)

In 1987 after the sale of the gift shop she did not attempt to find employment as a public school teacher. She became a teacher's aide at the Kushner Hebrew Academy 20 hours a week in 1987 until 1988 when she became ill.

Upon review of Florence Shifman's circumstances, the Commissioner finds and determines that she did not exert reasonable and diligent efforts to secure comparable employment so as to mitigate her damages. Her efforts to secure same were woefully inadequate and they ceased at the time her unemployment benefits expired. She is therefore found not to be entitled to the \$146,248 in back pay she claims. Back pay shall be limited to the period July 1, 1984-December 31, 1984.

Accordingly, the recommended decision of the Administrative Law Judge is affirmed as it relates to the denial of pre- and post-judgment interest and reimbursement of uncompensated medical and dental benefits. Reversed is her determination not to allow back pay awards to be reduced by the sum of unemployment compensation benefits. Willis v. Dyer, supra, and Ujhely, supra

The back pay awards to Constance Afromsky, Edith Kaplan, Marcia Grossman, and Rita Zimring are affirmed, while the denial of back pay to Rosemarie Siegler is reversed. The back pay awards to the other eight petitioners are modified as set forth above for petitioners' failure to make reasonable and diligent efforts to obtain comparable employment after their unemployment compensation benefits expired. Goodman, supra, and Zielinski, supra

Given the above determinations, the Commissioner orders

back pay to be awarded for the following periods of time:

<u>Petitioner</u>	<u>Period of Back Pay</u>
Shirley Blank	July 1, 1984 - November 1, 1985
Marsha Grossman	July 1, 1984 - September 1, 1989
Rita Zimring	July 1, 1983 - September 1, 1989
Esther Kaplan	July 1, 1984 - September 1, 1989
Florence Berk	July 1, 1984 - March 31, 1985
Barbara Davis	July 1, 1983 - January 1, 1984
Constance Afronsky	July 1, 1983 - September 1, 1989
Edith Ratner	July 1, 1984 - December 1, 1984
Doris Passner	July 1, 1984 - February 28, 1985
Rosemarie Siegler	July 1, 1984 - September 1, 1989
Rita Peretz	July 1, 1983 - December 31, 1983
Paula Kolin	July 1, 1984 - December 31, 1984
Florence Shifman	July 1, 1984 - December 31, 1984


COMMISSIONER OF EDUCATION

JANUARY 9, 1991

DATE OF MAILING - JANUARY 9, 1991

Pending State Board

WEST ORANGE SUPPLEMENTAL	:	
INSTRUCTORS ASSOCIATION <u>ET AL.</u> ,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION ON MOTION
SHIP OF WEST ORANGE, ESSEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

Bernard Star, Esq., for Petitioners
Stephen J. Christiano, Esq., for Respondents

Whereas, this matter was opened before the Commissioner of Education by the West Orange Board of Education on March 14, 1991 through the filing of a motion requesting a stay of the Commissioner's decision of January 9, 1991; and

Whereas, the Commissioner notes that both parties in this matter have filed appeals to the State Board, each challenging certain back pay awards ordered by the Commissioner in his January 9, 1991 decision; and

Whereas, an affidavit in opposition to the request for a stay was filed by petitioners on March 12, 1991; and

Whereas, the Board seeks a stay of the Commissioner's decision of January 9, 1991 which ordered it to accord to petitioners back pay for periods of time specified in the decision based upon the following:

1. The Board has determined that as a result of the Commissioner's January 9, 1991 decision the back salary award owing to the thirteen petitioners in this matter amounts to \$509,509;
2. On February 8, 1991, the Board's attorney wrote to petitioners' attorney to confirm an earlier telephone conversation they had wherein petitioners' attorney stated that petitioners would reject the amount determined by the Board and would appeal eight of the awards ordered by the Commissioner;
3. The Board is willing to comply with the Commissioner's decision of January 9, 1991 but is unable to do so given petitioners' refusal to accept the awards ordered; and

Whereas, the Board seeks a stay in order to prevent accrual of post-judgment interest pursuant to N.J.A.C. 6:24-1.16(c)2; and

Whereas, petitioners oppose the granting of a stay on the grounds that (1) the Board is attempting to penalize them for exercising their right to appeal the Commissioner's decision and (2) the Board should not be relieved of its obligations to pay the awards and post-judgment interest since not paying is a voluntary decision on its part; and

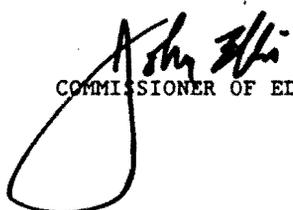
Whereas, the Commissioner has reviewed the positions of the parties and finds no basis for granting a stay because the Board has not met the standards for granting injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. 126 (1982) since it has failed to demonstrate that:

1. It would suffer irreparable harm if the stay were denied;
2. It has a likelihood of prevailing on the merits of its appeal to the State Board;
3. Greater harm would inure to it than petitioners if the stay were denied; and

4. The public interest compels the grant of a stay; now therefore

IT IS ORDERED that the Board pay petitioners the back pay awards directed in the Commissioner's January 9, 1991 decision; and

IT IS FURTHER ORDERED that no post-judgment interest is to be awarded based upon the fact that the Board has attempted to pay the awards within sixty days of the precise calculation of monies owing to the thirteen petitioners, but it has been unable to do so given their refusal to accept the sums resulting from the Commissioner's January 9, 1991 decision.


COMMISSIONER OF EDUCATION

APRIL 3, 1991

DATE OF MAILING - APRIL 3, 1991



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8927-89

AGENCY DKT. NO. 330-10/89

NANCY AND GERARD MANGIERI,

Petitioners,

v.

**BOARD OF EDUCATION OF THE
BOROUGH OF CRESSKILL,**

Respondent.

G. Emerson Dickman III, Esq., for petitioners

Harold Ritvo, Esq., for respondent
(Gruen & Ritvo, attorneys)

Record Closed: May 30, 1990

Decided: November 30, 1990

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an action on behalf of a public school student seeking transportation to and from school pursuant to *N.J.S.A. 18A:39-1*. Local school districts must transport students "residing remote from any schoolhouse " as defined in the regulations.

New Jersey is an Equal Opportunity Employer

OAL DKT. NO. EDU 8927-89

Distance is measured door-to-door "by the shortest route along public roadways or public walkways." *N.J.A.C. 6:21-1.3(b)*.

Essentially the dispute involves a pedestrian crossing or right-of-way over railroad tracks on a portion of the route proposed by the district. Two issues are raised: First, whether the pedestrian crossing constitutes a "public roadway or walkway." Second, whether the pedestrian crossing poses an increased risk of safety to children utilizing the proposed route.

Procedural History

Petitioners Nancy and Gerard Mangieri filed their petition with the Commissioner of Education ("Commissioner") on October 25, 1989. Respondent Board of Education of the Borough of Cresskill ("Board") filed its answer on November 16, 1989. Subsequently, on November 20, 1989, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on May 8, 1990. On the date of the hearing, the parties also submitted written legal memoranda. Although the record remained open until May 30, 1990 for submission of supplemental information, neither party offered any further evidence. Time for preparation of the initial decision has been extended to November 30, 1990.

After the close of the record, on September 26, 1990 the Board filed a motion to dismiss the petition on the ground of mootness. Petitioners filed opposing papers on October 29, 1990, and the Board filed its reply on November 7, 1990. On November 30, 1990, the OAL entered an order denying the motion to dismiss. Hence, this controversy must be resolved on its merits.

Findings of Fact

1. Background Circumstances

Many of the material facts are undisputed. Mr. and Mrs. Mangieri and their four children reside in the Borough of Cresskill in a section known as the Rio Vista area. At the time of the hearing, one son, age 13, was in the seventh grade of the

Cresskill public school system for the 1989-90 school year. An older daughter, age 16, was enrolled in a parochial high school in a nearby community and two younger children, ages 10 and 9, were going to parochial elementary school in another community. Next year, the son in the public system will be eligible to continue in the eighth grade at the same school. Any of the other Mangieri children might also transfer to the public system, in which event the younger ones could eventually attend seventh and eighth grades in the district.

Cresskill's middle school (grades 7 and 8) and high school (grades 9 to 12) share the same building located at the northwesterly corner of the borough. Total enrollment at the building is less than 500 students. School starts at 8:00 a.m. and lets out at 2:45 p.m. Children do not go home for lunch and are not allowed outside during lunchtime. Currently, the district does not provide transportation to public school, except for educationally handicapped and vocational students. No other parents have requested school transportation, although other families with children live in the Rio Vista area.

Railroad tracks owned by Consolidated Rail Corporation ("Conrail") run diagonally from north to south, bisecting the entire Borough of Cresskill. Students who live on the eastern side of the tracks must cross them somewhere in order to get to the school building. There are two competing routes between the Mangieri home on Jackson Drive on the east side of town and the school building on the west side near the Demarest border.

One route proceeds along county roads through the main business center and across the railroad tracks at Veteran's Square, an intersection where "six or seven" roads converge to form a square. The railroad crossing at this location is controlled by an electric flashing device and warning bells, but not by a gate or mechanical arm. Representatives from the County Superintendent's Office have measured to the closest door of the middle school and determined the distance to be 11,467 feet or 2.17 miles. The County Superintendent's Office has "approved" this particular route, a prerequisite before the local district qualifies for state transportation aid.

An alternate route traverses smaller residential streets and ends at a cul-de-sac leading to the newly created pedestrian crossing. In September 1989 Conrail and the school district entered into a written licensing agreement whereby the railroad

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granted an easement across its track and rail bed. Grant of the easement is expressly subject to certain conditions, most notably that the crossing is "for pedestrian use only," that it shall be "open only during the hours the school is operated" and that Conrail retained "the paramount right at all times" to use its tracks. Under the agreement, the district is obligated to provide "a crossing guard" and to erect and maintain "an appropriate lock-type gate" which must be kept closed and locked whenever the crossing is not in actual use.

Construction of the pedestrian crossing commenced shortly after the start of school in September 1989 and was completed in a few days. It consists of a macadam blacktop pathway approximately six feet wide and 94 feet long. Only 30 to 40 feet passes over property owned by Conrail, the remainder over school or borough property. Posts installed at either end prevent vehicular traffic.

At the request of the Board, the County Superintendent's Office measured the distance along the alternate route. Officially, the distance was 10,016 feet, which is 544 feet less than two miles. However, the County Superintendent's Office was unwilling to "approve" the alternate route for transportation aid purposes. In a letter to the Board, the County Superintendent expressed the view that the shorter route is not a public roadway or walkway "since it is by way of a roadway constructed across a railroad." Admittedly, the County Superintendent's Office did not conduct its own safety study or consult with local police about safety conditions.

(2) Safety Risks

The factual dispute focused on safety considerations. Petitioners contend that pedestrian crossing presents "greater risks," but have offered little proof in support of that conclusion. As required by the Conrail agreement, the Board has erected a gate in an existing fence surrounding the school. This gate is supposed to be kept

locked during the evening. Signs placed strategically along the railroad bed warn potential trespassers to keep off the train tracks.

Additionally, the municipal government furnishes a "school marshal" to watch over the location immediately before and after normal school hours. School marshals are specially trained adults empowered to issue court summonses. By comparison, many other railroad crossings in the Borough are not covered by a crossing guard. Building administrators have also instructed school custodians to keep an eye on the crossing area during after-school hours and on weekends. Custodians are responsible for maintenance of the walkway, raking leaves in the autumn and shoveling snow in the winter.

Mrs. Mangieri testified that on one recent Saturday afternoon the gate was wide open and children were playing in the area. Board witnesses explained that the gate is opened for school-related activities and, on this particular occasion, high school students were taking college entrance exams and the baseball team was holding practice.

An estimated 50 to 80 school children now use the pedestrian crossing daily. While the suggestion was made that the new crosswalk "attracts" more children than in the past, no reliable data was cited. Although the vicinity is "wooded," photographs show that the pathway is clear and unobstructed. Fears of increased likelihood of injury are unsubstantiated and appear exaggerated. No one has been injured since construction of the pedestrian walkway.

Conflicting testimony was given on the frequency of train traffic. Police chief Frank Tino indicated that a train passes in midday and another in the early afternoon, but that "most of the trains come late at night." School business administrator Dr. Stuart Binion, who works in the school building, insisted that trains pass only at night and never during the school day. Both witnesses agreed that trains always loudly blow their whistle when approaching the crossing.

Borough officials most familiar with local conditions regard the pedestrian crosswalk as a safety improvement. Children have historically used this location as a shortcut to school, despite efforts by the local authorities to stop them. Chief Tino, who grew up in the community, recalled that youngsters have cut holes in the school

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yard fence and crossed the train tracks at that spot as far back as 1965 when he was in school. Attempts to discourage the practice by prohibiting the parking of vehicles on nearby Morningside Avenue did not produce the desired effect. When he first came to the district as high school principal in 1973, school superintendent Alfred DiDonato tried unsuccessfully to plug the holes in the fence, but every time one hole was repaired a new one would take its place. According to this experienced educator, a controlled walkway is preferable to what was happening anyway.

I FIND that the pedestrian crossing in a quiet residential area is as safe, if not safer, than the longer route through the more heavily traveled business center. Cresskill local officials have taken reasonable precautions to protect the safety of children, including arranging for a crossing guard at peak hours, limiting access when school is not in session, and grading and maintaining the walkway. Certainly the formalized right-of-way, constructed with the blessings of Conrail, is much less dangerous than the prior situation, where large numbers of children crossed the tracks at unsupervised and unpaved locations.

Conclusions of Law

Based on the foregoing facts and the applicable law, I CONCLUDE that petitioners' son fails to qualify for school transportation.

Authority for free transportation to public school derives from Art. VIII, §4, ¶3 of the State Constitution of 1947, which confers on the Legislature the express power to provide for transportation of school-aged children to and from any school "within reasonable limitations as to distance." *N.J.S.A. 18A:39-1* authorizes a school board to make rules and contracts for the transportation of students "residing remote from any schoolhouse." Courts have required local boards to provide transportation for children living "remote" from the schoolhouse. See *West Morris Reg. Bd. of Ed. v. Sils*, 58 N.J. 464, 474 (1971), cert. den. 404 U.S. 986 (1971).

State regulations prescribe what is meant by "remote," which for present purposes means "beyond two miles." *N.J.A.C. 6:21-1.3(a)*. Both parties agree that the route via the business center is more than two miles and that the alternate route via the pedestrian crossing is less than two miles. Thus, the outcome turns on whether the pedestrian crossing satisfies the further condition that the route be

along "public roadways or public walkways." *N.J.A.C. 6:21-1.3(b)*. If so, then petitioners must lose.

Petitioners argue that the pedestrian crossing cannot be utilized because it is closed to vehicular traffic. Instinctively that argument makes little sense, since the entitlement to bussing or other forms of transportation is triggered only for distances which a child cannot comfortably walk. Vehicular accessibility is less relevant than pedestrian accessibility. Moreover, the rule is phrased in the disjunctive, either "public roadways" or "public walkways." The dictionary definition of a "walkway" is "a passageway used or intended for walking." *Webster's Third International Dictionary* (unabridged ed. 1976). If the rulemaker had intended to limit the concept to vehicular thoroughfares, then reference to "roadway" alone would have been enough.

Recent school law decisions confirm that "pedestrian distance and not vehicular distance is the measure." *Tenzer v. Tenafly Bd. of Ed.*, 1985 *S.L.D.* ___ (Comm'r May 17, 1985). Petitioners' reliance on *Fairlawn Bd. of Ed. v. Bailey*, 1984 *S.L.D.* ___ (St. Bd. Dec. 7, 1984) is misplaced. Although the Commissioner's decision in *Bailey* does suggest that a roadway must be open to vehicular traffic, the final State Board decision rests on an entirely different theory. Instead, the State Board held that forcing students to take isolated footpaths and trails through a park "would impose on them an increased risk of molestation and other threats to the safety of their person." (slip op. at 3). Unlike the factual pattern in *Bailey*, the record here demonstrates that the pedestrian crosswalk is actually less hazardous than any other available route.

Finally, petitioners urge that the pedestrian crossing cannot be considered a "public" walkway because of restrictions as to who may use it and when it may be used. Conrail has formally dedicated a portion of its property to public use. Access is provided to all persons with legitimate school business during regular school hours. Reasonable restrictions are imposed to minimize the risk of harm and to provide the children with safe passage to school.

Such provisions do not destroy the public nature of the arrangement, any more than a public library would lose its status because it closes its doors at night or a public school would lose its status because it prohibits unauthorized visitors from

OAL DKT. NO. EDU 8927-89

wandering the hallways. Even a driveway of a private school may be "public" in this general sense, provided that "individuals having legitimate dealings with the school" regularly use the driveway to get to and from the school premises. *Nelson v. McCaffery*, 1989 S.L.D. __ (Comm'r April 4, 1990), *aff'd St. Bd., appeal docketed*, No. A-218-90-T2 (N.J. App. Div., filed Sept. 10, 1990). It would surely defeat the overriding safety concerns if responsible school and police authorities were inhibited from planning safer and more direct walking routes to school.

Order

It is **ORDERED** the relief requested by petitioners is denied.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Nov. 30, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Dec 3, 1990
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

DEC 1 1990
Date

Mailed to Parties:
James J. Vecchia
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Nancy Mangieri, parent
2. Frank Tino, chief of police, Borough of Cresskill
3. James Anzenvino, transportation program monitor, Bergen County Office of Education
4. Dr. Stuart Binion, school business manager, Cresskill school district
5. Alfred DiDonato, superintendent of schools, Cresskill school district

List of Exhibits

No.	Description
J-1	Copy of a letter to the Cresskill Board of Education from the Bergen County Office of Education, dated April 7, 1989
J-2	Copy of a letter to the Cresskill Board of Education from the Bergen County Office of Education, dated May 2, 1990
J-3	Copy of a license agreement between Consolidated Rail Corporation and the Cresskill Public Schools, dated September 6, 1989
P-1	Photograph of Mountainside Avenue facing west
P-2	Photograph of danger sign on crossing pole
P-3	Photograph of railroad tracks facing north
P-4	Photograph of railroad tracks facing south

- P-5 Photograph of railroad crosswalk facing east from the school
- P-6 Photograph of the gate and fence facing west from Morningside Avenue
- P-7 Photograph of the gate and fence facing west from Morningside Avenue
- P-8 Photograph of the railroad crosswalk facing west from Morningside Avenue
- P-9 Photograph of the gate and fence facing west
- P-10 Copy of a letter to the Cresskill Board of Education from the Bergen County Office of Education, dated February 13, 1990
- P-11 Copy of a letter to the Cresskill public schools from Consolidated Rail Corporation, dated January 4, 1990
- R-1 Copy of the current tax map of the Borough of Cresskill, revised December 1985
- R-2 Photograph of the railroad crossing at Union Avenue near Veteran's Square
- R-3 Copy of the current tax map, showing alternate routes between the Mangieri home and the school
- R-4 Certified copy of a resolution adopted by the Mayor and Council of the Borough of Cresskill, dated August 31, 1989
- R-5 Photographs of the railroad crosswalk and gate at West Mountainside Avenue

OAL DKT. NO. EDU 8927-89

NANCY AND GERARD MANGIERI, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF CRESSKILL, BERGEN :
COUNTY, :
RESPONDENT. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioners and replies by the Board of Education were timely filed pursuant to N.J.A.C. 1:1-18.4.

In their exceptions, petitioners first argue that, on the continuum of possibilities that might constitute public walkways within the intendment of code, the ALJ erred in drawing the line to include the railroad crossing which is the subject of the present dispute. This crossing, they argue, is not at all like the public library example given by the ALJ, but is rather more akin to a backyard shortcut used with the property owner's permission. Petitioners also reiterate the explicit limitations on the crossing's use, including its limited hours of operation, its barricading during other times, the paramount right of Conrail to

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use its tracks and the revocability of the agreement between the Board and Conrail. (Exceptions, at pp. 1-2)

Petitioners next note that the ALJ may have created an impression that the Board acted altruistically in remedying the unsanctioned, unsupervised use of the crossing, when in fact the Board's actions were "Machiavellian machinations" aimed explicitly at circumventing the district's obligation to petitioners. Petitioners observe that there is nothing wrong with trying to address a longstanding safety hazard and enabling children to legitimately use a popular shortcut with district supervision; what they object to, however, is requiring children to use the shortcut so as to deprive them of transportation to which they would otherwise be entitled. (Id., at pp. 2-3)

Finally, petitioners observe that, assuming arguendo that the ALJ correctly characterized the disputed crossing as a public walkway, he has left unresolved the question of what would happen to petitioners and other potential families eligible for transportation if the agreement between Conrail and the Board is terminated for any reason, since the permanent availability of the crossing cannot be assured.

This reasonable lack of confidence requires that a responsible backup plan be devised to insure continuity of legally mandated services to the community. This crossing is neither a permanent nor equitable solution to the issue of transportation, and it falls short of the prudent and responsible action one would expect of officials invested with the public trust. (Id., at p. 3)

In reply, the Board first argues that a permanent, six-foot wide, 94-foot long macadam easement is not at all analogous to a backyard shortcut; that the crossing is open to all whenever school

is open, and closing the gate at other times is not dissimilar to closing the school building at such times; that a crossing guard is provided as at other intersections; that track use during school hours is infrequent at best, and that Conrail, like any railroad, always maintains paramount right to its tracks, including those over which the district's "approved" transportation route passes; and that termination of the licensing agreement is in the control of the Board, since such termination would be triggered by violation of the agreement's conditions by the Board. (Reply Exceptions, at pp. 1-2)

The Board further contends that petitioners have cited no authority in support of their argument that the Board's allegedly improper motivation somehow negates the ultimate practical outcome of this matter, namely that lawful accommodation of petitioners' needs was made by timely construction of a public pedestrian walkway enabling their children to walk to school, thereby obviating the need for transportation. (Id., at p. 2)

Finally, the Board argues that no remedy remains unresolved with respect to petitioners, whose child no longer attends the Cresskill public schools,* and that the Commissioner should not be called upon to address hypothetical possibilities (newly eligible students, closing of walkway) which have no basis in present fact. Accordingly, the initial decision of the ALJ should be affirmed. (Id., at p. 3)

Upon careful consideration, the Commissioner concurs with the ALJ that the newly created crossing is in fact a public walkway within the intendment of N.J.A.C. 6:21-1.3(b).

* See Initial Decision, p. 2, motion to dismiss on grounds of mootness.

As established in the line of cases cited by the ALJ at pages 7-8 of the initial decision, "public" for purposes of 6:21-1.3(b) refers not strictly to ownership, but to commonality of usage, freedom of access and reasonable expectation of safe passage under the auspices of a responsible government entity. In the instant case, the disputed walkway is open to any person desiring access to school property at any time when that property is open to lawful use; its physical construction is sturdy and permanent; its maintenance and safe operation are the responsibility of the borough and school district. Photos (Exhibits P-1 through P-9, R-5) show it to be plainly marked, unobstructed and free of any hint of the isolation and the other potential safety risks that led to rejection of the park pathways in Fair Lawn, supra. The walkway's "limitation" of leading only to school property rather than being a true "thoroughfare" is analogous to the driveway accepted in Nelson, supra, to the playground in Tenzer, supra, and to the specially constructed sidewalk in Logsdon v. Board of Education of the Borough of Demarest, Bergen County, decided by the Commissioner on August 11, 1980. In sum, there is nothing about the disputed crossing that would preclude its acceptance as a lawful means of providing convenience of access to the school building.

Nor does the fact that actual ownership of a portion of the property over which the walkway passes is private, in itself, render the thoroughfare any less public under the circumstances of this case. It is indeed true, as petitioners claim, that Conrail might revoke its permission for public use for any number of reasons and has specifically reserved the right to do so, subject to proper notice, at any time. That, however, is a contingency with which the

district must be prepared to deal, as its transportation obligation to students would then have to be met in some other manner.*

Accordingly, the initial decision of the Office of Administrative Law dismissing the Petition of Appeal is affirmed for the reasons stated therein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 11, 1991

DATE OF MAILING - JANUARY 11, 1991

* In response to petitioners' urging that his decision provide for such a contingency, the Commissioner notes that such provision is the right and responsibility of the Board, which obviously acts at its own peril if it places itself in a position of being unable to meet the lawful entitlements of students. The Commissioner judges, however, that his intervention at the present juncture would be both unwarranted and inappropriate.



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6534-90
AGENCY DKT. NO. 289-8/90

**TOWN OF BELVIDERE, a municipal
corporation,**

Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWN OF BELVIDERE, WARREN COUNTY, and
CECIL F. CORNISH, Executor of the Estate of
Paul Knight Cornish,
Respondents.**

**Brian D. Smith, Esq., for the Town of Belvidere, Warren County (Smith & Supp,
attorneys)**

**Robert E. Wade, Esq., for Board of Education of the Town of Belvidere, Warren
County**

Record Closed: November 19, 1990

Decided: December 7, 1990

BEFORE JAMES A. OSPENSON, ALJ:

In a petition of appeal filed with the Commissioner of the Department of Education, the Town of Belvidere, a municipal corporation, alleged the Board of Education of the Town of Belvidere entered into a contract with Cecil F. Cornish, Executor of the Estate of Paul Knight Cornish, for acquisition of 24 acres of unimproved land abutting the high school for \$520,000 as part of an overall Board

OAL DKT. NO. EDU 6534-90

project costing \$4,500,000, in which the property would be improved with athletic fields, renovations and additions to an existing school building on Board-owned abutting property. Acquisition was to be financed by a lease-purchase arrangement encompassing issuance of a series of certificates of participation. Consummation of the agreement between the Board and the Cornish estate was scheduled to take place no later than September 1, 1990, under notice by the Cornish estate that time was of the essence of the agreement. Alleging the Board acted illegally by entering into a lease-purchase of unimproved land with no intention to erect school buildings thereon, without prior approval of the Bureau of Facility Planning Services of the Department of Education as required under *N.J.A.C. 6:22-1.2* and *N.J.A.C. 6:22A-1.2(a)(1)*, the Town alleged broadly the transaction was violative of *N.J.S.A. 18A:20-4.2(f)* and if permitted to be consummated would visit irreparable harm upon property owners of the Town, whose taxes would be required to be applied to payment of an illegal debt. The Town sought both preliminary and permanent injunctive relief against both the Board and the Cornish estate restraining consummation of the transaction. The Board in its answer admitted intended consummation of the lease-purchase transaction but denied it was violative of statute or regulation. No answer was filed by the Cornish estate. The Department of Education transmitted the matter to the Office of Administrative Law on August 16, 1990 for hearing and determination as a contested case in accordance with *N.J.S.A. 52:14F-1 et seq.* No taxpayers in their individual capacities joined as parties petitioner to the action.

On short notice to the parties, the matter came on for hearing in the Office of Administrative Law on August 29, 1990, on the Town's application for imposition of preliminary restraints against the Board and the Cornish estate barring consummation of the lease-purchase agreement on or after September 1, 1990, and until disposition of issues at plenary hearing. The application was considered by the administrative law judge on pleadings, documentation, written briefs and arguments of counsel and was DENIED. A written order in denial was incorporated as paragraph 13 of the prehearing conference order of August 29, 1990. The order in denial was subject to review by the Commissioner of the Department of Education under *N.J.A.C. 1:1-12.6*. It was not reviewed. The prehearing order established a plenary hearing date in the matter for November 19, 1990; the record closed then.

Before plenary hearing, the Board filed a motion to dismiss the petition, on certifications and brief, on the grounds, *inter alia*, that the Board had fully complied with obligations under powers to engage in lease-purchase agreements under *N.J.S.A. 18A:20-4.2(f)* and regulations promulgated thereunder in *N.J.A.C. 6:22-1.1 et seq.* and *6:22A-1.1 et seq.*; that if consummated as intended by the Board and the Cornish estate, no irreparable harm would result to the municipal corporation; that boards of education were entrusted by the Legislature with operation of schools within their districts under both specific and general powers, for example, *N.J.S.A. 18A:11-1(d)*; that the Town does not have standing to challenge validity of execution of Board duties under statute and regulation nor, in this proceeding, does the Commissioner of Education under *N.J.S.A. 18A:6-9* have jurisdiction to hear and determine controversies arising therefrom; and that, finally, the Town's petition should be dismissed for mootness and lack of controversy.

As to the latter issue, it was stipulated by the parties as of November 19, 1990, date of plenary hearing, that the contract of sale for the Cornish property was not consummated on September 1, 1990. By the terms of agreement, since time was of the essence and since a noticed time for closing on that date had come and passed, the contract became null and void; a \$20,000 deposit (plus interest) was divided between the Board and the Cornish estate. No other agreement had been entered into by the Board and the Cornish estate in regard to purchase of the property.

On November 19, 1990, the parties filed a stipulation that the petition should be withdrawn and dismissed without prejudice in view of termination of the lease-purchase agreement without consummation. J-1.

DISCUSSION

The *Uniform Administrative Rules of Procedure* of the Office of Administrative Law provide in *N.J.A.C. 1:1-19.2(a)* that:

A party may withdraw a request for a hearing or a defense raised by notifying the administrative law judge and all parties in writing. Upon receipt of such notification, the administrative law judge shall discontinue all proceedings and return the case file to the clerk. If the administrative law judge deems it advisable to state the circumstances of the withdrawal on the record, the judge may enter an initial decision

memorializing the withdrawal and returning the matter to the transmitting agency for appropriate disposition. [emphasis added]

This matter is such a case. I think it involves a sensitive interplay between educational and municipal governmental powers. Thus, I hold that while the petition of appeal should be withdrawn and dismissed for mootness as stipulated by the parties, the unanswered issue of the Town's standing to sue survives. It involves fundamentally whether the Town has sufficient stake in the outcome of proceedings and whether a municipal position is sufficiently adverse to that of the Board to predicate municipal challenge. Under rules of the Department of Education, *N.J.A.C. 6:24-1.1*, "interested persons" are persons who will be substantially, specifically and directly affected by outcome of a controversy before the Commissioner.

Generally, New Jersey school districts of whatever classification, though usually coterminous with municipal boundaries except in cases of consolidated or regional districts, are, and have been for more than half a century, local governmental units, governed by boards of education. They are separate, distinct and free from control of the municipal governing body except to the extent education law provides. *Botkin v. Westwood*, 52 *N.J. Super.* 416, 425 (App. Div. 1958). A local board of education may in the exercise of discretionary powers acquire lands under lease-purchase agreements. *N.J.S.A. 18A:20-4.2(f)*; and see *Silverman v. Bd. of Ed., Tp. of Millburn*, 134 *N.J. Super.* 253, 259 (Law Div. 1975). In *Tp. of Dover v. Bd. of Adj. of Tp. of Dover*, 158 *N.J. Super.* 401 (App. Div. 1978), the court spoke of local governmental autonomy in another context:

The board of adjustment is an independent administrative agency whose powers stem directly from the Legislature and hence are not subject to abridgment, circumscription, extension or other modification by the governing body. . .

A necessary corollary of that principle is that ordinarily the manner in which the board exercises its exclusive statutory power is not subject to monitoring by the governing body and is therefore immune not only to direct interference by the governing body but also to the indirect interference of an action in lieu of prerogative writs brought by the governing body seeking judicial review of the board's determinations. . .

Review at the instance of the governing body of alleged errors in the exercise of statutory authority and such disputes as to the exercise of discretion would seriously and perhaps irremediably undermine the board's essential autonomy. . . [at 408,9].

The principle of autonomy has broad application. In *Bergen County v. Port of New York Authority*, 32 N.J. 303 (1960), a case in which the County sought declaratory judgment that the Authority lacked legal authority to make leases on land it acquired for an airport, the Supreme Court held the *parens patriae* interest of a political subdivision alone is not sufficient to justify its judicial challenge to an exercise of power by another public body on the ground that such other public body exceeded its jurisdiction. To permit contests among governmental bodies solely to vindicate the right of the public with respect to jurisdictional powers of other public bodies is to invite confusion in government and diversion of public funds from the purposes for which they were entrusted. The fear is not idle or theoretical. Practical politics being what they are, one can readily foresee lively wrangling among governmental units if each may mount against the other such assaults, noted the Court. [At 314-5].

Here, the municipal council of the Town of Belvidere in its petition alleged the Belvidere Board violated its powers under N.J.S.A. 18A:20-4.2(f), powers over which the municipal corporation itself has no right of oversight. Among other assertions, the Town alleged in paragraph tenth of the petition that unless it were awarded permanent injunctive relief against the Board's consummation of the Cornish agreement, "irreparable harm would result to property owners of the Town of Belvidere because the purported financing scheme permanently obligates the taxpayers to underwrite lease payments for five years through increases in local property taxes. . ." Thrust of the Town's petition, therefore, is assertion of *parens patriae* responsibility on behalf of Belvidere taxpayers; it has held itself up as the guardian of its citizens in relation to the education district. The fact the Town is collecting agent for school district taxes does not give it basis for intrusion into school affairs. *Botkin v. Westwood, supra*, at 426 of 52 N.J. Super.

Though the Town urged issues raised have been mooted by non-consummation of lease-purchase agreement, it suggested in argument it stood ready in future to re-institute its present action should the Board undertake new negotiations for lease-purchase, conceding merely that it would "join with an individual taxpayer" as a nominal party petitioner to avoid, presumably, a future standing issue. See Town's

OAL DKT. NO. EDU 6534-90

letter to administrative law judge, dated October 31, 1990; 1-2. While it may be premature to comment on a future action, the inference is available, a sad irony, that Belvidere taxpayers may continue to abide the cost of both prosecution and defense of meddlesome litigation. Cf. *Botkin v. Westwood*, supra, 52 N.J. Super. at 431:

We are certain that this particular referendum question [initiated by borough council by asking the county clerk to put a referendum on the ballot seeking voter approval of action by the board of education to deconsolidate the school district, and challenged by taxpayers in an action in lieu of prerogative writ] does constitute a prohibited intrusion. . . in school affairs by a body that has no business intermeddling with them in the slightest degree except as the Legislature has permitted.

CONCLUSION

From the above, I **CONCLUDE** that the parties have stipulated to undertake and allow voluntary withdrawal and dismissal of the present petition without prejudice. The procedure is permissible under *N.J.A.C. 1:1-19.1(a)*. Whether the Town of Belvidere as a municipal corporation has standing to sue the Board in future on the same or similar grounds must await the event.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 7, 1990
Date

James A. Ospenson
JAMES A. OSPENSON, AL

Receipt Acknowledged:

12/12/90
Date

[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 12 1990
Date

[Signature]
OFFICE OF ADMINISTRATIVE LAW

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OAL DKT. NO. EDU 6534-90

List of Exhibits

- J-1 Stipulation of withdrawal and dismissal filed November 19, 1990
- J-2 Town's attorney's letter to administrative law judge dated October 31, 1990
- J-3 Town's attorney's letter to Director and Chief Administrative Law Judge J. LaVecchia, filed November 21, 1990

TOWN OF BELVIDERE, :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN : DECISION

OF BELVIDERE, WARREN COUNTY, :

AND CECIL F. CORNISH, EXECUTOR : .

OF THE ESTATE OF PAUL KNIGHT :

CORNISH, :

RESPONDENTS. :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed.

Although controlling regulations (N.J.A.C. 1:1-18.4 and 1:1-19.2) make no specific provision for submission of exceptions in the case of a withdrawal, the Commissioner notes for the record that petitioner has objected to the ALJ's recitation of procedural history as creating, through omission of certain facts, an erroneous impression of petitioner's course of action in the conduct of the present litigation. Further, petitioner objects to the ALJ's discussion of standing as being beyond the bounds of the "circumstances" contemplated by N.J.A.C. 1:1-19.2(a) and without meaning in view of the fact that no briefing was held on this issue and no conclusion is reached in the initial decision with regard to it.

Upon review, and independent of petitioner's exceptions, the Commissioner observes that the ALJ's digression on standing does appear inappropriate. In the Commissioner's view, N.J.A.C. 1:1-19.2(a) refers more to factual circumstances than legal considerations, especially when discussion of such considerations appears unrelated to the reasons for withdrawal and unnecessary to create a satisfactory record for the Commissioner's review. This is particularly so when, as in the present case, the ALJ's comments plainly espouse a certain point of view, but stop short of a formal conclusion and make no concomitant recommendation upon which the Commissioner may act.

Accordingly, the Commissioner adopts the recommendation of the Office of Administrative Law dismissing the instant matter without prejudice based on its voluntary, mutual withdrawal by the parties, but specifically declines to include in his adoption the substance of the ALJ's discussion of standing.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

JANUARY 25, 1991

DATE OF MAILING - JANUARY 25, 1991

- 10 -



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

185 WASHINGTON ST
NEWARK, NEW JERSEY 07102
(201) 648-6186

INITIAL DECISION

OAL DKT. NO. EDU 2895-90

AGENCY REF. NO. 167-5/89

(EDU 4589-89 - On Remand)

BOARD OF EDUCATION, TOWNSHIP
OF WEST ORANGE,
COUNTY OF ESSEX,

Petitioner,

v.

TOWNSHIP COUNCIL OF WEST ORANGE,
ESSEX COUNTY,

Respondent.

Steven J. Christiano, Esq., for petitioner
(Christiano and Christiano, attorneys)

Matthew J. Scola, Esq., for respondent

Record Closed: November 5, 1990

Decided: December 12, 1990

BEFORE EDITH KLINGER, ALJ

The West Orange Board of Education (Board) appeals a \$600,000 reduction of its unappropriated surplus for transfer to its current expense appropriations by the Township Council (Council) following the defeat of its 1989-90 proposed budget by the voters of West Orange. The matter was originally transmitted to the Office of Administrative Law as a contested case on June 22, 1989 by the Commissioner of Education, pursuant to

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OAL DKT. NO. EDU 2895-90

N.J.S.A. 52:14F-1 et seq. At a prehearing conference held on August 18, 1989, before Ward R. Young, ALJ, the parties agreed to proceed to summary decision on the threshold question of whether the Council has the authority "to certify a reduction in the amount of money to be raised through taxation by unilaterally transferring \$600,000 from the Board surplus into the Board's 1989-90 current expense appropriations." In the event the Council prevailed on that issue, the parties agreed to proceed to plenary hearing on the issue of whether the "Council's transfer of \$600,000 from surplus to the Board's 1989-90 current expense appropriation impinges on the Board's responsibility to provide a thorough and efficient education for the pupils in West Orange during the 1989-90 school year."

Partial summary decision was granted to the Council by Judge Young in an Initial Decision, dated October 6, 1989. The decision was affirmed by the Commissioner on April 11, 1990, and the matter proceeded to hearing on the second issue. On February 23, 1990, Judge Young issued his Initial Decision disposing of the other issue in controversy.

On April 11, 1990, the Commissioner of Education issued his decision rejecting the Initial Decision of Judge Young and remanding the matter to the Office of Administrative Law for further action consistent with the Commissioner's Decision.

The matter was retransmitted to the Office of Administrative Law by the Commissioner of Education on April 12, 1990, where it was assigned to the undersigned for hearing and given the present docket number, EDU 2895-90.

At a prehearing conference conducted on September 7, 1990, it was determined that the parties would produce no other testimony or documentary evidence and that the matter would proceed upon the transcript of the hearings conducted before Judge Young on December 26 and 27, 1989 and the evidence introduced at that time. The parties agreed to submit briefs containing proposed findings of fact and conclusions of law. The record closed on November 5, 1990, when the last submission was received from the parties.

Stipulations

In the prior hearing before Judge Young, the parties stipulated to certain facts. These stipulations as they appear in the decision of Judge Young are as follows (A seventh stipulation, rejected by the Commissioner, has been excluded):

1. The Council certified to the Essex County Board of Taxation a total of \$784,050 to be levied less than the Board's defeated proposal for the 1989-90 school year.

2. The certified reduction by the Council represented \$734,050 for current expense and \$50,000 for capital outlay. The latter is not contested.

3. \$134,050 of the certified reduction for current expense was identified by line items in the Board's budget, which are not contested.

4. \$600,000 of the certified reduction was unilaterally transferred by the Council [pursuant to the Council's direction to the Board] from the Board's surplus into the Board's current expense revenue.

5. The Board's proposed 1989-90 budget incorporated \$27,833,836 for current expense and \$335,000 for capital outlay, which were both rejected by the voters of West Orange.

6. No certifying statement of reasons was provided to the Board by the Council when it acted to certify the amount to be levied by taxation with the Essex County Board of Taxation.

DISCUSSION AND FINDINGS OF FACT

In an unpublished decision, dated November 1, 1988, the Appellate Division of the Superior Court of New Jersey decided, in the matter entitled West Orange Supplemental Instructors Association, et al. v. Bd. of Ed., Township of West Orange, Essex County, (N.J. App. Div., November 1, 1988, A-5792-86T8), that supplemental teachers in the West Orange school district were entitled to salary compensation, sick days, and medical and dental benefits from July 26, 1983 to August 31, 1984, less mitigation.

OAL DKT. NO. EDU 2895-90

Because of the inability of the parties to determine what constituted the appropriate amount of award to each of the 13 petitioners involved pursuant to the Appellate Division decision, the matter was transferred by the Commissioner of Education to the Office of Administrative Law on December 13, 1989, for determination as a contested case. The matter was heard by Administrative Law Judge (ALJ) Marylouise Lucchi, and her Initial Decision, dated October 12, 1990, awarded these supplemental teachers an aggregate amount of \$1,473,371, to be paid by the Board. A Final Decision has not as yet been issued by the Commissioner.

In anticipation of the outcome of this litigation, the Board provided in its 1989-90 school budget for a current expense surplus of \$1,700,554 to cover the possibility of an award to or a settlement with these supplemental teachers. The Council reduced the amount of this surplus by \$600,000, which generated the present appeal.

James Krieger, the school business administrator and secretary to the Board, prepares the annual school budget in consultation with the superintendent of the district and the various business administrators. It was decided that a surplus of \$1,700,000 would allow the Board to settle with or pay a judgment to the supplemental teachers whose suit was pending against the Board and still leave a reserve of \$300,000 to \$400,000 for "unforeseen calamities."

He explained that since 1982, the Board had undertaken a policy of transferring funds from surplus to current expense revenues in order to reduce taxes. The surplus after the 1988-89 school year was \$2,145,000, from which the Board transferred \$400,000 to current expense revenue, leaving sufficient surplus to cover the projected payments to the supplemental teachers and unexpected expenses. Following the Council's \$600,000 reduction, the Board was forced to hold projects in abeyance. Needed improvements, maintenance, and repairs to the school buildings were postponed. Purchases of furniture and audiovisual equipment were also deferred. These items were included in the 1989-90 budget by the Board at the time it was prepared and not substantially reduced by the Council after the defeat of the budget.

Krieger testified that the Council did not mention any educational considerations when it decided that \$600,000 should be taken out of the surplus. No rationale was given by the Council to the Board for removing this amount.

Rocco John Capozzi, a member of the Board, stated that when the budget was proposed, the Board was concerned with the pending suit by the supplemental teachers and wanted to make provision in the event of a settlement or judgment. The Board felt that the surplus should remain intact in order to pay damages awarded and still maintain a reserve to provide for unforeseen expenses. It was concerned that it would be required to pay more than was available in the surplus, leaving the district without resources to meet other contingencies. He explained that the Board was concerned with the aging school facilities in the district, additional requirements by the Department of Education for staff and facilities, and steadily decreasing State aid.

According to Capozzi, these considerations were discussed by the Board and Council at various meetings. He recalled that the Council initially proposed to cut \$700,000 from the surplus, which amount was subsequently reduced to \$600,000. The Council did not explain its rationale for making this cut, although it expressed a desire not to harm the students or the operation of the school system in any way.

All of the members of the Council testified at the hearing.

Councilman Peter Dunn stated that the Council was aware of the suit by the supplemental teachers, but it believed that a reduction in surplus of \$600,000 would leave a sufficient amount for normal expenses pending judgment in the lawsuit.

He could not explain how the Council decided to cut \$600,000 from the surplus. The Council reviewed the budget carefully with the Board and decided to make no cuts of any substance in line items because it wanted to avoid impairing the educational programs, teaching, or operation of the school district. He could not name any specific educational considerations that the Council discussed during its deliberations. In its private session, the Council discussed only the merits and prospects of the pending litigation.

Councilman Joseph P. Brennan Jr. proposed that the surplus be cut by \$500,000 because he thought that \$600,000 would be too much. He was the only member of the Council who voted against the \$600,000 cut. Brennan believed that removing \$500,000 from the surplus would leave a sufficient amount to pay any settlement or judgment. He also believed that the settlement or judgment would not have to be paid for some time.

According to Brennan, he does not recall the Council discussing any educational considerations per se. It was generally felt that if the Council did not touch the line items, that is, if it left the money for teaching, buildings, and programs alone, it would not affect education in the district. It, therefore, decided to make any budget cuts of substance from the surplus funds.

Councilman Anthony J. Minniti testified that he was aware that the district was keeping funds in the surplus because of the lawsuit. He, too, equated the quality of education in the district with the money projected for line items in the budget and decided that a cut of \$600,000 in surplus funds would not affect the quality of education.

Councilman Glenn B. Sorge proposed the \$700,000 reduction in surplus, which was rejected by the Council. As he said, someone "proposed \$500,000 and we settled on \$600,000." Sorge was aware of the pending litigation but did not recall the amount of exposure that the school district faced. The cut he proposed was based upon "the amorphous nature of the lawsuit." He also equated quality of education in the district with the line items in the budget.

Councilwoman Toby Katz stated that the Council did not discuss educational considerations. It considered only the litigation in deciding upon a \$600,000 transfer from surplus. She believed that this transfer would have no impact on the quality of education.

Based upon the evidence, the testimony of the witnesses, and the Initial Decision of Judge Lucchi, dated October 12, 1990, in the matter entitled West Orange Supplemental

Instructors' Assn. et al. v. Bd. of Ed., Twp. of West Orange, Essex Cty., I make the following **FINDINGS OF FACT**:

1. Subject to the Final Decision of the Commissioner in the matter, the Board is liable for an aggregate payment of \$1,473,371 in court-ordered awards to supplemental teachers in the district.
2. The Board has an unallocated surplus in its 1989-90 school budget of approximately \$1,700,000, part of which was earmarked by the Board to cover any awards made to the supplemental teachers as a result of their lawsuit.
3. A reduction of the surplus in the amount of \$600,000 would leave a reserve of \$1,100,000 to meet a claim that was already determined to be over \$300,000 in excess of that amount as of October 12, 1990.
4. If \$600,000 were transferred from surplus, payment of the liquidated damage amount would leave the district with a negative unallocated surplus with which to meet unexpected expenses.
5. The Council took no educational considerations into account when ordering the reduction of unallocated surplus by \$600,000. It considered only the nature and timing of the pending litigation, not the impact that a judgment or settlement would have on the ability of the district to provide a thorough and efficient education.
6. The action of the Council, in effect, forced the Board to retain funds in surplus previously allocated for current operating expenses in the area of building improvement and maintenance, furnishings and audiovisual equipment, to the detriment of line item expenses previously acknowledged as necessary by the Council.
7. If the \$600,000 were not transferred from the unallocated surplus, payment of the judgment against the Board would leave a surplus of \$300,000 to \$400,000, which is between one and one and one-half percent of the 1989-90 current expense budget.

OAL DKT. NO. EDU 2895-90

8. The Council's inference that the Board has at any time the use of the return on the investment of an average monthly sum of \$2,000,000 to \$3,000,000 to supplement the surplus is disregarded since there is no evidence that this amount is actually available for investment, or evidence of the amount of income which it might afford to the Board for unanticipated expenses, if it were available. As Krieger testified, investment income is not included in the surplus because it's "an on-going constant to the budget . . . that's usually spent by the end of the year"; moreover, this appears to have already been accounted for in preparing the budget.

DISCUSSION OF LAW AND CONCLUSIONS

The position of the Council is that the \$600,000 which it ordered transferred from allocated surplus to current expenses was not needed to fund school programs or school operations or for any contingencies that might be associated with them. The evidence shows clearly that exactly the opposite is the case.

The Board provided in its unallocated surplus for a contingent fund to meet the projected damages resulting from a lawsuit against the district. The fund was set aside when the 1989-90 school budget was prepared in accord with the parameters established by the claims against the district. With the passage of time and the progress of the suit, it appears that the Board's estimate of its exposure may have been somewhat conservative, but it was certainly a reasonable one.

The Council, on the other hand, decided, for no reason apparent in the record, that the day of reckoning would be put off to some indefinite time in the future and would result in damages much less than the amount which the Board had estimated.

From the facts, I CONCLUDE that the Council's position in regard to the contingent fund was arbitrary and capricious and conflicted with information already available to the Council on April 4, 1989, when the proposed 1989-90 budget was defeated by the voters; the Appellate Division had decided on November 1, 1988, that the 13 supplemental teachers in the district were entitled to salary compensation and other benefits, less mitigation.

I further CONCLUDE that the decision by the Council to transfer \$600,000 from the budget surplus was arbitrary and capricious, since the Council failed to take into account any educational considerations in its determination to remove \$600,000 from the surplus as required by N.J.S.A. 18A:22-37. Board of Education of Deptford v. Mayor and Council of Deptford, 116 N.J. 305, 315 (1989). Equation by the Council of the sufficiency of the budget line items with the Board's ability to provide a thorough and efficient education in the district is clearly erroneous. If the district were required to pay damages to the supplemental teachers and meet unexpected expenses in the same year, it could wreak havoc on the district's ability to function, much less maintain the required standard of education. The Board is already holding necessary and approved maintenance, improvements, and purchases in abeyance.

It is clearly necessary that the Board maintain a reasonable surplus to meet unforeseen contingencies:

It is also clear that the Board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies. [citations omitted] Patently, the whole purpose of the Board's maintenance of a surplus would be defeated if it were required to be expended for regularly budgeted and appropriated purposes. It is thus clear that surplus funds, not being legally available for regular budgeted expenses, could hardly be compelled by the municipality to be used to offset anticipated regular expenditures for purposes of the N.J.S.A. 54:4-75 requisition. Furthermore, since surplus funds are not usable until a proper contingency arises, the dictating financial practicality is for contingent funds to be invested until actually required. . . ." Board of Education of Fair Lawn v. Mayor and Council of Fairlawn, 143 N.J. Super. 259, 273-4 (Law Div. 1976), *aff'd*, 153 N.J. Super. 480 (App. Div. 1977).

In Board of Education of Delaware Valley Regional High School District v. Township Committee of Holland, 1989 S.L.D. Feb. 6, 1989 at 9, the State Board of Education determined a free balance of approximately four percent of the current expense budget to be a slender reserve. N.J.A.C. 6:20-2.14(a) suggests that a free balance of three percent of the current expense budget is not unreasonable. In the present matter, if the \$600,000 were left in surplus and not transferred as directed by the Council, it would leave the Board with an unappropriated surplus of between one and one and one-half per cent of

OAL DKT. NO. EDU 2895-90

current expense after payment of damages with which to meet unexpected expenses. If transferred, it would leave no surplus in the event the Board was required to pay damages to the supplemental teachers.

I **CONCLUDE** that the Council's requirement that the Board transfer \$600,000 from its surplus to current expenses is unreasonable and would impair the ability of the district to provide a thorough and efficient education to its students.

In his decision of April 11, 1990, OAL DKT NO. EDU 4589-89, remanding this matter for further hearing, the Commissioner already determined that a judgment against the Board by the supplemental teachers subsequent to July 1, 1990 would not moot the questions raised in this appeal for the 1989-90 budget year since the impact of the reduction in surplus will carry forward into subsequent school years and affect the Board's ability to budget to insure provision of a thorough and efficient education to the children of the district in the future.

Accordingly, I **CONCLUDE** that the \$600,000 reduction of the Board's unappropriated surplus for transfer to its current expense appropriation by the Township Council was arbitrary, capricious, and unreasonable and the \$600,000 should be restored in full to the Board's surplus for the 1989-90 budget year so that it may provide a thorough and efficient system of schools in the Township of West Orange.

ORDER

Accordingly, it is **ORDERED** that \$600,000 be added to the tax levy of the Township of West Orange by the Essex County Board of Taxation so that the total amount certified to be raised by local taxation for current expense costs of the West Orange Board of Education for the Township of West Orange for the 1989-90 school year shall be \$27,699,786.00.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 11, 1990
DATE

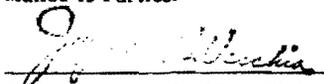

EDITH KLINGER, ALJ

12/14/90
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

DEC 15 1990
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

njt/g/e

APPENDIX

Witnesses

For Petitioner:

**James Krieger
Rocco John Capozzi**

For Respondent:

**Peter Dunn
Joseph P. Brennan Jr.
Anthony J. Minniti
Lynn B. Sorge
Toby Katz**

Exhibits

- P-1 Petition to Commissioner of Education**
- P-2 Schedule of Board building repair project**
- P-3 Interrogatories propounded by the Board of Education**
- P-4 Minutes of Council meeting of April 25, 1989**

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF WEST ORANGE,	:	
ESSEX COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF WEST ORANGE,	:	DECISION ON REMAND
ESSEX COUNTY,	:	
RESPONDENT.	:	
_____	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. The Township Council's exceptions were untimely filed pursuant to the dictates of N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and conclusion of the Office of Administrative Law in its recommended initial decision on remand that the \$600,000 reduction of the Board's unappropriated surplus for transfer to its 1989-90 current expense appropriation by the Township Council was arbitrary, capricious and unreasonable and that the \$600,000 should be restored in full to the Board's surplus for the 1989-90 budget year for the provision of a thorough and efficient education. In so deciding, the Commissioner takes official notice of the Commissioner's decision rendered in the case

captioned West Orange Supplemental Instructors' Association et al. v. Bd. of Ed. of the Township of West Orange, Essex County, decided by the Commissioner January 9, 1991, which affirmed in part and reversed in part the recommended decision of the Office of Administrative Law pertaining to payments owing to 13 supplemental teachers rified in 1983 or 1984. Therein the Commissioner determined that approximately \$550,000 to \$600,000 is payable to such teachers, thus, approximating very closely the \$600,000 sum transferred from the Township Council of West Orange from surplus to the 1989-90 current expense budget in that school district. Presuming that the amount so determined as due to such group of teachers by the Commissioner represents the final disposition of the matter, the amount remaining in the surplus account for the school year in question, approximately \$1,100,000, represents a reasonable figure of approximately four percent of the total current expense budget in the district.

Notwithstanding the above conclusion, the Commissioner accepts the recommendation of the Office of Administrative Law for the reasons stated therein as to the unreasonableness of such transfer without reasons provided to the Board. Accordingly, the Commissioner hereby directs that \$600,000 be added to the tax levy of the Township of West Orange by the Essex County Board of Taxation so that the total amount certified to be raised by local taxation for current expense costs of the West Orange Board of Education for the Township of West Orange for the 1989-90 school year shall be \$27,699,786, as set forth in the following chart:

	<u>Current Expense Tax Levy</u>
Original Current Expense Tax Levy	\$27,822,836
Reduction	734,050
Current Expense Tax Levy After Reduction	27,099,786
Restoration to Current Expense Budget	600,000
Current Expense Tax Levy After Restoration	27,699,786


COMMISSIONER OF EDUCATION

JANUARY 28, 1991

DATE OF MAILING - JANUARY 28, 1991

BOARD OF EDUCATION OF THE TOWN- :
SHIP OF WEST ORANGE, :
PETITIONER-RESPONDENT, :
V. : STATE BOARD OF EDUCATION
TOWNSHIP COUNCIL OF WEST ORANGE, : DECISION
ESSEX COUNTY, :
RESPONDENT-APPELLANT. :
_____ :

Remanded by the Commissioner of Education, April 11, 1990

Decision on remand by the Commissioner of Education,
January 28, 1991

For the Petitioner-Respondent, Stephen J. Christiano, Esq.

For the Respondent-Appellant, Matthew J. Scola, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. The Board's request for post-judgment interest is denied in that the Board has not made application therefor to the Commissioner, who has been authorized to determine that such an award is due. N.J.A.C. 6:24-1.16 (formerly codified as N.J.A.C. 6:24-1.18).

July 3, 1991



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT

ORAL INITIAL DECISION

OAL DKT. NO. EDU 8097-90
AGENCY DKT. # 343-10/90

BIEHN CONSTRUCTION, INC.,
Petitioner,

v.

PACIFICORP CAPITOL, INC.,
WARREN HILLS REGIONAL SCHOOL
DISTRICT BOARD OF EDUCATION,
AND DE SAPIO CONSTRUCTION COMPANY,
Respondent.

185 Washington Street
Newark, New Jersey 07102
Monday, October 29, 1990
9:00 a.m.

William Baggitt, III, Esq., for petitioner

Steven D. Weinstein, Esq., for Pacificorp
(Blank, Rome, Comisky & Mc Cauley, attorneys)

John P. Gallina, Esq., for De Sapia
(Gaetano M. De Sapia, Esq., attorney)

James W. Broschious, Esq., for Warren Hills Regional
(Broschious, Cooke & Glynn, attorneys)

BEFORE PHILIP B. CUMMIS, ALJ:

This is a transcript of the administrative law judge's October 29, 1990 Oral Initial Decision pursuant to N.J.A.C. 1:1-18.2.

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THE STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU 8097-90

BIEHM CONSTRUCTION, INC., a
corporation of the State of
Pennsylvania, authorized to do
business in the State of New
Jersey,

Petitioner,

vs.

PACIFICORP CAPITOL, INC., a
corporation of the State of
Virginia, doing business in the
State of New Jersey; WARREN
HILLS REGIONAL SCHOOL DISTRICT
BOARD OF EDUCATION, a municipal
corporation of the State of New
Jersey located in Warren County,
New Jersey and DE SAPIO CON-
STRUCTION COMPANY, a New Jersey
entity,

Respondent.

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NOV 28 1990

Monday, October 29, 1990
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Newark, New Jersey
Commencing at 9 a.m.

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B E F O R E :

HONORABLE PHILIP B. CUMMIS
Administrative Law Judge

A P P E A R A N C E S :

WILLIAM BAGGITT, III, ESQ.
Attorney for the Petitioner.

MESSRS. BLANK, ROME, COMISKY & MC CAULEY
BY: STEVEN D. WEINSTEIN, ESQ.
Attorney for Pacificorp.

GASTANO M. DE SAPIO, ESQ.
BY: JOHN P. GALLINA, ESQ.
Attorney for Respondent De Sapiro.

MESSRS. BROSCIOUS, COOKE & GLYNN
BY: JAMES W. BROSCIOUS, ESQ.
Attorney for Warren Hills Regional Board
of Education.

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THE COURT: We've had a conference off the record and before us today are two issues.

The first issue to be argued will be whether or not the matter was timely-filed.

The second issue is whether or not it is necessary in a lease purchase, more particularly, in this school district, for the parties, namely, the Board of Education and/or the lessor, to put out for bid the contract for construction.

Does that cover it, gentlemen?

MR. WEINSTEIN: Yes.

MR. BROSCIOUS: Yes, sir.

MR. BAGGITT: I'm not sure, your Honor. Maybe you're missing something.

My impression was that the issue was they have already put it out to bid. There was no doubt about that.

THE COURT: The question is did they have to. If they don't have to, then they don't have to take the lowest bid. They may put it out and get 15 bids and decide to take the highest bid, for

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whatever reasons, because their position is, as I understand it, if you follow the yellow brick road which is the procedure laid out by the commissioner under the rules and regulations and the laws, and you do step one, two, three, four and five, and you follow all those steps and you get all the approvals and you put out the bid for the lessor, and you hire the lessor based upon the bid, the lessor then takes overall obligation with the exception of they, the school district, is reserved to itself the ability to review the contracts that are let out to make sure that this is what they really want in their school.

Isn't that your position?

MR. BROSCIOUS: Yes.

MR. BAGGITT: I understand that, your Honor.

THE COURT: I just want to make sure it's stated for the record.

MR. BAGGITT: My only point was that, indeed, in this case they actually did then seek the lowest responsible bidder

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in their advertisement. They asked for the lowest responsible bidder.

THE COURT: Right, and assuming you're correct, then we have the issue that we talked about off the record, as to whether or not you, in fact, are the lowest bidder. There's a question -- that's a whole other issue here which I don't think, based upon the papers before me, I can decide.

I don't think I have enough information to make that decision. So I've put that aside in my own mind.

But as far as I can see factually -- and I've found it the easiest to work with -- I've taken Mr. Weinstein's factual situation, as set up in his brief and I've used that as the basis for the facts in this case.

I don't know if anybody has a problem with that. I'm sure you've all read the briefs and heard the facts laid out. It just seems to me they were laid out a little bit better than the other ones. For anybody who's going to read

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this after me, I think it's just going to make it easier. So if we accept those as the facts in this case, then we can get on with the decision.

If we don't accept that and we have a factual issue, then it's not right for summary judgment. I think we all agreed it's right for summary judgment.

Do I hear a no?

MR. BAGGITT: I think it's right for summary judgment on that issue. I just don't exactly recall the detailed facts in Mr. Weinstein's brief.

My assumption is that what you say is so.

THE COURT: They just laid it out a little better. I think if you put them all together, as I did, and you read them and you reread them and you work with them, I think Mr. Weinstein just did a better job of laying it out than anybody else.

Mr. Broscius?

MR. BROSCIOUS: I agree with that, Judge.

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THE COURT: It makes life easier for us all.

MR. BROSCIOUS: If any of us differed from what Mr. Weinstein said, we certainly could have set it forth earlier.

THE COURT: You would have had trouble because I just got his brief Thursday.

MR. BROSCIOUS: I'm saying I'm not aware of any papers that have been filed today or any statement today that controverts any of the facts that are set forth.

MR. BAGGITT: That's precisely what I'm concerned about.

THE COURT: Let's do it this way. Mr. Weinstein, do this: Turn to the factual part of your brief and let's read it into the record.

MR. WEINSTEIN: Just read it exactly as it is?

THE COURT: It's only three or four pages, so everyone hears it and we can agree upon it and if there are any

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1 changes in it, we'll make the changes
2 right now. I want to end this case
3 for you. I don't want it to go on
4 forever for you. I know the ground is
5 starting to get hard as of last night.

6 MR. WEINSTEIN: "This matter
7 involves the applicability of public
8 bidding requirements under the Public School
9 Contracts Law, N.J.S.A. 18A:18A-1, et seq.
10 to a lease purchase arrangement entered
11 into by a Board of Education pursuant to
12 N.J.S.A. 18A:20-4.2(f).

13 "The Board of Education of the
14 Warren Hills Regional School District
15 (hereinafter Board) determined the need
16 for certain improvements and expansion of
17 its senior high school and approved the
18 use of a lease/purchase program for said
19 acquisition pursuant to N.J.S.A. 18A:20-4.2(f).
20 The Board publicly advertised pursuant
21 to N.J.S.A. 18A:20-4.2(f) for an active
22 lessor and an agent bank. The Board
23 adopted a resolution on February 21, 1989,
24 appointing Pacificorp Capitol, Inc. (hereinafter
25 Pacificorp) as the active lessor and New Jersey

1 National Bank as agent. (See Board
2 resolution of February 21, 1989, Exhibit
3 3). Previously, on January 17, 1989,
4 the Board, having made the statutorily-
5 required findings, authorized an application
6 to the Commissioner of Education of the
7 State of New Jersey for his review and/or
8 approval of the proposed lease/purchase
9 program in accordance with N.J.S.A. 18A:20-4.2(f).
10 At the same meeting the Board authorized its
11 professionals to make application pursuant
12 to the statute to the local finance board
13 of the State of New Jersey. (See Board
14 resolution of January 17, 1989, Exhibit
15 4). The Commissioner of Education approved
16 and endorsed the transaction by letter
17 dated April 14, 1989. (See Exhibit 5).
18 The local finance board held a public hear-
19 ing and approved the transaction on April
20 18, 1989. (See Exhibit 6). These
21 approvals were pursuant to N.J.S.A. 18A:20-4.2,
22 18A:20-8.2(b) and N.J.A.C. 6:22A-1.1, et seq.
23 The lease/purchase program contemplated
24 the sale by the agent of \$8,880,000 aggregate
25 principal amount of certificates of par-

1 ticipation (certificates). Notice of sale
2 was duly published and at a public meeting
3 of the Board advertised and held in
4 accordance with law, bids were accepted
5 for the sale of the certificates for
6 the lease/purchase program.

7 "The Board authorized approval
8 of a lease/purchase agreement dated
9 as of May 1, 1989 between the Board as
10 lessee and Pacificorp Capitol, Inc. as
11 lessor. (See Exhibit 7). It similarly
12 authorized the approval of a ground lease
13 agreement dated May 1, 1989 between the
14 Board as lessor and Pacificorp Capitol,
15 Inc. as lessee and the approval of the
16 agent agreement dated as of May 1, 1989
17 by and among the Board, New Jersey National
18 Bank, as agent and Pacificorp Capitol,
19 Inc. The primary governing document is
20 the lease/purchase agreement between
21 Pacificorp as lessor and the Board as
22 lessee dated as of May 1, 1989 (Exhibit 7).

23 "In the definition section of
24 the agreement on Page 6, contractor is
25 defined as that party selected by the

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lessor and approved by the lessee. Section 301 of the lease/purchase agreement covering rent makes clear that the rental payments by the Board come from available revenues only and that the certificates of participation are not a debt or liability of the School Board, lessee. Furthermore, the certificate holders have no right to compel the use of the School Board's taxing power for rental payments, lease/purchase agreement 301, Exhibit 7. Section 304 of the lease/purchase agreement provides for the return of the land and the projects to the lessor upon the lessee's cancellation of the agreement. Section 502 of the agreement requires the lessor to contract with the contractor on the approval of the lessee. Once the contracts are signed, this section makes it clear it is the lessor's responsibility to have the project built on time. Section 608 provides that title to the project is in the lessor subject to the exercise of the option to purchase by the lessee which is contained in Section

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701 of the agreement.

"As is typical of leases and lease/purchase agreements in the private sector, this agreement contains provisions typically found in such agreements covering termination, events of default (non-appropriation not being an event of default), termination after full payment or prepayment, title to the property during the leasehold, leasehold rights, restrictions regarding liens, requirements on the lessee regarding the care and use of the property, the lessee's right to quiet enjoyment, negligence responsibilities, indemnification of the parties and subleasing restrictions.

"Such provisions are typical to and not unusual in a private sector setting for a specifically-designed single-use building.

"Following all of the above-indicated approvals and actions, the parties submitted the plans and specifications to the Department of Education Bureau of Facilities Planning and ultimately received

1 the necessary approvals to proceed with
2 the construction. Single prime construction
3 bids were solicited in the name of Pacificorp
4 as lessor pursuant to a notice to bidders
5 inviting bids on July 23, 1990, later
6 changed by addendum until August 1, 1990
7 (see Exhibit 1 attached to Biehn's petition.)

8 "On or about September 7, 1990,
9 the project architect solicited from the
10 bidders a fixed best price proposal.
11 In other words, the lessor was seeking a
12 maximum or capped price for the project.
13 See Exhibit 3 attached to Biehn's petition).
14 Petitioner submitted the same bid it had
15 previously submitted which did not include
16 the fixed best price as requested.
17 Pacificorp, as owner/lessor, determined
18 to award the contract to respondent DeSapio
19 Construction Company. On September 25,
20 1990, respondent Board of Education approved
21 that decision by Pacificorp. The verified
22 complaint, order to show cause and this
23 petition ensued shortly thereafter."

24 MR.BAGGITT: Your Honor, the only
25 issue I take with that is that I'm referring

1 to the last -- basically, the last para-
2 graph. The bids by petition in the matter
3 basically recites the effects as we have
4 them and we responded to the notice to bid
5 on July 23, 1990. That notice to bid and
6 specifications had no mention of any fixed
7 price contract, absolutely not.

8 We responded. The bids were open
9 and read on August 1, 1990. That's when
10 we were, at that point, \$669,000 lower
11 than the next-lowest bid.

12 Subsequent to that time, as
13 he mentions, on September 7, practically
14 five weeks later, the architect began
15 to solicit this fixed price concept com-
16 pletely different. I just want to be
17 sure --

18 THE COURT: Mr. Weinstein, can
19 we agree with that?

20 MR. WEINSTEIN: We can agree.

21 THE COURT: Let's amend the
22 facts, then, to conform with that, that
23 the initial bid did not ask for a fixed
24 price contract and it wasn't until some
25 six weeks later when the architect became

1 involved that there was a second proposal.

2 Is that correct?

3 MR. BAGGITT: Well, your Honor,
4 the architect was involved all along.
5 He was present at the bid opening.

6 THE COURT: All right.

7 But the architect put out a
8 second proposal some six weeks later,
9 including a fixed price bid.

10 MR. BAGGITT: That's right, your
11 Honor.

12 THE COURT: Would that change it
13 for you?

14 MR. BAGGITT: That's good enough.
15 I just wanted to be sure.

16 THE COURT: Absolutely.
17 That's why we did it this way.

18 MR. BAGGITT: All right.

19 THE COURT: We will stipulate the
20 facts as read by Mr. Weinstein from his
21 brief and as amended. They'll be the
22 facts of the case.

23 MR. WEINSTEIN: There should not
24 be, your Honor, and I don't believe there
25 is an implication in that amendment that

1 the first, if I may use that term, in
2 any way required an award to the lowest
3 bidder.

4 THE COURT: Well, that's what
5 we're dealing with. That's what we're
6 here for today. That's one of the decisions
7 that hopefully I'll make.

8 Now, the next thing I thought
9 we would do to make life easier is take
10 the exhibits for the brief and the opposition
11 to the request and in support of the motion
12 for summary disposition on an expedited
13 schedule.

14 There are 11 exhibits, I believe,
15 nicely bound. I think they're also from
16 Mr. Weinstein and if no one has any
17 objection, I think this contains all the
18 documentation of the leases, et cetera,
19 including my opinion in the CARE case.
20 If somebody wants to offer this into
21 evidence or as a joint exhibit for the
22 four of you, I think it might be a
23 good idea for the standpoint -- from the
24 standpoint of the record -- to put this
25 in.

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Does anybody have any problem with it?

MR. BAGGITT: Your Honor, attached to my brief are several items that I don't think are -- I am almost sure they're not attached.

THE COURT: Fine.

Let's pull them out of your brief and we'll annex them to this.

MR. BROSCIOUS: Judge, respectfully, I wonder if we can just do first things first. Do you have an objection to those 117

MR. BAGGITT: I have no objection to that.

I just want to make sure.

THE COURT: I thought that's what he said. He just wants the additional ones that are not in here that he annexed to his brief annexed. So we'll have a more complete record.

I have no problem with that. It seems no one else does. Pull them right out of your brief right now and we will give them all to the court reporter.

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We'll have them marked into evidence now. That should take care of all the documenting evidence.

MR. BAGGITT: In fact, your Honor, if I might say, I don't think he duplicated any of my exhibits.

THE COURT: Do you want to put all yours in?

MR. BAGGITT: I would like to do that.

THE COURT: Fine.

I want it as complete as possible.

MR. WEINSTEIN: Just so we're clear, on the record, are we talking about the exhibits to your petition or to the --

MR. BAGGITT: From my brief.

MR. WEINSTEIN: I didn't put them in mine.

MR. BAGGITT: I don't think you put them in there. Okay.

Shall I identify them on the record?

THE COURT: Yes.

Mr. Weinstein will identify his

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for the record, too. I have two copies of that.

I'll be more than happy to get rid of one of my copies. I'm going to give that to the court reporter for marking purposes.

MR. BROSCIOUS: Judge, just for the record, I did not receive any attachments to Mr. Baggitt's brief. All I received was a brief.

THE COURT: I think the attachments were in the original brief filed with the Superior Court. That's what you're talking about?

MR. BAGGITT: That's what I'm talking about.

I did not have any attachments to my brief.

THE COURT: And I have -- I do have those, the brief and opposition order to show cause.

MR. BAGGITT: That's Mr. Weinstein's.

THE COURT: Yes, but they are in the original Superior Court brief. For the record, we'll mark them if no one

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has any objection. You can mark these as J exhibits since they have just the documentation of the leases, et cetera. All of these will be marked as J-1, et cetera.

Let's do this: Mr. Weinstein, read yours in. Just give us a brief description of each one. Then we'll take Mr. Baggitt's.

MR. WEINSTEIN: The first is the order to show cause dated October 2, 1990, signed by Judge Kingfield.

THE COURT: You don't have to be that explicit. Just say order to show cause.

MR. WEINSTEIN: The second is the proposed order to Judge Stritshoff. It's since been signed. I don't have the date. That's the order to transfer the matter to you.

The third is a resolution of the Board dated February 21, 1989, appointing Pacificorp as lessor.

The fourth is a resolution of the Board dated January 17, 1989, authorizing the lease/purchase transaction in the

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application to the Commissioner and
the local finance board.

Five is the April 14, 1989 letter
of Dr. Sol Cooperman, Commissioner of
the Board of Education, together with
an endorsement certificate of the
Commissioner.

Six is the resolution of the
local finance board dated April 18, 1989
approving the transaction.

Seven is the lease/purchase
agreement.

Eight is a memorandum dated April
13, 1987 from Vincent B. Calabrese, Assisting
Commissioner of the Department of Education
to County Superintendents with attachments.

Nine is Chapter 22A, N.J.A.C. 6,
Chapter 22A.

Ten is N.J.A.C. 6:20, Section 8.1
et seq.

Eleven is the opinion of Judge
Cumis in the matter known as CARE vs. the
Board of Education of the Township of Passaic-
Morris County.

THE COURT: Okay.

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Now, what you'll have to do for me is just prepare a typed list from the exhibits. You can fax it to me. Mark them J-1, J-2, et cetera.

MR. BROSCIOUS: Judge, for the record, two has been executed by Judge Stritshoff on October 18, 1990. That's an unsigned copy.

THE COURT: But we all agree it is a copy, even though it was unsigned?

MR. BROSCIOUS: It is and has been signed.

THE COURT: Mr. Baggitt, you'll do the same thing. The first will be J-1 through J-11. The one you're going to give us now is J-12.

MR. BAGGITT: J-12 is the verified complaint which I filed in this matter. The next number, if I forget them, 13 is a notice to contractors, two-page document.

The next which would be 14, is the bid tabulation.

Next is a letter from the architect dated September 7, 1990.

The next number is a letter from

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myself to the Warren Hills Regional School District dated September 11, 1990. Next number is a letter from my client to Biehn Construction Company to the architect dated -- I guess it's not dated. It's an undated letter.

The next is a letter from the architect to all contractors dated September 14, 1990, reciting the best price bids proposal.

The next number is a copy of the invitation to bids, Subsection E entitled Acceptance of Bid Award.

The next number is a copy of the resolution of the Warren Hills Regional School Board of Education of September 25, 1990.

The next number is the copy of plaintiff's order to show cause in this matter.

The next number is a copy of the petition before the Commissioner of Education.

The next number is entitled lease/purchase guide and a one-page attachment

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from that lease/purchase guide.

The next number is a letter.

MR. WEINSTEIN: I don't have it in front of me. Is that the School Board Association?

MR. BAGGITT: That's correct. It's published by the New Jersey School Board Association and page 26 is attached.

The next number is a letter opinion from McCarter & English dated May 10, 1989, five pages.

Next is -- I can skip that because the lease/purchase document is already in evidence.

THE COURT: Just pull it out.

MR. BAGGITT: That's no problem because those are both in there.

The next number is again the notice to bidders dated June 29, 1990, in re: proposed petitions and authorizations. It's a letter from the architect to all the bidders.

The next number is an exhibit which includes the notice to contractors and all of the specifications relating

1 to the bidders of the contract. There
2 are some identified by pages. These
3 come right from the bidders' documents
4 A-1 and A-2, B-1 through B-13, C-1 through
5 C-12, D-1-1, then D-1-2, then D-2-1 and
6 2, D-3-1, then Section E, Page 1, Section
7 E, Page 2, Section F, Page 1 and the
8 next document is an addendum to the plans
9 and specifications, then several pages of
10 information relating to prevailing wages
11 and then it contains a listing of schools
12 and colleges where Biehn Construction
13 Company has indeed performed construction.
14 These are all part of the request for
15 bids, request for information for bidders.

16 Then finally, the blank forms
17 of bid bond which were required to be
18 submitted and information from the Department
19 of Treasury relating to prequalification
20 of the petitioner. That's it, your
21 Honor.

22 THE COURT: Okay.

23 Now, here's how we're going to
24 do this today. Ordinarily, of course,
25 I would say to the petitioner proceed with

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your argument and I'm going to do that on the second issue. But on the first issue, the issue that was raised by Mr. Weinstein as to whether or not it was timely-filed and whether or not it should have gone to the Appellate Division within 45 days, since Mr. Weinstein raised that, I'm going to let him argue that and then give you an opportunity to respond to that.

It's a fair way to do it.

MR. BAGGITT: Your Honor, I don't disagree with that.

But I really, truly think that issue was --

THE COURT: Well, let's get it on the table anyway. Let's see what happens. Okay.

MR. WEINSTEIN: Thank you, your Honor.

I think in a certain sense, although the issue was one that I've raised and I believe has merit in and of itself, also has to be put into a certain extent in the context of the failure of the state of claim

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articles which we'll get to then later on, in terms of harm and weighing of interests.

But to the extent that petitioner seeks to avail itself of rights before the Commissioner, it would appear that there has to be a decision of the Commissioner which it appeals or disagrees with or seeks to be heard on. It is clear that not only is the process which was followed in this instance one which is legislatively and authorized by regulation and controlled by regulation in its procedure, but also was a procedure which was done publicly, done at public meetings of the local school Board and the actions which went to the Commissioner were actions which were authorized by the school Board at public meetings, adopted at public meetings pursuant to the Sunshine Law, the Open Public Meetings Act.

Petitioner raises in an allegation in its petition that possibly the actions taken in this instance were in violation of the Open Public Meetings Act. We disagree

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with that.

THE COURT: I don't think that's really before me, as to whether or not they are or not.

MR. WEINSTEIN: The point is that the Board authorized in 1989 that this matter go before the Commissioner of Education and the local finance board for its approval. The Commissioner made that decision April 14, 1989.

The subject of lease/purchase at the school Board level is a controversial subject. It has its impact not just with potential bidders, contractors, but obviously, with the electorate in terms of the choice taken, whether it be a bond referendum under the other procedure or a lease/purchase transaction under this procedure. It is one that is in the public forum quite clearly and in this instance is one which was acted upon in the early months of 1989, and by April 14, 1989 by the Commission.

Following that action and based upon the action of the Commissioner and the

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local finance board which occurred a few days later, an awful lot of activity then gets kicked into motion, if you will. The plans and specifications get finalized and get submitted to the Department's Bureau of Planning which takes a lot of work in terms of their approval process. The professionals for the school Board and the lessor kick into action, and underwriting took place here. Almost \$9 million of certificates were issued and held by the agent bank. It's my understanding certain site work began at the site, and if the process was to be stopped, if the process was to be challenged, then the action of the Commissioner should have been the action that was appealed, because without the action of the Commissioner the matter could not have gone forward, obviously.

THE COURTS: By that you mean the final approval of all documentation filed, plus the bidding for the lessor?

MR. WEINSTEIN: Bidding for the lessor, correct.

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THE COURT: When was all that completed, on what date?

MR. WEINSTEIN: Well, the Commissioner approved it on April 14, 1989. The Board authorized the signing of the documents on April 11, 1989. The lessor, Pacificorp, was appointed by the Board on February 21, 1989. Prior to that time the bidding for the lessor occurred.

THE COURT: Okay.

So the real date is April 14, 1989 when the Commissioner put this final stamp of approval on this project?

MR. WEINSTEIN: That's correct. The local finance board acted on April 18, four days later, which also was a necessary approval, so the latest --

THE COURT: Okay.

So April 13, 1989.

MR. WEINSTEIN: I think an appeal of that, not being an appeal as we have here today, however, within the Department of Education --

THE COURT: What I'm trying to

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establish is the exact date that you contend that the 45 days started the roll for the Appellate Division appeal.

MR. WEINSTEIN: Well, I would contend since the petitioner so chose to appeal to the Commissioner of Education that it's the April 14th day, the approval of the Commissioner. But quite frankly, given the long length of time that's gone by since that period of time, other than for record purposes, which I understand four days is not a critical situation here.

THE COURT: And, in any event, the first appeal by the petitioner to anybody was --

MR. WEINSTEIN: The filing of the complaint in the Superior Court on October 2, 1990, followed, I think, a day or two later by the filing of the petitioner before the Commissioner.

The reason for the 45-day time period to appeal, I think it's clear and that is that there has to be certainty. There has to be finality. That provides an

1 adequate time period for someone to take
2 an action, challenge it and have the
3 administrative process kick in, which is
4 controlled by the regulation.

5 To suggest that we can go through
6 all that's happened since April of 1989
7 and have a transaction where almost \$9
8 million of certificates have been sold
9 to the public and have them holding
10 those certificates and all the work that
11 I detailed, and then have the project
12 held up based on an appeal to the Commissioner
13 flies in the face of any understanding
14 and any purpose to a 45-day time limit
15 to appeal and the finality requirements
16 that are inherent in that.

17 I suggest that is so clear that
18 not much more has to be said about that.
19 Petitioner will likely suggest that it
20 was not a party in those earlier proceedings,
21 that it did not become a party to this
22 process, if you will, until it received
23 or observed the notice to bidders, notice
24 to contractors, and that this is a bidding
25 question and not a Commissioner of Education
 approval process question and, at the least,

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2 it has no notice of the earlier activities.
3 I will suggest, as I did earlier in my
4 remarks, that, first of all, lease/purchase
5 is a controversial subject. The contractors,
6 with the kind of experience that this
7 contractor has in the school field, un-
8 doubtedly are well-aware of this controversy
9 and that the actions of the Board again,
10 as I said, were taken on public notice by
11 public action.

12 More particularly, if the argument
13 is a bidding argument, then we are
14 caught in the quandry, I guess, that
15 your Honor pointed out earlier today of
16 what might be termed overlapping juris-
17 diction by the Superior Court and the
18 Commissioner.

19 But given that and given the
20 Superior Court, which in the non-school
21 situation and the public and the municipality
22 situation, for instance, typically handles
23 bidding questions, I think one has to
24 look at all that's happened here and look
25 at the equities and weigh the obligations
that are on each of the parties in terms of

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the activities which are before you.

I would simply suggest that if this is a matter for the Commissioner and it's been deemed to be a matter for the Commissioner, then the rule is clear that it has to be within 45 days of the Commissioner's action. The Commissioner hasn't taken any action in the last 45 days or so before October. That action was taken in 1989.

THE COURT: I think it would be unfair to you if you have to answer, and then let somebody else go after you and then answer again. So I think what we'll do is we'll see if the other two parties have anything to add to Mr. Weinstein and that will give you a chance to hear anything that you have to answer to.

Gentlemen, do you have anything at all?

MR. BROSCIOUS: Yes, briefly, your Honor.

Your Honor, I would just add to what Mr. Weinstein said that it is the decision

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of the Commissioner in April of 1989 which created the status of lessee for this Board of Education, which we submit changed the obligations or changed the bidding picture considerably and it is for that reason, it is the creation of that status that makes the bidding statutes not applicable here.

If the issue is as to status, then the appeal should have been back in April of 1989.

THE COURT: Let me ask a question: It's all open to all three of you. Where does he get standing from to go to the Appellate Division at that juncture in April of '89 and make this challenge? Anyone can answer.

I don't care.

MR. WEINSTEIN: Well, I think that that issue appears as an issue sort of as an initial reaction, but I don't think that there's any question that if a contractor maintains that lease/purchase, excludes public bidding and that the action was taken pursuant to Department of Education

1 regulations, that that is an appropriate
2 point and that there -- they would have
3 standing first, probably, although I'm
4 not sure for it to be heard before the
5 Commissioner before one would get to the
6 Appellate Division.

7 THE COURT: So your position is
8 that April 14, give or take a week or
9 whatever, when all this was wrapped up,
10 he should have made an appeal firstly
11 to the Commissioner of Education and
12 that would have tolled the time for
13 the 45 days to appeal to the Appellate
14 Division?

15 MR. WEINSTEIN: That is correct.
16 I assume there's a procedure for that,
17 but I think that is correct because
18 what's really at issue here is the validity
19 of the lease/purchase statute.

20 THE COURT: Well, that's been
21 determined.

22 MR. WEINSTEIN: Well, I think so
23 but I've argued that.

24 THE COURT: I don't think it's
25 an issue any longer as far as I'm concerned.

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I don't think that's the lease/purchase statute. They had a chance to challenge it. In fact, they did go to the Appellate Division in the CARE case, but they politically worked it out because what happened is that the citizens of Passaic Township turned the whole Board out and put their own people in and they decided to fix two schools rather than building one.

I don't think there's any question about lease/purchase. It's existed in the State of New Jersey now for well over 20 years with public buildings. But the question is: Is there a procedure, is there a juncture where an independent person or a company is at a point where now you come in -- I don't see it in any regulation or statute that says if you're going to challenge you come in at this point.

MR. WEINSTEIN: That's correct, but clearly, they are an affected party and could make the argument that we --

THE COURT: Do they have a duty to read every public announcement that is posted on any lease/purchase in the State of

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1 New Jersey? Do they have a duty to only
2 do that when it would affect them, when a
3 bid is put out? I don't know.

4 MR. BROSCIOUS: Judge, I think
5 they have a duty if they're going to make
6 this argument. What we have here is
7 CARE took us to this opinion and we
8 are going now to the next logical step.
9 If a contractor had enough concern, the
10 contractor ought to be charged with the
11 knowledge that lease/purchase has been
12 around, that lease/purchase involved a
13 fundamental change of the relationship of
14 the parties as in Bulman vs. McCrane
15 (phonetic) which is cited in the CARE case,
16 recognizing that in the school context --

17 THE COURT: Then just for the
18 record, that's at 64 New Jersey 103.

19 MR. BROSCIOUS: Yes, sir.
20 Recognizing now that in this
21 context, that has been approved by the
22 Administrative Court and then by the
23 Commissioner and there has been approved
24 a change in the way in which projects are
25 going to be done, at that point I submit that

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a person such as this petitioner did have the duty and obligation to assert himself or itself into the process just as in this case I have received some phone calls from different interested industry types requesting dates of hearings, "Could we see a copy of the petition" and so forth.

So I think once the process reached the point where we were going to recognize lease/purchase in this setting, that a person such as this person did have the obligation to come forward if they intended to bid on the projects.

THE COURT: Unless Mr. Baggett is going to stand up and tell me right now that he admits or his client admits that they read every one of the newspapers or whatever these things are advertised in to see what's coming up in the future.

I have no evidence before me to accept the proposition that his client is in such a position and is of such a nature as a contractor who does this kind of work.

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I don't have it so I can't make a finding on it. I may agree with you if there was something in the record that says that they are the largest school contractor in New Jersey, bid on 85 percent of the contracts in New Jersey, have an employee who does nothing but read the newspapers to see what's going on in school contracts, et cetera.

But I have none of that before me and I can't reach that conclusion.

MR. WEINSTEIN: Your Honor, if I may, I would also point out that this case, in a sense, could be looked at as pursuant to the lease/purchase regulations, N.J.A.C. 6:22A et seq., and I don't have the cite and I apologize for this. But there is a requirement that once regulations are adopted, that they can be challenged within one year.

These are adopted in late 1988, I believe. Clearly, the contractor is on equal footing with anybody else and these regulations clearly prescribe a procedure by which the school Board is to

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act. The school Board can't do whatever it wants. It must act pursuant to these.

THE COURT: I don't think he's challenging the regulations. I think he's saying that somewhere along the line after all this procedure is followed, you come to a step in the procedure where it is mandated upon the public authority and/or their agent/servant/representative lessor or whatever to put out for public bidding the contract to do physical work, either to build a new school or to fix up the old school or whatever.

Is that not your position?

MR. BAGGITT: Correct, your Honor.

MR. WEINSTEIN: I think that is the position, but I think that position -- and this does tie in, as I said in my opening comments to the basic argument really of the interpretation of the statute.

But to take the position in that way misses the point that the school Board, as a creature of the Legislature, must act in accordance with the legislative dictates

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and the regulatory dictates which set forth a certain procedure.

That procedure does not provide for public bidding. Now, I understand we haven't argued that point.

THE COURT: But it doesn't also provide for a time for an outsider during this whole process to come in with a challenge to any part of the process.

MR. WEINSTEIN: It does not explicitly provide for that but if one ultimately accepts the arguments that we've put forward on the interpretation of the statute, one has to come to the conclusion, I would suggest, that as Mr. Broscious said, the action of the Commissioner in April of '89 creates a status for the project. Everything flows from that point forward in terms of the requirements on the school Board to proceed in accordance with the Department's regulations.

Therefore, if one accepts the interpretation, it cannot be challenged at this point in time.

The only challenge that can be

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made is either to the adoption of the regulation within the one year provided or to the Commissioner's decision as it affects this particular case. To do otherwise allows the type of challenge which creates -- which allows official actions to take place of a substantial nature and substantial cost, including the issuance of certificates to be overruled or thrown out after it's all done, and that makes no sense, to allow a process to proceed in accordance with regulations and then rule it illegal, if you will.

THE COURT: But that's exactly what you're asking in this case, that it's all done now and he should have, within the 45 days from the completion of the process, gone to the Appellate Division to make exactly that challenge and hold up the whole procedure.

MR. WEINSTEIN: Within 45 days of the Commissioner's decision.

THE COURT: That's right.

The whole process is complete and

1 McCarter & English to the New Jersey
2 Department of Education. That was back
3 on May 10 of 1989. That letter was
4 submitted by McCarter & English and
5 solicited by the Division of Finance.

6 THE COURT: On whose behalf
7 was McCarter & English appearing at
8 that point?

9 MR. BAGGITT: McCarter & English
10 was special counsel, bond counsel, and
11 they were giving their opinion to the
12 Department of Education, the finance
13 section, and that opinion is supposed
14 to be on the question of the applicability
15 of the public opinion statute. The opinion,
16 if your Honor please, back on May 10,
17 relates to only one of the public bidding
18 statutes. That's 18A:18-18, which is
19 the statute which is the bane of all school
20 Boards. It has been for many, many
21 years. That's the statute that says when
22 you bid a school Board job over a certain
23 amount of money, you must bid five prime
24 contractors plus a general -- what McCarter
25 & English, in effect, were saying was

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that lease/purchase does not apply to that particular statute.

Now that's back on May 10.

THE COURT: Well, the ultimate question is if lease/purchase applied to any part of 18A:18-A or any of the education statutes requiring bids, and that's what we're here for.

MR. BAGGITT: Yes, your Honor. I think that's so.

I would also just simply say, therefore, we didn't have standing. We didn't know about it.

I don't know how we could have known about it. I point out this also to your Honor: I've done five of these lease/purchase financing. I understand Pacificorp's concern. I think I even did one with Pacificorp. I'm not sure but I understand their concern and I understand that going through that process is a lot of work. It's a tremendous amount of work. There are a lot of people involved and so on.

But the point is in all of my situations, we've awarded to the lowest

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responsible bidder. There is not --

MR. BROSCIOUS: Judge, I object to that.

THE COURT: Let him finish.

MR. BROSCIOUS: I object because he's now giving testimony before the Court.

If so, maybe you ought to swear him in.

THE COURT: I understand. I'm sitting without a jury, so I know what's going on.

MR. BAGGITT: The idea is that -- and my argument in this case or part of my argument in this case is that this is a compatible situation that just simply because the lease/purchase transaction was approved, it was approved by the Commissioner of Education, the next step is to go out to bid.

When you go out to bid, then you're bound by the statutes. So we're not attacking what went on. I say we didn't have the status to attack it. We're not attacking it now.

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We're taking what I think is a reasonable position. A reasonable position is that that statute applies and we should proceed in that way.

THE COURT: Okay.

I'm going to rule on issue one. I find that the petitioner in this case timely made his application to both the Commissioner and the Superior Court when he was noticed that bids were being solicited for the project, and that he had no notice nor standing to proceed to the Appellate Division, give or take 45 days after April 14, 1989, and that he is, therefore, properly before the Office of Administrative Law on the one issue that we have left.

Now, that's the issue of whether or not bidding is required for the construction of this particular high school. It's an addition, is it not?

MR. BROSCIOUS: Yes, sir.

THE COURT: Okay.

MR. WEINSTEIN: Your Honor, excuse me, but just so the record is clear, if I

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wrote correctly, your Honor said that petitioner timely made application when noticed that bids were solicited for the project.

The bids were initially solicited on July 23. Forty-five days from July 23 is not within the time frame that petitioner filed either action.

Now, there was a second bid and just so we have a clear record --

THE COURT: To be clear, it would be six weeks later.

MR. WEINSTEIN: Of the second bid?

THE COURT: The second bid, in all fairness, since we're dealing almost with an offer and an acceptance and almost simple contract law, if I can remember back that far.

So it would be from the second bid, and I think they're properly here and properly raising the question here now.

The question is whether or not their position is tenable under the lease/purchase

1 act and under the education acts and
2 whether or not they're required under the
3 education act or under the lease/purchase,
4 whether the lessor, in fact, has complete
5 control and can let out the contracts
6 any way they want to let them out, either
7 by bid or not by bid or under any other
8 methodology as long as they stay within
9 the 8.8 million dollars in this case,
10 which has been approved by the Commissioner
11 of Education.

12 More particularly, I think we
13 have to deal with the Bulman case. I
14 think that is the prime case that we
15 have to deal with in our argument here.
16 I specifically would like you to address
17 for me on Page 108 of the Bulman case
18 the comments, starting in the first full
19 paragraph and going into the second
20 paragraph. It starts before turning our
21 attention to what regard is the major
22 issue and goes into the second paragraph.

23 So when you do your arguments,
24 I would like you to take -- does everybody
25 have that?

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2 MR. BROSCIOUS: I just passed
3 it over to Mr. Baggitt.

4 THE COURT: I have my copy.
5 I'll be happy to give it to you.
6 Let's take a ten-minute adjournment.
7 We'll come back a few minutes after 11
8 o'clock.

9 (Whereupon, there was a break in
10 the proceedings.)

11 THE COURT: Please proceed.

12 MR. BAGGITT: Your Honor, I know
13 you've had the benefit of my brief and
14 all the attachments and all briefs have
15 been submitted to you.

16 Let me just state our position as
17 quickly and succinctly as I can.

18 Our position on this question is --
19 well, first of all, let me state it is our
20 position that the defendant Board and/or
21 Pacificorp, once they undertook the bids,
22 which they did, were bound by the public
23 bidding statute. That statute requires
24 advertisement of certain contracts. This
25 was one of them.

THE COURT: That's an equitable

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argument?

MR. BAGGITT: Yes, your Honor.

Once they did this, they were bound by that statute. They were bound by 18A:18A-37 which directs that the contract be awarded to the lowest responsible bidder. Not only do I argue that, but the Board, in fact, in its invitation to bid, requested that or stated that that contract would be awarded to the lowest responsible bidder.

I know that there was a qualification on that. The qualification was that they reserve the right to reject all bids.

THE COURT: When you say the Board did that, you don't mean Pacificorp, who is the lessor at that point, or do you?

Or do you not make a distinction then?

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MR. BAGGITT: I don't make a distinction, number one, and, number two, unfortunately I am not party to who actually did that advertising, whether it was the Board or whether it was --

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THE COURT: Can anybody answer that for us?

MR. WEINSTEIN: It was the architect, I believe.

THE COURT: Who worked for?

MR. WEINSTEIN: It was probably technically the agent of both.

THE COURT: Okay.

That's usually what happens. I'm just trying to help you out on this one.

MR. BAGGITT: I haven't seen the architect's contract.

MR. WEINSTEIN: But the bids were solicited in the name of Pacificcorp.

MR. BROSCIOUS: That's in the documents that were submitted by counsel.

MR. BAGGITT: Well, your Honor, my point, therefore, is that they both -- either or both are also bound by the lowest responsible bidder statute and that that's a very clear and plain meaning of the statute.

I take that statute and compare it with the lease/purchase statute and we

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don't find the lease/purchase transaction as being one of the exceptions to 18A:18A-37.

It's very clear. There is a list of exceptions in 18A:18A-5, very detailed list of exceptions.

THE COURT: To help you, I've read the list.

MR. BAGGITT: All right, your Honor.

It's not set forth therein. In the Bulman case which we talked about before, leases were one of the exceptions to the public bidding act, and even though leases were exceptions, an exception to the public bidding act, nevertheless the Court noted that the State still had -- nevertheless insisted on awarding to the lowest responsible bidders, even though the transaction was accepted, as I read that case.

I think the whole nature of the statutory framework -- well, let me backtrack for a minute and say, basically, your Honor, where I'm coming from is that there are public funds involved here,

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public money. The public money that's involved, the \$8,800,000 is going to be paid back by the school district over a period of years.

To the extent that that money is not needed, to the extent they have saved, therefore, if the lowest responsible bidder comes in, \$315,000 lower, that's a net saving to the Board of that money on an advertised basis, plus the interest that it might cost. It's clear it's a saving to them and it's clear that's where that statute is aimed at.

It's aimed directly at that. The second point I would like to make is that we're dealing with school property here. The property upon which these buildings are going to be built and altered belongs to the school, albeit in the lease transaction they have, I assume -- and I forget -- they probably have a 90-year lease or 40-year lease of the ground lease to Pacificorp, so that they can carry out their activities.

But the reality is, and the statute

1 says that it's public grounds, public
2 property. So we're dealing with public
3 property.

4 We're dealing with public funds.
5 We have a special trust when we're dealing
6 with those. The lowest responsible bidder
7 statute, and my equitable arguments, as
8 you have seen, relate the horrors of
9 avoiding that statute. The horrors of
10 avoiding the lowest responsible bidder
11 on a public statute are discrimination,
12 coalitions between the contractor and
13 the public, fraud, all kinds of evils
14 come down upon that kind of situation.

15 So it's ensconced with those
16 protections and it always has been and
17 it should be in this case.

18 That's what I'm arguing. The
19 other extreme that one goes to -- I don't
20 want to sound ridiculous about this, but
21 if the defendants are correct, they can
22 get the lease/purchase transaction approved
23 by the State and they can go out and
24 award to anyone they want to, even if
25 someone came in who was \$2,000,000, I mean,

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you have to carry to extremes, \$2,000,000 lower than my client was, let's say here a \$4 million contract.

THE COURT: In fact, they don't even have to go that far. They can just go out, take anybody, not knowing what the other people would come in at and they let it out for bids.

MR. BAGGITT: That is the argument that they make. I can't believe that the statutes contemplate that. I don't think that they ever, ever dreamed that this situation would take place, and I think the Bulman case is a case in point.

As the Supreme Court points out even now, they noted that the State awards to the lowest responsible bidder. When you shake it all out, it comes down to that. It's public property and the award, therefore --

THE COURT: What do I do with this? Let's look at the Bulman case. Let's look at the top.

When I said I was interested in the second and third paragraphs, I'm really

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more interested in the first paragraph here.

It says here again the controlling question is whether the basic transaction is a lease, and if so, the bidding statute is irrelevant, and then it goes on to cite N.J.S.A. 52:34-9C.

So the Court recognized, at least in this instance, that in case of a lease, for whatever the reasons are, that it goes on to talk about they recognize they don't have to bid. So we do have a case of Court and Legislature obviously in a public position with public funds and public building saying that if it's a lease, it's up to you.

Then in this case, the Commissioners looked it over and the people have looked it over and all the forms have been filed and they've come to the conclusion with their approval that if it comes in at 8.8, that's a reasonable amount because they signed off on it, and they don't appear to be worried that it could come in at 8.5 rather than 8.8. That's going to

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be their argument.

I just want you to see that if you want to address it; you don't have to address it. I'm just sorting it out.

MR. BAGGITT: Yes.

Well, your Honor, now, 8.8 to do that project --

THE COURT: I may agree with you as a taxpayer that absolutely, if you can save the school district \$1 million, \$300,000, \$20, one should do that.

I don't know if I agree with you as a Judge, based upon what's in front of me. I'll let you know that in a few minutes, but as a taxpayer, sure. I don't think anybody in this room would say for various reasons we should get the lowest price. Of course, the lowest price may turn out to be the contractor who's got one shovel.

MR. BAGGITT: I understand that, your Honor.

If your Honor please, would you just say, again, what you're looking for?

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I was thinking about something else when you were talking about that. I'm sorry.

THE COURT: We have at least one instance in front of me in the Bulman case where you have a public authority being told by the Court that if there was a lease involved here, they won't have to put it out for bidding. It's certainly what that says.

MR. BAGGITT: That's true, your Honor.

THE COURT: And it says it very clearly.

It says here again the controlling question is whether the basic transaction is a lease. If so, we are here holding the bidding statute as irrelevant, so we know that our Courts, our Supreme Court and our Legislature and, at least in this instance, this type of deal would go for that.

MR. BAGGITT: Right, your Honor. I think the point is that that statute, 52:34-9 contains a list of contracts that

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1 are not subject to public bidding by
2 virtue of their subject matter and, under
3 that statute, the contract purchase with a
4 subject consists of a lease, buildings,
5 real property is exempt. So there was an
6 exemption in that case. That's what I am
7 arguing here.

8 If we had an exemption, we
9 wouldn't be here at all. In fact, we'd
10 all be doing something different.

11 THE COURT: But the further
12 question is by the fact that the school
13 district itself no longer owns this
14 property, it has now turned it over to
15 Pacificorp and it is no longer a public
16 authority of any nature that is controlling
17 the process to solicit bids to give it
18 to one person or solicit bids and throw
19 them all out or do whatever they want,
20 does that change the situation here?
21 Pacificorp now has 8.8 and they've got
22 to bring it in at 8.8 or bring it in under
23 8.8 and make more profit, I guess.

24 But, in any event -- or turn it
25 back to the school district, whatever the

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case is.

But, in any event, we no longer are dealing with the -- with a public authority. We're now dealing with a private lessor approved by the Commissioner who bids on the job. So there was a bidding, but you would say it's a secondary bidding. It's the first bidding. It's a primary bidding. I'm not sure.

MR. BAGGITT: Your Honor, to answer that question, I just would point out to you --

THE COURT: I guess I'm arguing your case.

MR. BAGGITT: First of all, your Honor, if I may say the Board retained the right to approve all contracts. The lease/purchase agreement is crystal clear that they retain that right and they had control of who those contracts were awarded to.

THE COURT: They retain the right to approve all contracts, but they retain it to make sure, I assume, that where they ordered three toilets on the

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1 third floor for the boys' or men's room,
2 that contract states they're getting
3 the three toilets for the boys' room,
4 et cetera. So they have a chance to review
5 the specifications.

6 MR. BAGGITT: Well, apparently,
7 your Honor, in this case it went a little
8 bit further than that, and in many cases,
9 it does.

10 It's an unqualified power.
11 It's not a qualified power to prove
12 those contracts in that situation.

13 The Board has incredible position.
14 They're really into the process. It's
15 a public body who is now involved.
16 They're saying, "We're not going to approve
17 this contract unless it's under certain
18 conditions." They have control over it.
19 They're in the process. There's no doubt
20 about it in my mind.

21 If, indeed, in this contract,
22 if it truly were, as you say, a powerless
23 situation, that would be a different matter.
24 But it's not that way in this case.

25 Section 502 puts the Board right in

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the middle of it. It does not only put the Board in the middle of it, but the Board is in the middle of it with this advertisement for bids.

I think the Board directly got involved in that, your Honor. Also, it's true that the Board has entered into a lease/purchase agreement. They still have an equitable right to have title to that property at any time that the obligation is paid off.

They have an equitable right, so the Board hasn't parted with title to the property. They parted with legal title but they still have an equitable right to enforce that title claim.

THE COURT: That's nothing outside a normal real estate transaction or any time you pay it off, you have your equitable when you come back.

MR. BAGGITT: Yes, on a lease/purchase transaction, yes, your Honor.

I think basically the thrust of what I'm saying is that in this case, the document itself, the lease/purchase itself,

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1 was such a nature that the Board retained
2 rights and, therefore, the Board had approval
3 of these matters and the Board was directly
4 involved, therefore, throughout and still
5 remains involved in these processes.

6 I assume that the other questions
7 will be decided on later on, that is,
8 relating to whether or not that second
9 notice was at all applicable to our
10 situation. I don't think that it was.

11 I think, your Honor, basically that
12 the thrust of our argument is that they
13 must comply with the lowest responsible
14 bidder statute. They have not done that
15 and they're obligated to do so.

16 THE COURT: What if they didn't
17 put this out for bid? What if they just
18 went ahead, called up a bunch of companies
19 and said, "Would you be interested,"
20 and they all said, "Yes, we'd be interested"
21 but they are known because of company
22 reputation in the field of construction of
23 school buildings that they do a terrific
24 job and they say, "You got to do it under
25 8.8," and they say, "Let us see the plans,"

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and a day later they call them back and say, "We'll come in under 8.8," and they say, "You have it."

Then what?

MR. BAGGITT: Well, your Honor, I can't think of the horrible situations that could result over that. I know offhand, and I know your Honor will consider this in the way in which I am stating it, the situation came up down in Monmouth County with the Manalapan Township School District. It got to the level before a Superior Court Judge and the matter was somehow settled because that's exactly what happened in that case.

I don't know whether Pacificorp was involved in that situation or not. It may have been.

MR. WEINSTEIN: They were, and I was counsel.

MR. BAGGITT: So that's something that happened there.

THE COURT: So why didn't you settle this case?

Don't answer that.

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MR. WEINSTEIN: Bids hadn't been opened in that case.

MR. BAGGITT: Your Honor, the horrors which descend upon the public in that kind of a situation are just --

THE COURT: Isn't that what we're talking about?

MR. BAGGITT: What's what they're talking about?

THE COURT: If they didn't send that letter, that's what we're talking about, in fact, you wouldn't be here.

You wouldn't even have known about the situation. You wouldn't challenge the situation because they would have said, "Give it to DeSapio" I guess.

MR. BAGGITT: I think, your Honor, the difference here is we're in a public sector and the public has an obligation -- it's public money, public property, and I think that's what we're dealing with.

THE COURT: You all understand that this is not an easy case for me. I'm having great difficulty with it.

1 I have had great difficulty with
2 it from the second that Judge Weiss gave it
3 to me, and if it's the last thing I do,
4 I will get him.

5 I understand your argument.
6 I have carefully read your papers, and
7 I understand where you're coming from.

8 Does anybody want to address
9 me?

10 MR. BAGGITT: I would just make
11 one final point, and that is that I see
12 nothing inconsistent with the relief which
13 we want which is to be awarded the
14 contract as we should, and perceive, I
15 think, that it can be done within a
16 statutory framework.

17 THE COURT: You do understand one
18 of the problems I have in this case
19 is that if I agree with your position --
20 and I may well agree with your position --
21 that means that this school building
22 isn't going to go up until a year -- well,
23 next spring when the ground starts to thaw
24 because it's going to be in litigation
25 all winter long.

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We all understand that, I think.
That seems to be obvious to me. So it's
going to cost the school district five
percent more, eight percent more, whatever.

MR.BAGGITT: Well, your Honor,
I don't know that would be the case.

THE COURT: I don't, either.

MR. BAGGITT: It would depend
on what happened.

THE COURT: But it is certainly
mentioned in one of the briefs that from
the standpoint, we've got to get on with
this and one of the reasons you're going
to get a decision today is so you can get
on with it.

Wherever you go from here, you go
from here.

MR. BAGGITT: All right, your
Honor. Thank you.

MR. WEINSTEIN: Thank you, your
Honor.

I would just like to briefly
respond to a couple of points that were
made by petitioner and try not to go through
the arguments that I made in my brief.

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Counsel began by saying that he had an equitable argument and that once Pacificorp advertised for bids, the matter had to be based upon public bidding and he made reference a number of times to unspecified language in the documents, whereby he indicated that the documents called for award to the lowest responsible bidder. That's not correct.

The documents, which, by the way, were submitted by petitioner attached to the petitioner's complaint or petition, and part of the documents that are joint exhibits now say quite the opposite of that.

First of all, they clearly say in many instances, including the first sentence of Section A, notice to contractor, sealed proposals will be received for the lease/purchase construction contract by Owner/Lessor (Pacificorp Capitol, Inc.)

It then indicates in the end of Section A these are sections which petitioner's counsel circled in its submissions to bring

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to the Court's attention the Owner/Lessor, Pacificorp Capitol requires that all proposals shall comply completely with the construction documents. I'm skipping some language not relevant.

The Owner/Lessor reserves the right to award the contract to any contractor to negotiate with one or more contractors or to reject any and all proposals submitted.

Then, in another exhibit of petitioner in the instructions to bidders, under acceptance of bid award, it says it is the intent of the owner to award a contract to the lowest responsible bidder, provided the bid has been submitted in accordance with the requirements, and it goes on to say that the owner shall have the right to waive any informality or any irregularity in any bid or bids received, but it is not obligated to do so, nor does it represent that it will do so, and to accept the single bid or combination of bids which in their judgment is in their own best interests.

The owner also reserves the right to award to any bidder, negotiate with one

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or more bidders, reject and/or all proposals.
I think it should be one or all proposals.

It is clear in the documents upon which petitioner relies that the equitable argument it puts forward on that issue, that is, that the documents say lowest responsible bidder, and once they were advertised, they must control, when, in part of petitioner's argument, he misreads the documents and the documents clearly say that, in fact, they say exactly the opposite and give the owner/lessor, Pacificorp, the option to basically do whatever it wanted to do.

That gets us down, really putting that aside, to the argument that petitioner makes that these are public funds, there's a special trust, and all the arguments that come into play in public bidding situations. Interestingly, petitioner avoids the argument that if public bidding applies, why not five-prong. In fact, petitioner makes the argument that the 18A:18, the five-prong requirement is a normal school construction. The public

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bidding situation does not apply here and, in fact, a single contract can be bid, but makes no justification for the distinction whatsoever.

I suggest there's a reason for that. It's obvious that petitioner is right that public bidding applies, but petitioner is no more entitled to this contract than anybody else that bid on it.

I presume it would have to be bid under Title 18A, which requires the five prongs, but the basic argument is that there's all this protection that surrounds public bidding, and that this legality of a lease/purchase is really a ruse, if you will, that's been created to avoid public bidding.

I would suggest that --

THE COURT: Well, the project is capped, is it not?

MR. WEINSTEIN: Yes.

THE COURT: And it's capped by the Commissioner?

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MR. WEINSTEIN: Yes.

THE COURT: So, in any event,
the project cannot come in over 8.8.

MR. WEINSTEIN: It's 8.880,
actually.

THE COURT: It's close enough.

MR. WEINSTEIN: And I think it's
actually 8.5 for constructional costs.

THE COURT: So there's a cap
and it cannot come in under any circum-
stances --

MR. WEINSTEIN: Not without the
approval of the Commissioner and issuance
of additional certificates.

But there's no money to pay
for it beyond that.

The agent that is holding the
money couldn't pay any more than that,
so it is capped. But the basic underlying
argument is one, the protection of public
bidding, and, two, that this is a ruse
or whatever word you want to be put on
it, formality, legality, to get around
the public bidding statutes. I've detailed
in my brief the many ways in which the

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1 Legislature sought to include protection
2 of the public because, obviously, it's
3 going to be used for school children, the
4 public funds. The rentals are going
5 to be raised through the tax rate for
6 the school, and no one is disputing
7 that.

8 THE COURT: A yearly basis?

9 MR. WEINSTEIN: Correct, yearly
10 basis.

11 THE COURT: And then walk away
12 from the project?

13 MR. WEINSTEIN: They can.

14 THE COURT: If they don't put
15 the funds in the budget?

16 MR. WEINSTEIN: Absolutely,
17 that's correct.

18 But the Legislature, through
19 the approval of the Commissioner, through
20 the local finance board which is charged
21 with the responsibility specifically to
22 assure that the costs are appropriate
23 through the public acts of the Board,
24 the public bidding, to accept the lessor
25 and the public action of the Board to

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approve the concept of public bidding and apply to the Commissioner, all of these methods, the Commission, the Legislature, has shown an interest in providing protection through the public and the public's funds.

The question then becomes is it a technicality? Is it a ruse? Let's assume for the sake of argument that it is a technicality. My point would be that it is a legislatively-approved technicality, and that bidding, as much as we wrap it in the flag and as being the all-American way to proceed, is a legislative enactment. Bidding does not come down from above as some approach that must be used. It's not a constitutional requirement. It's a legislative requirement and the Legislature has the ability, clearly, to restrict those instances in which bidding is necessary.

In this instance we would argue that the Legislature's intent is quite clear, and I've cited the language that,

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notwithstanding any other law to the contrary, language contained in 4.2(f) as well as the applicability of the prevailing wage law in the sections which follow and the fact that the privately-owned land and building improvements are not subject on real estate assessment and taxation which is contained in 4.2 itself.

So I think that the Legislature has clearly recognized that this is outside of the entire concept of public bidding, because it is owned by a private entity.

Therefore, it need not exempt bidding because it's a different kind of a method to approve and construct a project.

THE COURT: It need not exempt bidding by the private entity?

If Pacificorp wished, they could not put it out for bid or any other methodology that they wished, as long as it's under the 8.8?

MR. WEINSTEIN: That's correct, but it didn't need to exempt the requirement

1 for public bidding, I guess is what I
2 meant to say, because it is a different
3 method.

4 As your Honor has indicated
5 already, the Bulman case speaks about in
6 terms of the normal incidents of a lease,
7 is it a lease or isn't it a lease?
8 I don't think there's any question that
9 it fits under the category of a lease.

10 The Legislature has said that
11 lease/purchase is a separate method.

12 THE COURT: I don't even think
13 we have to argue that point because as
14 far as I'm concerned, that's settled.
15 There has been no challenge to CARE
16 and all districts -- many, many districts
17 who are going to this methodology and
18 follow it, and I am sure all of you in
19 this room don't want to overturn that
20 because you're involved in it one way
21 or another or will be, in the future.

22 MR. WEINSTEIN: But petitioner
23 suggests that the lease/purchase method
24 is permissible with a requirement for
25 public bidding, the lowest responsible bidder.

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THE COURT: That's correct, either because it is required or because it's required because it represents a public body in one form or another.

MR. WEINSTEIN: What I am suggesting, your Honor, is that it cannot be part of the process of the lease/purchase transaction, that the Legislature, for the arguments I've set forth, has deemed them separate, that there is no way that you can establish the legal concept of a lessor owning property, private party, and then tell that private party that it has to follow public bidding requirements that are applicable to a public school or public entity.

That defeats the entire concept involved behind this transaction.

THE COURT: Well, what about the fact that the school system reserved the right within this contract itself to review all the facets of the construction?

MR. BAGGITT: First of all, that's not unusual in any private setting for single-use type buildings on a lease/purchase

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basis built to suit, if you will, to insure that the final product complies with the use for which it was intended.

THE COURT: But doesn't that lead us also in a direction of the fact that the Legislature might decide in this type of transaction to require the private lessor or bid on the project to be the lessor to go out and bid on the contracts?

MR. WEINSTEIN: I'm not suggesting the Legislature could not decide that.

THE COURT: I thought you were.

MR. WEINSTEIN: Because, in fact, there have been bills submitted to the Legislature. This is beyond what we've submitted, which has sought to include that and they haven't moved out a committee yet and there's too many of them, really, to detail in the papers.

But I am suggesting that while the Legislature may be able to do that, the concept behind lease/purchase is at variance with that type of activity.

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2 If the private party owns --

3 THE COURT: The concept beyond
4 lease/purchase is speed.

5 MR. WEINSTEIN: The goal is
6 speed but the concept is a private party.
7 It goes back to traditional real estate
8 concepts.

9 THE COURT: But it's really
10 speed, to save money. The reason that
11 you don't go bonding is that it takes a
12 year longer. You have to go through
13 the process of setting up an election
14 and all the other attendant problems
15 with it, where with a lease/purchase,
16 you can probably save yourselves in an
17 inflationary period a lot of money by
18 moving it through the lease/purchase
19 process, even though it costs you a
20 little more on the financing.

21 It's probably a lot less because
22 you're moving the project six months or a
23 year faster.

24 MR. WEINSTEIN: That's probably
25 correct.

But having said that the school

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Boards would not be able to avail themselves of this process had not the Legislature said that they could, just like the Legislature requires them to do certain things when they, the school Board, wished to construct the building through the bonding method, the traditional method, and in establishing those two different methods, the Legislature recognizes the real property concepts which have been inherently involved in our law and accepted in our law for years and years, which are embodied in a lease/purchase concept.

They have made the requirement that there be an annual appropriation. They have done all the things that are necessary to distinguish it from a private entity owning it versus a public entity owning it and to combine those as petitioner seeks to do, it seems to me, destroys the mechanism which the Legislature sought to achieve and the nature of the documents which lessors signed and enter into to undertake these responsibilities do not include from the

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1 very beginning the requirement to publicly
2 bid. Public bidding, for all that
3 Mr. Baggitt has indicated, is not always the
4 end-all to avoiding fraud and favoritism
5 and so forth. As we probably all know,
6 it often forces public entities to accept
7 the lowest responsible bid which is very
8 hard to show something's not responsible.

9 It's often not the lowest bid.
10 A private entity can offer construction
11 at a lower cost, so public bidding has
12 its purpose. It's not necessarily to get
13 the lowest cost. It's to protect against
14 all the other problems of favoritism
15 and so on when a public body is spending
16 the money and is responsible for that
17 construction.

18 That's not the case here. It's
19 simply not the case, and I don't believe
20 he's addressed that issue, to suggest why
21 it is.

22 His only answer is that public
23 funds are being used on an annual appro-
24 priation basis. Public funds are used
25 every time a school Board goes out and buys

1 of a lease, the bidding statute is irrelevant,
2 and then it cites the statutes which requires
3 advertisement.

4 It is not an answer to say that
5 that merely related to the need to advertise
6 and that that's not present in this case.
7 Both in Title 40 and in Title 18, there
8 are two parallel sections. One is the
9 public bidding section and the other is
10 the property acquisition section which is a
11 wholly separate section of Title 40A.

12 Under school law we have the
13 same type of separateness. We have Title
14 18A:18A, which deals with public bidding,
15 and we have Title 18A-20 which deals
16 with the acquisition and disposition of
17 property. That's the caption of it.

18 When you get to 20-4.2, it provides
19 an all-inclusive, self-contained method
20 for the acquisition of a site and a
21 school.

22 I submit to you that given that
23 statutory scheme in this case, the dis-
24 tinction which counsel seeks to draw for
25 Bulman vs. McCrane is a distinction without

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a difference and that that case is controlling for better or for worse, and when I say for better or for worse -- because we've heard about evils and horrors and all sorts of terrible things that happen if we don't hold this matter out for public bidding -- let me suggest to you that the process that was followed by Pacificorp Capitol had a significant number of protective devices against those evils and those horrors.

When you look at the bid specs, the bid specs sought to elicit information, sought to elicit the bid which was to be in their best interest, but also in the Board's best interest. The Board had the right of approval over who Pacificorp Capitol was going to enter into a lease with, and I submit to you that that's not unusual.

It's not unusual in a private setting. It's not unusual for the Board to retain for the lessee to retain significant review over the construction of something which the lessee is ultimately

1 going to lease. All of these items were
2 placed in here in order to protect, given
3 the absence of public bidding, and I submit
4 to you that the horrors that were conjured
5 up and evils simply don't exist in this
6 case.

7 The Board does not concede that
8 the plaintiff was the lowest responsible
9 bidder. I think it's significant to note
10 that the bidder which Pacificorp Capitol
11 proposes to award the contract to agreed
12 to cap the costs and that the petitioner
13 here did not agree to cap the costs.

14 So I would just like to indicate
15 in closing that all the evils which are
16 conjured up don't exist in this case.
17 The framework, it seems to me, is absolutely
18 clear until the petitioner comes forward
19 with something that suggests that Bulman
20 doesn't really apply in general in terms
21 of how it's structured, in terms of the
22 statutory structure that's behind it,
23 that this Court is bound to those principles
24 and is bound to apply them in this case.
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MR. GALLINA: We would adopt the arguments made on behalf of the respondents.

THE COURT: All right.

Anything further?

MR. BAGGITT: No, your Honor.

THE COURT: Okay.

Gentlemen, as I said before, this has not been an easy case. I have spent an enormous amount of time with it and I have read all the cases cited in all your briefs.

I have read all the statutes, all regulations and all pages of documentation that you have submitted here. I've come to the conclusion, after hearing your arguments and reading your materials, that the Legislature, in this particular instance, did not provide for a process that requires the lessor who must bid on the contract or must bid on the total project himself to follow any bidding scheme in letting out the contract for the renovation or new building of any of the school structures, that the protections built in by the act and the regulations and the documents that

1 have to be filed, processed, reviewed by
2 the Department of Education, by the local
3 boards, by counsel, special counsel hired
4 by the district afford the kind of protection
5 that is necessary to protect the public
6 interest.

7 I find that the element of speed
8 that I mentioned before in getting these
9 buildings erected as quickly as possible
10 and financing placed at the proper times
11 when financing may be better in one month
12 than another month and if they can get a
13 financing out at a cheaper rate and move
14 the project along faster, it probably
15 saves more money than the bid process
16 would save if they put the buildings out
17 for bid.

18 I therefore find in favor of
19 the respondents in this case. I hold
20 that bidding is not a necessary element
21 in a lease/purchase contract for a school
22 district. I do rely on the Bulman case
23 and the statement by the Supreme Court
24 as to the fact that New Jersey has, at
25 least in one instance in a public situation,

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not required a bid or bids to be put
out for lease projects. I think this
is dispositive of all the issues before
me.

Is there anything further that
any of you would like to add that I may
have missed? It's tough when you jump
orally. It's easy to sit in the office
and do these things here.

Okay. Thank you.

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C E R T I F I C A T E

I, **ANNETTE KIRSCH, C.S.R.**,
a Shorthand Reporter of the State of New Jersey,
do hereby state that the foregoing is a true
and accurate transcript of my stenographic notes
of the within proceedings, to the best of my
ability.

Annette Kirsch

Dated: 11-4-90

OAL DKT. NO. EDU 8097-90

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

DEC 5, 1990
Date

Sydney Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 11, 1990
Date
bh

James DeVincenzo
OFFICE OF ADMINISTRATIVE LAW

BIEHN CONSTRUCTION, INC., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
PACIFICORP CAPITAL, INC., : DECISION
ET AL., :
RESPONDENTS. :

The record and the oral transcript initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions as did Respondent DeSapio Construction Company and Respondent PacifiCorp, Inc.

Petitioner files five exceptions, which are summarized, in pertinent part, below.

Exception 1

The Judge's reliance on Bulman v. Mc Crane, 64 N.J. 105 (1973), is misplaced because that case was decided under a statutory provision which is specifically designated as applicable only to matters paid from state funds.

Petitioner contends the ALJ relied on Bulman as dispositive of all issues before him, citing the transcript at pages 90-91 in support of this proposition. Petitioner distinguishes that case from the instant one, however, because Bulman was decided under N.J.S.A. 52:34-6 et seq., which provisions apply only to public

works, contracts and printing for the state. Petitioner states that different provisions apply for local public contracts under N.J.S.A. 40A:11-1 et seq. and still others apply to public school contracts under N.J.S.A. 18A:18A-1 et seq. Petitioner notes that such provisions require public advertising and bidding for expenditure over a given amount, and that each lists specific exceptions to the bidding requirement. Petitioner further notes, however, that the given exceptions differ from one another provision to provision, and it suggests that such differences indicate that the Legislature tailored the exceptions to differences between state and local entities, and between local entities and school districts. Relying on canons of statutory construction and such case law as Marshall v. Western Union Telegraph Co., 621 F. 2d 1246, 1251 (3rd Cir. 1980) (where the lawmaking body has carefully included a term in one place and excluded it in another, the term is not to be implied where it is excluded), petitioner advances the position that the bidding exemption applicable to state contracts and agreements, thus, should not be implied to cover local agreements, including school district agreements.

More specifically, petitioner argues that the court in Bulman, supra, focused on the exception from bidding found under N.J.S.A. 52:34-9(c). Suggesting that whether or not the Legislature intended for such provision to cover lease purchase agreements as opposed to lease agreements might well be questioned, petitioner contends that even assuming that the Bulman court correctly decided that subsection 9(c) covers lease purchase, the issue in the instant matter is whether that statutory provision controls this case. Petitioner submits that it does not. It claims:

- 94 -

The contract at issue in this case is the construction contract pursuant to the lease/purchase agreement, not the lease/purchase agreement itself. If the lease exception of N.J.S.A. 52:34-9(c) were relevant to this case, then, it would except the lease/purchase agreement from public bidding. In Bulman, it was the lease agreement which was exempt from bidding. Bulman v. McCrane, supra, 64 N.J. at 108. The court's reasoning was that the subsidiary arrangement for construction of the building, as part of an integrated lease transaction, did not violate the bidding requirements for construction because the basic transaction was a lease--which was specifically exempted under the relevant provisions from the bidding requirement. Id. at 107-08. Under the provisions relevant to Bulman, there are no specific requirements as to leases, and there is a specific exemption for leases which are required for the conduct of the state's business.

Under the relevant provisions for this case, by contrast, there are detailed requirements for a lease/purchase agreement and no listed exceptions from the bidding requirements that in any way relates to lease/purchase agreements. N.J.S.A. 18A:20-4.2; 18A:18A-5. These provisions specifically require public advertising for bids where the agreement includes the "transfer or lease [of] land or rights in land, including any building thereon." N.J.S.A. 18A:20-4.2(f). In Bulman, the basic transaction was excepted, and the subsidiary transaction was thereby excepted as well. In this case, by contrast, the basic transaction is not excepted, and the subsidiary transaction, likewise, cannot be excepted.

(Exceptions, at pp. 3-4)

Petitioner claims that to apply the lease exception from Bulman to school districts would render N.J.S.A. 18A:20-4.2(f) nugatory. Mentioning that the ALJ herein at page 89 of the transcript specifically referred to a process which requires the lessor to bid on the total project, petitioner avows that the lease exception which controlled in Bulman does not control the instant matter, nor does the Bulman case. Rather, petitioner states "[t]he question for this case is *** whether the procedures of N.J.S.A.

18A:20-4.2 negate the bidding requirements of 18A:18A-4, or otherwise create an exception to those requirements not listed in 18A:18A-5, for building contracts contemplated pursuant to a lease/purchase agreement." (Exceptions, at p. 5)

Exception 2

Contrary to the Judge's conclusion that there is no statutory requirement for a bidding scheme as to the school construction project at issue, the requirement under N.J.S.A. 18A:18A-4 for bidding, which covers every contract that is paid with or out of school funds unless excepted under N.J.S.A. 18A:18A-3 or 18A:18A-5, is applicable to this case.

Petitioner relies on the provisions of N.J.S.A. 18A:18A-4 to counter the ALJ's conclusion that the Legislature has not provided for a process that requires a lessor who has successfully bid on the total project to follow any bidding scheme in letting out that contract. Petitioner suggests that N.J.S.A. 18A:18A-4 requires bidding for all work or materials paid for from school funds, unless specifically exempted. It stresses that said statute centers on the sources of funds, rather than on the entity contracting. Petitioner claims that PacifiCorp, as successful bidder to be the lessor and builder for the project, is required to publicly advertise for bids unless it can show that payment for the work will not be from school funds or that its lease purchase agreement is specifically exempted from the bidding requirements. Biehn asserts that PacifiCorp has shown neither, nor can it.

As to the first situation, petitioner avers the lease purchase agreement makes clear that rental payments come from the school district's available revenues, and cites the transcript at page 11 in this regard. Petitioner claims that PacifiCorp serves as a "conduit" (Exceptions, at p. 6) for the payment of some of the

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school funds to the actual builders and retains some of the funds for its own payment.

The second situation does not apply to the instant matter, in petitioner's opinion because there is no exception under either the Public Schools Contracts Law or elsewhere that applies to contracts under the lease purchase agreement method of acquiring a school site and/or building. Rather, petitioner notes, N.J.S.A. 18A:20-4.2(f) is silent as to the contract between the lessor and builders. N.J.S.A. 18A:18A-5, which lists exceptions from the bidding requirements for any purchase, contract, or agreement which consists of certain subject matter, does not include any subject matter related to the lease purchase agreement.

Petitioner finds N.J.S.A. 52:34-9(c) mentioned in Bulman, supra, inapplicable, citing F.S.D. Industries v. Board of Education of the City of Paterson, 166 N.J. Super. 330 (App. Div. 1979) as supportive of this proposition. It claims that both cases are distinguishable from this case by the presence of applicable statutory exceptions from the bidding requirement. Moreover, in rebuttal to the Board's argument that Bulman should apply because of the parallel separateness between contract/bidding and acquisition in the state and school district provisions, referring to the Transcript at page 86 in summarizing the Board's position in this regard, petitioner notes that the exception on which Bulman was decided is found in the contract/bidding section of the provisions on state contracts. "That a school district may acquire facilities by an alternative method to issuing bonds does not negate its responsibility as to bidding, whether in the lease/purchase phase of the transaction or in the construction phase." (Exceptions, at p. 8)

Petitioner submits that the ALJ went beyond the statutory language in concluding first, that the bidding procedures were unnecessary because the protections otherwise built into the act afford sufficient protection of the public interest and, second, in finding that elimination of the bid requirement would allow faster progress on the project and the possibility of cheaper financing. Petitioner advances the rebuttal that while both of these premises may have merit, neither justifies a departure from the statutory framework.

Exception 3

The Judge's conclusion that bidding procedures were unnecessary for contracts under a lease/purchase agreement because protections otherwise built into the act afford sufficient protection of the public interest is not a sufficient basis for eliminating the statutory requirement for bidding.

Petitioner first contends in this regard that the bidding requirement it alleges exists in this case is in keeping with, not contrary to, clearly established policy. Relying on Porter v. Nowak, 157 F.2d 824, 825 (1st Cir. 1946), petitioner contends that departures from the literal application of the requirement are to be the exception and must be clearly intended.

Second, petitioner avers that N.J.S.A. 18A:20-4.2(f) and the regulations do not evidence any intent to eliminate all bidding requirements. Citing an Assistant Commissioner of Finance Memorandum of April 13, 1987 and New Jersey School District Lease Purchase Guide as supportive of its position, petitioner states:

An active lessor is not required to conform to the public bidding requirement for bids on each of the five prime contracts, ***but rather is allowed to let bids for one general contractor or construction manager. In such a case, the Department of Education will require a legal

opinion that the transaction does, indeed, utilize an active lessor so as to justify waiver of the five prime contract bids.

(Exceptions, at p. 10)

Petitioner claims in this case no such legal opinion was issued. Moreover, petitioner claims that all documents appear to support the continued requirement for competitive bidding on the construction project, albeit for one general contractor rather than for five prime contractors. If competitive bidding is required, as petitioner believes it is, then the requirement that the contract be awarded to the lowest responsible bidder is also necessary in order to avoid the absurd result that the bids are without meaning and that the contracting agent can simply award the contract on whim, petitioner submits, citing N.J.S.A. 18A:18A-37.

Exception 4

The Judge's finding that the elimination of the bid requirement would allow faster progress on the project and the possibility of cheaper financing is an insufficient basis for eliminating the statutory requirement for bidding.

Petitioner contends that the literal application of the bidding requirement to contracts under lease purchase agreements would not so grossly extend the project time as to shock the general morale or common sense. Petitioner advances the argument that the time gained under the lease purchase option is not in the elimination of bidding, but in the elimination of the requirement for an election to approve a bond issue. To exempt construction from the requirements of bidding when it is done under a lease purchase agreement, rather than under a bond referendum, would produce the absurd result of creating an exception which the Legislature declined to create and which has no basis in reason.

Exception 5

PacificCorp does not stand in the place of a private individual, but rather stands in the place of an "agent" of the school board and is, therefore, subject to the same requirements, except as explicitly provided otherwise by statute, regardless of the terms of the contract.

At point five petitioner contends, in pertinent part:

Under a lease/purchase agreement, land and buildings are considered the property of the school district, not to be assessed for tax purposes. N.J.S.A. 18A:20-4.2(f). All PacificCorp owned as lessor was the contract right to build and lease the building to the school district in exchange for the rental paid by the district, to cover the certificates of participation, and the land interest transferred to it as security. PacificCorp can scarcely be said, therefore, to stand in the position of a private person. To the contrary, PacificCorp stands in the place of the school district, for which it is compensated, and functions as the district's "agent/servant/representative lessor" (See Transcript at 41). It is clear, then, that PacificCorp is not merely in the position of any other private entity. It cannot accept the benefits of its cooperative agreement with the school district and, at the same time, refuse to accept the constraints attached to expenditures of school funds. Finally, it goes without saying that the terms of a contract with a governmental entity are binding only to the extent that they conform to relevant statutory requirements and must be considered void where they conflict with those requirements. See Berel Co. v. Sencit F/G McKinley Associates, 710 F. Supp. 530 (D.N.J. 1989) (complaint to recover cost of change orders was not viable on a direct contract theory where statutory provision imposed a duty as to method of approval of change orders.)

(Exceptions, at pp. 15-16)

Petitioner seeks reversal of the recommended decision of the Office of Administrative Law.

The Board summarizes petitioner's five exceptions to the ALJ's Oral Decision by stating that:

[T]he common theme of those exceptions is that a contract for the construction of a building which will ultimately be used as a school must be

publicly bid, irrespective of the provisions of N.J.S.A. 18A:20-4.2(f) or the legal relationship created by a Lease Purchase Agreement. It is the Respondent's position that contracts entered into between private entities, in the present case, PacifiCorp Capital, Inc. and DeSapio Construction Company does (sic) not require public bidding.
(Reply Exceptions, at p. 1)

The Board rebuts petitioner's contention that the ALJ's reliance on Bulman, supra, is misplaced averring it is on point because that case was decided under Public Schools Contracts Law, that petitioner fails to take into account the fact that structurally the transactions involved are identical, and that the analysis, therefore, of Bulman is relevant and controlling under Public Schools Contracts Law. The Board argues that the relationship created by the lease purchase agreement between PacifiCorp and the Board, that of active lessor/lessee, is one wherein PacifiCorp is the owner of the improvements subject to the rights of the tenant, Warren Hills, "to occupy and utilize the premises in fulfillment of its constitutional mandate to provide a thorough and efficient education to its students." (Reply Exceptions, at p. 2) It recites sections of the approximately 100 pages of the lease purchase agreement in support of this contention.

Specifically, the Board cites reference to Sections 401, 502, the definition of the Project and Schedule A describing the land on which the Project is to be constructed, in support of its position that all incidents of ownership have passed to PacifiCorp Capital as a result of the lease purchase agreement. The Board advances the argument that it is in such context that said procurement used by PacifiCorp for the construction of the building must be analyzed. The Board avers that petitioner fails to

recognize PacifiCorp's ownership of the Project and the resulting relationship between the Board and PacifiCorp flowing of that fact.

The Board also claims that it is that change in relationship which led the Supreme Court in Bulman, supra, to conclude that no public bidding was required, in that the public procurement takes place when the lease purchase agreement is entered into. The issue in this case, the Board submits, is the method by which a private entity fulfills its contractual obligations to the public entity which has properly procured a facility. Bulman, the Board advances, "***stands for the proposition that where there exists statutory authorization to enter into a lease purchase agreement, the manner in which a private entity fulfills its obligations is irrelevant from a public bidding perspective." (emphasis in text) (Reply Exceptions, at p. 4)

Additionally, the Board claims it is significant to note that no allegation has been made that the Board has deviated in any respect from any of the procedural aspects of N.J.S.A. 18A:20-4.2(f), which the Board declares is the statute within which the present controversy must be decided. It is submitted by the Board that its compliance with such statutory terms constitutes its procurement of a school and site. From that point forward the construction of the building itself is governed by general rules of contract between private parties, it claims, in this case, between PacifiCorp and DeSapio Construction Company. It adds that the relationship between PacifiCorp Capital and Warren Hills created by the lease purchase documents is the same as the relationship between the State and its vendor in Bulman, supra, and that the rationale of that case is controlling in this matter.

The Board contends that the fact that Bulman was decided under N.J.S.A. 52:34-6 et seq. is irrelevant to the instant issues. The issue resolved in Bulman, it avers, is that the procurement undertaken by the State was of a site and building pursuant to the public lands law. The relationship created between the public entity and the private entity was one of lessor/lessee which rendered public bidding on the construction of the building irrelevant, the Board claims. "To follow the logic of Petitioner's argument would extend the school contracts law to an area which it was never intended to cover, namely the relationship of one private entity to another." (Reply Exceptions, at p. 7)

The Board's final argument addresses petitioner's assertion that PacifiCorp is not a private company, but is an agent of the Board, subject to the requirements of the Public Schools Contracts Law. The Board contends that PacifiCorp is a private company and that it entered into a statutorily permitted relationship with the Board in which it acts as lessor and Warren Hills as lessee. Thus, the Board avers, PacifiCorp has not become a public entity and is entitled to procure the building in any manner which it sees fit. While its actions are subject to approval by the Board, there is nothing improper or unusual about that relationship, the Board submits. "It is in fact, that relationship which makes Bulman v. McCrane controlling here." (Id., at p. 8)

DeSapio's reply exceptions state it is in agreement with the recommended decision of the ALJ, which denied petitioner's request for interim restraints and which granted respondents' motion for summary disposition. DeSapio is in agreement with the reply exceptions submitted on behalf of Respondent PacifiCorp Capital, Inc.

PacifiCorp's reply exceptions rebut point for point petitioner's submission and, at the outset, states its accord with the recommended decision of Judge Cummis denying petitioner's request for interim restraints and granting respondents' motion for summary disposition. PacifiCorp also proffers that the issue of whether petitioner would qualify as the lowest responsible bidder was procedurally not before the ALJ when he dismissed the petition, and PacifiCorp maintains that petitioner would not be entitled award of the bid even if public bidding were required. If the recommended initial decision is reversed, it is PacifiCorp's position that the matter would have to be remanded to OAL for a full hearing on the merits.

In reply to petitioner's contention that Bulman, supra, is an improper authority for the instant matter, PacifiCorp contends that the relevance of Bulman to this case relates to the determination of the status of the parties as lessor and lessee. Bulman supports the finding, PacifiCorp submits, that:

As long as the governing document, in this case the lease purchase agreement, is held to be an appropriate leasing type arrangement, the status of the School Board as lessee and PacifiCorp as lessor implicates established legal principles. This determination is necessary to insure that the transaction is appropriately within N.J.S.A. 18A:20-4.2(f). Once it qualifies as such, both the traditional standing of a lessee and a lessor and the interpretation of 4.2(f) support the basic issue, i.e., that public bidding is not required.***

(PacifiCorp's Reply Exceptions, at p. 3)

Further, in reply to the arguments raised by petitioner on pages 3, 4 and 5 wherein PacifiCorp avers petitioner appears to be arguing that the lease purchase transaction is not exempt from the bidding statute, PacifiCorp submits that such argument was not made

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at the hearing. It states that the lease purchase agreement was awarded pursuant to a public proposal consistent with the bidding requirements, and that such is not in issue.

PacifiCorp notes in reply to petitioner's Exception 2 that said exception's caption, although not its argument, is the crux of the case. PacifiCorp reiterates its contention that the question in this case is whether the lease purchase statute requires public bidding for the construction contract. In response to petitioner's contention that public bidding is required on the fact that the annual rental payments are school funds and that such funds cover the performance of work for the additions of schools, PacifiCorp contends such argument is incorrect for more than one reason.

First, PacifiCorp argues that N.J.S.A. 18A:18A-4 does not require "bidding for all work or materials paid for from school funds***." (Petitioner's Exceptions, at p. 5) (PacifiCorp's Reply Exceptions, at p. 4) PacifiCorp argues that the statute does not read all work or material paid for from school funds but, rather, says every contract or agreement for work or materials paid for from school funds. It submits that the difference is not minor. It contends the Board did not enter into a contract or agreement for work or materials but, rather, entered into an agreement with PacifiCorp to lease certain school facilities. It left to PacifiCorp the requirement to enter into an agreement with a contractor to build the project. Thus, PacifiCorp contends, petitioner is incorrect when it said that the law centers on the source of funds rather than on the entity contracting.

Indeed, both the bidding law and the lease purchase law speak to the ability of the school board to enter into contracts or agreements.

Neither speaks to the broader "use of school funds." Furthermore, the actual payment for the project is not directly from school funds. It is from the proceeds of the Certificates of Participation. The annual rental agreed to be paid out of available revenues by the School Board is the cash flow relied upon by the lessor/owner to repay the Certificates.

(PacifiCorp's Reply Exceptions, at p. 5)

Accordingly, PacifiCorp avows that there is no need to exempt lease purchase from N.J.S.A. 18A:18A-4. As to petitioner's argument that 18A:20-4.2(f) is silent as to the contract between the lessor and the contractor, PacifiCorp acknowledges that that is true, but it suggests that the silence is because Section 4.2(f) covers the contract between the public entity Board and the lessor. The rest of the transaction is meant to be between private parties. PacifiCorp argues. Therefore, specific bidding law exceptions relied upon by petitioner are irrelevant to the transaction between the lessor and the contractor.

In reply to Exception 3, PacifiCorp states:

The "other protections" contained within the lease purchase transaction are simply further indications of the legislative understanding of the setting and the legislative intent to set up an alternative method. They are not primary and Judge Cummis's Decision is not interpreted as relying on these comments as the underlying basis for his Recommended Decision.

Furthermore, Petitioner's references to the Calabrese Memo are totally out of context. When that Memo is taken in its entirety and in context, it clearly omits bidding from the lease purchase scenario. Reference to the Lease Purchase Guide by the New Jersey School Districts Association is irrelevant as that is not the position of the Department of Education -- the governmental agency here charged with oversight.

Additionally, Petitioner continually makes the argument that the bidding law applies for general contractors (which would include Petitioner obviously) but not for the five primes. This

argument is made without explanation. While Petitioner continually repeats the argument it cites no statute, case law, or even a theory, to support this argument.

Finally, while no one seeks to dispute that the goals of public bidding are aimed at avoiding certain evils, that argument is irrelevant to the case at bar simply because the Legislature in this instance did not require public bidding.

(PacifiCorp's Reply Exceptions, at pp. 5-6)

PacifiCorp's reply to petitioner's Exception 4 avers that the ALJ's comments that lease purchase is a faster method are meant to be a further basis to interpret the legislative intent and not a basis for the decision.

Last, in reply to Exception 5, PacifiCorp rebuts the argument that it is simply the agent of the Board by suggesting that such argument was never raised by petitioner directly at hearing. More to the point, PacifiCorp contends petitioner's statement that the documents amount to an agency relationship is a total misreading of those documents. It contends that petitioner's citing to Judge Cummis' comment on page 41 of the transcript is also inappropriate in that, at that point, Judge Cummis was summarizing petitioner's position, not finding that PacifiCorp was the agent. PacifiCorp contends that the initial decision should be affirmed.

Upon a careful and independent review of the record presented, the Commissioner adopts the conclusion of the ALJ below, finding in favor of the respondents, but for reasons different from those suggested by the Office of Administrative Law regarding the merits of the matter. However, at the outset the Commissioner notes his accord with the ALJ relative to the timeliness of the filing of the instant matter. The Commissioner thus adopts the ALJ's

conclusion of fact and law that the instant petition is timely filed for the reasons expressed in the oral initial decision.

Before launching into the Commissioner's rationale on the merits, the review of this matter warrants a brief explanation of terms and procedure related to lease purchase as permitted pursuant to N.J.S.A. 18A:20-4.2(f).

As noted by the ALJ's oral decision, the parties have stipulated certain facts which were read into the record. The chronology of events relative to the instant lease purchase are included therein as follows:

MR. WEINSTEIN: This matter involves the applicability of public bidding requirements under the Public School Contracts Law, N.J.S.A. 18A:18A-1, et seq. to a lease purchase arrangement entered into by a Board of Education pursuant to N.J.S.A. 18A:20-4.2(f).

The Board of Education of the Warren Hills Regional School District (hereinafter Board) determined the need for certain improvements and expansion of its senior high school and approved the use of a lease/purchase program for said acquisition pursuant to N.J.S.A. 18A:20-4.2(f). The Board publicly advertised pursuant to N.J.S.A. 18A:20-4.2(f) for an active lessor and an agent bank. The Board adopted a resolution on February 21, 1989, appointing Pacificorp Capital, Inc. (hereinafter Pacificorp) as the active lessor and New Jersey National Bank as agent. (See Board resolution of February 21, 1989, Exhibit 3). Previously, on January 17, 1989, the Board, having made the statutorily-required findings, authorized an application to the Commissioner of Education of the State of New Jersey for his review and/or approval of the proposed lease/purchase program in accordance with N.J.S.A. 18A:20-4.2(f). At the same meeting the Board authorized its professionals to make application pursuant to the statute to the local finance board of the State of New Jersey. (See Board resolution of January 17 1989, Exhibit 4). The Commissioner of Education approved and endorsed the transaction by letter dated April 14, 1989. (See Exhibit 5). The local finance board held a public hearing and approved the transaction on April 18, 1989. (See

Exhibit 6). These approvals were pursuant to N.J.S.A. 18A:20-4.2, 18A:20-8.2(b) and N.J.A.C. 6:22A-1.1, et seq. The lease/purchase program contemplated the sale by the agent of \$8,880,000 aggregate principal amount of certificates of participation (certificates). Notice of sale was duly published and at public meeting of the Board advertised and held in accordance with law, bids were accepted for the sale of the certificates for the lease/purchase program.

The Board authorized approval of a lease/purchase agreement dated as of May 1, 1989 between the Board as lessee and Pacificorp Capital, Inc. as lessor. (See Exhibit 7). It similarly authorized the approval of a ground lease agreement dated May 1, 1989 between the Board as lessor and Pacificorp Capital, Inc. as lessee and the approval of the agent agreement dated as of May 1, 1989 by and among the Board, New Jersey National Bank, as agent and Pacificorp Capital, Inc. The primary governing document is the lease/purchase agreement between Pacificorp as lessor and the Board as lessee dated as of May 1, 1989 (Exhibit 7).

In the definition section of the agreement on Page 6, contractor is defined as that party selected by the lessor and approved by the lessee. Section 301 of the lease/purchase agreement covering rent makes clear that the rental payments by the Board come from available revenues only and that the certificates of participation are not a debt or liability of the School Board, lessee. Furthermore, the certificate holders have no right to compel the use of the School Board's taxing power for rental payments, lease/purchase agreement 301, Exhibit 7. Section 304 of the lease/purchase agreement provides for the return of the land and the projects to the lessor upon the lessee's cancellation of the agreement. Section 502 of the agreement requires the lessor to contract with the contractor on the approval of the lessee. Once the contracts are signed, this section makes it clear it is the lessor's responsibility to have the project built on time. Section 608 provides that title to the project is in the lessor subject to the exercise of the option to purchase by the lessee which is contained in Section 701 of the agreement.

Following all of the above-indicated approvals and actions, the parties submitted the plans and

specifications to the Department of Education, Bureau of Facilities Planning and ultimately received the necessary approvals to proceed with the construction. Single prime construction bids were solicited in the name of PacifiCorp as lessor pursuant to a notice to bidders inviting bids on July 23, 1990, later changed by addendum until August 1, 1990 (see Exhibit 1 attached to Biehn's petition).

(Oral Initial Decision, at pp. 8-13)

Significantly, the above recitation of stipulated facts makes plain that petitioner herein does not challenge the Board's selection of PacifiCorp Capital, Inc. as lessor. Neither is it contested that the relationship between the Board and PacifiCorp is that of active lessor and lessee for the purposes of constructing what has been termed "the project": Project is defined in the Lease Purchase Agreement as follows:

"Project" shall mean the project as described in Exhibit A hereto, including the improvements, and the construction, acquisition, renovation and remodeling of property of the Board and the installation of certain equipment therein which is to be financed in whole or in part hereunder; provided however, such Project does not include the Land. (Lease Purchase, Exhibit 7, at pp. 11-12)

An active lessor may be contrasted to a nominal lessor. In the latter situation the board selects the contractors and controls all aspects of construction of the project. In the former relationship, such duties are assumed by another party, with the lessor taking a more active role in bidding and construction related aspects of the project; the Board thus has no more than incidental participation in the selection of the contractor(s).

By so installing PacifiCorp, Inc. as an active lessor, it was PacifiCorp's responsibility to select the company to construct the "project" to be leased by the Board. The instant lease purchase contract defines the role to be played by such third party "contractor" as follows:

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"Contractor" shall mean in connection with the Project, any Contractor selected by the Lessor and approved by the Lessee to acquire and construct the Project in accordance with applicable State law and the Plans and Specifications and shall also mean a construction management firm proceeding under a contract specifying a guaranteed maximum price for the construction and acquisition of the Project.
(Lease Purchase Agreement, Exhibit 7, at p. 6)

Therefore, the contract at issue in the instant matter is the construction/project contract that exists as a result of the active lessor status assumed by PacifiCorp, not the lease purchase agreement itself. N.J.S.A. 18A:20-4.2(f) is silent as to whether such project construction contract need be advertised for bids in conformity with the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq. In deciding whether such statutory provisions apply to the construction contract, the Commissioner finds Bulman, supra, is not instructive in that the court's rationale in that matter rested upon recognizing that the initial transaction between the parties arranging for the construction of a building was, in fact, a lease and not a lease purchase agreement.

Once having reviewed the agreements between the parties and determined the transaction was, in fact, a lease, the court in Bulman then determined that pursuant to N.J.S.A. 52:32-2, 34-8, such "basic transaction" was not subject to the bidding requirements because the statute governing such leases exempted such relationship. Thus, the court was dealing with a different level of review, that of the primary contract relationship between the parties at the outset, not with a secondary relationship evolving out of a lease purchase agreement established between the parties as is the case in this matter. Moreover, in so holding the court in

Bulman was benefitted by the fact that there was a statutory exemption which applied to leases once the relationship between the parties was clarified. No such statutory framework exists in the instant matter to aid in determining whether the project construction contract is subject to public bidding laws.

More instructive to the matter at hand is the case captioned Lill v. Director, Div. of Alcoholic Bev. Control, 142 N.J. Super. 242 (1976). In that matter, plaintiff, a printing firm, sought action to restrain the State Director of the Division of Alcoholic Beverage Control (hereinafter ABC) from awarding a contract to Jersey Printing Co., Inc. for the printing of price lists pursuant to the rules of the ABC. Plaintiff sought a judgment declaring that the award of the contract for printing and distributing a price list for liquor could only be awarded after public advertising and competitive bidding pursuant to N.J.S.A. 52:34-6 et seq., the statutory provisions which establish the public bidding requirements for state purchases and contracts. Reversing the Chancery Division, the Appellate Division held that where the contract in question was between the representative association of liquor dealers and the printing firm, and neither the State agency, ABC, nor its Director nor subalterns had any power or control over designation of the printer or the amount to be paid for its services, the contract was not within the public bidding statute, albeit that the Director of the ABC received invoices from the printer and allocated costs among filers and that the Division prescribed standards and specifications for the work. (Id., at 242, 249)

The Appellate Division noted that the ABC does not select the printer, nor does it become a party to the contract. Rather, the selection of the printer is made by the representative organization of the more substantial filers, an Association, which becomes the contracting party. While agreeing with the Chancery Division that there is an important public policy underlying the statutory requirement of competitive bidding, the Appellate panel noted the presence of "***common denominators which are nonexistent in the position and participation of the State department***" that distinguished the Lill facts from those cases requiring application of the bidding statute. (Id., at 248-249) In so deciding, the court set down the following standards:

In each of the cited opinions the governmental unit exercised control over either the selection of the contractor or the determination of the consideration flowing to or from the contractor or a combination of both. It therefore is rational and appropriate to insist upon compliance with the public bidding statutes to guard against the potential of the evil of favoritism and corruption. Patently, where public officials have the determinative voice in the selection of an exclusive contractor and/or the price which he is to charge, there exists the milieu for favoritism and corruption whether the consideration is paid by the governmental entity or the members of the public who are part of that entity. In such a setting the insistence upon competitive bidding is wholly in accord with the purpose and philosophy underlying the rigid legislative requirements.

In contrast thereto, the factual complex relating to printing of the price lists herein does not present the potential for favoritism and corruption involving the governmental unit or its employees. We are rather concerned with a private contract between the representative association of liquor dealers and the printing firm in which neither the ABC, nor its Director or subalterns, have any power or control over the designation of the printer or the amount to be paid for its services. Where the public

officials are in this neutral position with respect to the decision-making function, the potential of public corruption or favoritism does not appear as a specter to guard against. The incidental participation of the ABC in the preparation of specifications for the work, or insistence upon compliance with those specifications, or the promulgation of rules relating to the apportionment of the cost, do not propel the Division or its employees into the making of the key decisions which would require the need for the prophylaxis of competitive bidding.

Further, since the arrangement between the Association and Jersey does not involve public funds directly from the State Treasury or indirectly from pockets of the general public, the discretionary judgment involved in the selection of the printer and the determination of the contract price is purely a private matter beyond the concern of the State or its citizens. Under such a set of circumstances the policy considerations underlying competitive bidding requirements are not relevant.*** (Id., at 249-50)

Under such standards, petitioner bears the burden of demonstrating that the public officials or agency -- in this case the School Board -- "ha[s] a determinative voice in the selection of an exclusive contractor and/or the price which he is to charge." (Id., at 249) The Commissioner finds and determines that on the record before him Petitioner Biehn has failed to make such showing. While admitting that N.J.S.A. 18A:20-4.2(f) is silent as to any bidding requirements for selection of the contractor for construction of the project, petitioner's attention is directed to broad policy justifications for requiring bidding on such contract with such assertions that the regulations do not evidence any intent to eliminate all bidding requirements. Moreover, citation to the New Jersey School District Lease Purchase Guide as requiring an opinion from independent counsel to assure no untoward Board

involvement in the approval of such contractor is not dispositive for any proposition at issue here because such publication is not one developed by the New Jersey State Department of Education but, instead, is a publication of the New Jersey School Boards Association. Rather, petitioner's argument more correctly should have focused on the extent of the Board's authority over such contractor's functions. Instead, petitioner's arguments appear to attack PacifiCorp's status and involvement as active lessor, averring that it "stands in the place of an 'agent' of the school board" (Exceptions, at p. 14) rather than that of a private individual. Such arguments miss the mark, in the Commissioner's judgment, in assessing the need to avoid the "potential of public corruption or favoritism" (Lill, at 249) that public bidding laws are intended to prevent.

Moreover, petitioner has likewise failed to bring forward a preponderance of evidence to support a conclusion that the monies to be advanced for said construction by the sale of certificates of participation constitute the direct expenditure of public funds or even the indirect expenditure "from [the] pockets of the general public" (Id., at 250) that would warrant application of the competitive bidding statute embodied in N.J.S.A. 18A:18A-1 et seq. insofar as citizens voluntarily choose whether to purchase such certificates. Instead, petitioner argues that the lease purchase agreement makes clear that rental payments come from the school district's available revenues. However, the rental payments are not relevant to the financing scheme provided for the construction of the physical plant to be leased by the Board. Rather, because the construction of said building is to be financed from the issuance of

certificates of participation from the Agent Bank, the Commissioner finds and determines that petitioner has similarly failed to meet his burden of demonstrating that the lease purchase scheme in question herein, in any manner implicates the use of public monies which might then trigger the application of the Public Schools Contracts Laws as embodied at N.J.S.A. 18A:18A-1 et seq.

In summary, the standard of review in this matter establishes that in order to require the contract for construction of the Project to be subject to the Public Schools Contracts Law, N.J.S.A. 18A:18A-1 et seq., petitioner has the burden of demonstrating that PacifiCorp is not an active lessor. The Commissioner herein finds petitioner has failed to meet this burden.

Accordingly, for the reasons expressed above, not those espoused by the ALJ, the instant Petition of Appeal is dismissed with prejudice.

FEBRUARY 6, 1991

DATE OF MAILING - FEBRUARY 6, 1991


COMMISSIONER OF EDUCATION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9590-89

AGENCY DKT. 345-11/89

E.C., in the interest of
his minor child, R.C.,
Petitioner,
v.

**BOARD OF EDUCATION OF
THE TOWNSHIP OF MAHWAH,**
Respondent.

John A. Merrill, Esq. for petitioner

Mark G. Sullivan, Esq. for respondent
(Sullivan & Sullivan, attorneys)

Record Closed: July 31, 1990

Decided: January 2, 1991

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is an appeal by a parent who asks the Commissioner of Education ("Commissioner") to change a failing final grade received by his child for a Spanish language class during the 1988-89 school year. Two issues are raised by the pleadings: first, whether the suit is barred as untimely under the 90-day rule, *N.J.A.C. 6:24-1.2*; second, whether the suit should be dismissed for failing to state a

OAL DKT. NO. EDU 9590-89

claim for which relief may be granted. For the reasons which follow, the petition is dismissed on the second ground.

Procedural History

On November 15, 1989, petitioner E.C., parent of R.C., filed a petition with the Commissioner, alleging that the local school officials had acted arbitrarily, capriciously and unreasonably and demanding that his child's failing grade be changed to passing. Respondent Mahwah Board of Education ("Board") filed its answer on December 5, 1989, denying the charge and asserting various affirmative defenses. Subsequently, on December 19, 1989, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Originally the OAL scheduled a hearing for July 9, 1990, which was adjourned to July 24, 1990 to accommodate the parties. Meanwhile, on April 16, 1990, the Board filed a motion for summary decision, together with supporting affidavit and brief. Petitioner filed opposing papers and a cross-motion for summary decision, including an affidavit, copies of correspondence, answers to interrogatories and a brief, on April 26, 1990. On May 8, 1990, the Board filed extensive reply papers, consisting of a supplemental brief and four additional affidavits. Although not contemplated by the procedural rules or the prehearing order, petitioner filed another legal memorandum on May 10, 1990. All these documents have been considered as part of the record. Instead of holding the hearing, the case was submitted on July 31, 1990 for ruling on the papers.

Findings of Fact

All of the material facts are undisputed. From the pleadings, affidavits and exhibits, I FIND the following facts:

Petitioner and his daughter reside in Mahwah, New Jersey. During the 1988-89 school year, the daughter was a tenth grader in the local public high school. One of her courses was Spanish 2C taught by Matthew Piccolo. She received poor grades for the first two marking periods and failed both the midterm and the final examination. District policy authorizes a teacher to raise a lower grade to 55 "in order to encourage the student to continue working."¹ Even though Mr. Piccolo

raised her actual first and second quarter grades and R.C. showed improvement in the last two quarters, her grade point average for the entire year was still below passing.² As recorded on her final report card issued June 15, 1989, R.C. received the following quarterly grades:

1st Quarter	55
2nd Quarter	55
3rd Quarter	79
4th Quarter	81

Additionally, the report card records her grade on the midterm as 39 and her grade on the final examination as 55. Besides her failing grades, R.C. had six unexcused absences from class and "routinely abused bathroom privileges by insisting [on] leaving the room" while her Spanish lesson was in progress.

There exists a factual dispute as to whether the report card accurately reflects her grade on the final examination. Sworn affidavits by Mr. Piccolo attest to the fact that her actual grade was 52, which he changed upward to 55. According to petitioner's affidavit, his daughter's grade on the final examination should be 59 because Mr. Piccolo had advised him that he had "raised all students' grades by four (4) points." It does not matter who is right on this particular point, since R.C. would not have a high enough average to pass the course in either case.

Although petitioner makes no claim to any qualifications as a teacher, he offers his advice that Mr. Piccolo should have "curved" the test results because more than half the class had allegedly failed the final examination. Mr. Piccolo rejected any suggestion that the examination contained material not covered in class and, in the exercise of his professional discretion, he decided not to curve the results. Use of a

¹R.C.'s actual grade for the first quarter was 36 and her actual grade for the second marking period was 52.

² Passing requires a grade of 65 or above.

class curve would benefit those students who had not demonstrated basic mastery of the course content.

Grading procedures set forth in the current student handbook use a weighted average in which quarterly grades are counted as three times the unit value, the final examination is counted as twice the unit value, and the midterm is counted as equal to the unit value³. If the grades on the final report card are used, then R.C.'s final grade for the course is 63.93, which is rounded up to 64. If, on the other hand, the grade on the final examination is regarded as 59, then the final grade for the course is 64.47. Petitioner, who is a certified public accountant, argues that the average must be carried out to one-hundredth of a decimal point and rounded up to 65.

Apart from petitioner's self-serving statement, the record lacks any support for the proposition that such dubious degree of exactness must be made. Instead, the uncontradicted affidavit of Allen Van Eck, director of student services, indicates that "every fractional grade of less than 0.5 is rounded down to the next lowest whole number." Consequently, R.C.'s final grade is rounded down to 64, regardless of whether she achieved a 55 or a 59 on her last test. In order to pass the course, she needed at least a 60 on the final exam.

Board policy statement No. 512 outlines a route of appeal for students who are dissatisfied with their grades:

... [S]chool administrators retain the authority to review grades and to prevent assignment of unreasonable or arbitrary grades. The acts of teachers may not be insulated from review of their supervisors and administrators; therefore, each principal shall maintain the right to change any grade assigned to a student by a teacher. No such change in grade shall be made until a

³Petitioner's moving papers attach what appears to be an earlier version of the handbook, which uses an unweighted average of the quarterly grades and the final examination and does take into account the midterm grade. Nonetheless, both sides utilize the same weighted formula in their computation of the final grade for the course.

conference is held between the teacher and the principal and until the principal, in turn, has discussed the change with the Superintendent. At the high school, the principal must review the proposed change with a committee of four department heads, including the head of the department in which the disputed grade occurred, prior to discussing the change with the Superintendent. (Emphasis in the original).

After learning that his daughter had failed the Spanish course, on or about June 22, 1989 petitioner telephoned Mr. Piccolo and requested that the grade be changed. When the teacher denied his request, petitioner went to see the high school principal, Mr. Bruce Segall, who brought petitioner's concern to the attention of school superintendent Barrent Henry. On July 13, 1989 Mr. Henry wrote to petitioner, stating that his daughter's grade "has been reviewed several times already by the teacher, department chairperson and the principal" and that "no basis was found to warrant any grade change." Mr. Henry also expressed his reluctance, except in "a most extraordinary situation," to "override the professional judgment of three appropriate staff members." Convening of a four-member committee was apparently deemed unnecessary, since both principal and department head had recommended against any "proposed change."

Petitioner mistakenly believed he had a further right of appeal to the board of education and erroneously assumed that he was legally entitled to a full-fledged hearing.⁴ Despite the absence of any formalized avenue of appeal, the Board

⁴As noted, Board policy directs that professional school administrators "retain the authority to review grades and to prevent assignment of unreasonable or arbitrary grades," without expressly authorizing a right of appeal beyond the chief school administrator. Assuming (but not deciding) that the Board cannot delegate its ultimate responsibility for overseeing the school system, it does not follow that petitioner must be afforded a trial-type hearing with sworn testimony and cross-examination of opposing witnesses. Under some circumstances "an informal appearance before the board" will satisfy due process requirements. Cf. *Donaldson v. No. Wildwood Bd. of Ed.*, 65 N.J. 236, 246 (1974) (nonrenewal of a nontenured teacher's contract) What process is due in a particular setting is partly a function of the importance of the interest affected. *Woodland Private Study Group v. Dept. of Environmental Protection*, 109 N.J. 62, 74 (1987). It would seriously undermine respect for the teacher's legitimate authority if any student unhappy with a particular grade could demand a hearing.

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offered petitioner the opportunity to appear before it on September 18, 1989. But petitioner failed to accept this offer because of his insistence that the half-hour allotted for his presentation was not enough time for a full hearing. Instead, petitioner brought this appeal to the Commissioner.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the petition fails to state a claim for which relief may be granted.

At the outset, the Board seeks to dismiss this appeal as untimely under the regulations governing appeals in education cases. *N.J.A.C. 6:24-1.2* prescribes that appeals in controversies and disputes involving school law must be filed with the Commissioner "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education." (Emphasis added).

Respondent urges that the 90-day limitation period started to run on June 22, 1989, the date of the teacher's written adverse notice or, at the very latest, on July 13, 1989, the date of the superintendent's written refusal to change the grade. In response, petitioner maintains that case law required him to exhaust administrative remedies before bringing an appeal to the Commissioner. See, *Finucane v. Franklin Bd. of Ed.*, OAL Dkt. No. EDU 7738-82 (Oct. 1, 1982), adopted (Comm'r Nov. 9, 1982); *M.R. v. Edison Twp. Bd. of Ed.*, OAL Dkt. No. EDU 1342-81 (May 5, 1981), adopted (Comm'r June 3, 1981). Accordingly, petitioner argues that the 90-days did not start to run until September 18, 1990, the date of petitioner's canceled appearance before the Board. Both sides' arguments have major conceptual weaknesses.

Insofar as the Board's position is concerned, the regulation clearly provides that the 90-day period commences from final action by the local board, not from lower-level activity by teachers or school administrators. Irrespective of local policy, the Board did in fact offer petitioner the opportunity for an informal appearance, thereby creating a reasonable expectation on petitioner's part that this step must be exhausted before resort to the Commissioner's review.

Yet petitioner chose not to appear before the Board, undercutting the force of his argument that the Board must be given a first chance to correct any error. If such were the present posture of the case, then the petition would surely be dismissed. By letter dated September 15, 1989, however, respondent's counsel represented that the Board would not interpose the defense that petitioner failed to exhaust administrative remedies by "not having had a hearing before the Mahwah Board of Education." That waiver seems to have been relied on by petitioner in deciding not to appear before the Board three days later on September 18, 1990. On the possibility that the Board's waiver may have lulled petitioner into a false sense of security, the better approach is to treat the matter as if petitioner had fully exhausted his remedies below, in which case an appeal to the Commissioner filed on November 15, 1989 is well within time.

Viewed on its merits, petitioner's complaint reduces to the absurd claim that the teacher's grading system was wrong by a few hundredths of a decimal point. Significantly, petitioner does not allege that the teacher was biased against his child on the basis of race, religion, ethnic origin, gender, or political affiliation or because of the exercise of any constitutionally-protected right. This is not, for example, a case where a student allegedly received lower grades because her sincere religious beliefs precluded her from dissecting a frog, saluting the flag, studying evolution or attending sex education classes. Nor is this a situation where the Commissioner might conceivably want to intervene to enforce a paramount state educational policy, such as the improper use of grades as a disciplinary device, *Talarsky v. Edison Twp. Bd. of Ed.*, 1977 S.L.D. 862 (Comm'r July 29, 1977) and *Wermuth v. Bernstein*, 1965 S.L.D. 121 (Comm'r Aug. 31, 1965), or to coerce students to purchase a gym uniform in violation of their right to a "free" public education, *V.F. v. Haddon Heights Bd. of Ed.*, 1988 S.L.D. ___ (Comm'r June 28, 1988).

Here petitioner's pleadings, taken as true, present an honest difference of opinion about a teacher's judgment call, nothing more or less. Absent a clear showing that the actions complained of resulted from bias, bad faith, arbitrariness, statutory violation or constitutional infirmity, a petition seeking to change a final grade is "without merit." *Talarsky*, 1977 S.L.D. at 870-71. Generally, courts will not override an academic decision unless it represents "such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 277

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(1985). (medical student who failed a national medical examination). Likewise, the Commissioner is loath to substitute his judgment for that of the classroom teacher, without more than a mere assertion that someone deserves a better grade.

Order

For the foregoing reasons, it is **ORDERED** that the Board's motion to dismiss the petition is granted.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/2/91
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Seamus Weiss

7/4/91
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 1991
Date

OFFICE OF ADMINISTRATIVE LAW

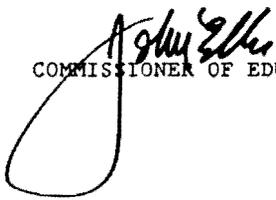
al

E.C., in the interest of his minor
child, R.C.,

PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MAHWAH, BERGEN COUNTY, : DECISION
RESPONDENT. :
: :
_____ :

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

Upon review of the record, the Commissioner agrees with and adopts the findings and conclusions of the Administrative Law Judge. The matter is, therefore, dismissed for the reasons stated in the initial decision.


COMMISSIONER OF EDUCATION

FEBRUARY 11, 1991

DATE OF MAILING - FEBRUARY 11, 1991

COASTAL LEARNING CENTER, INC., :
 DR. RONALD BOEDART, HELEN BOEDART, :
 JOSEPH J. SCALABRINI, NANCY :
 SCALABRINI, JOHN BREUNIG, VERA :
 BREUNIG, FRANK D. VISCOMI, JOYCE :
 VISCOMI, AND ROBERT VISCOMI, :
 :
 PETITIONERS, : COMMISSIONER OF EDUCATION
 V. : DECISION ON MOTION
 STATE BOARD OF EDUCATION, DEPART- :
 MENT OF EDUCATION, COMMISSIONER :
 OF EDUCATION, DIVISION OF FINANCE, :
 JOHN DOE, JAMES DOE, EMPLOYEES OF :
 THE DIVISION OF FINANCE, :
 RESPONDENTS. :
 _____ :

Timothy B. Middleton, Esq., on behalf of petitioners

Robert J. Del Tufo, Attorney General, on behalf of
respondents (Arlene G. Lutz, DAG, of Counsel)

Whereas, this matter was opened before the Commissioner of Education on January 22, 1991 through the filing of a Petition of Appeal and Motion for Emergent Relief; and

Whereas, an Answer to the Petition of Appeal and letter brief in opposition to the Motion for Emergent Relief were received from respondents on February 13, 1991 together with a Motion for Dismissal; and

Whereas, petitioners seek a stay of respondents' application of certain regulations for private schools for the handicapped contained within N.J.A.C. 6:20-4.1 et seq. and adopted

by the State Board of Education on November 7, 1990 pending disposition of its litigation before the New Jersey Superior Court Appellate Division appealing the validity of those regulations and the manner in which they were adopted; and

Whereas, petitioners seek a stay to the application of the disputed regulations in that it will cause immediate and irreparable harm to petitioners if the stay is denied because the application of N.J.A.C. 6:20-4.4(a)47 to Coastal Learning Center and its lease arrangement with Arnold Associates until 1997 could lead to the default of the corporation. If this occurs, irreparable harm would befall respondent shareholders as they have jointly and severely guaranteed the terms and conditions of the lease; and

Whereas, petitioners aver that although the leasing terms call for rental payments of \$91,000 in 1991, application of the above-cited regulation could result in allowable reimbursement rent of as little as \$50,000; and

Whereas, petitioners aver that Coastal could lose in excess of \$40,000 a year until 1997 under the requirements of said regulation which will immediately impair its ability to raise capital and will jeopardize its present loan status which must remain strong since Coastal must borrow approximately \$400,000 per year to cover school expenses; and

Whereas, petitioners argue that Coastal's present financing will be jeopardized as it will be considered in default if its financial condition materially worsens, a condition which will occur with application of the regulation; and

Whereas, petitioners also contend that it is clear money damages retrieved in subsequent actions against respondents cannot adequately compensate petitioners for their losses; and

Whereas, respondents argue that the Motion for Stay should be denied because petitioners have failed to meet the four-prong test for a stay; i.e., irreparable harm will result if a stay is denied; there is a likelihood of prevailing on the merits; there is demonstration that the grant of a stay would not harm other interested parties; and the public interest will be served by the imposition of a stay; and

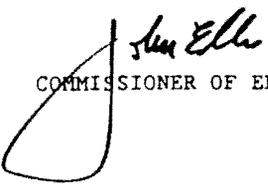
Whereas, the Commissioner has carefully considered all the arguments advanced by the parties which are herein incorporated by reference; and

Whereas, the Commissioner has considered the standards for the grant of injunctive relief set forth by the New Jersey Supreme Court in Crowe v. DeGioia, 90 N.J. at 133 (1982) as well as the myriad of other case law cited by the parties; and

Whereas, the Commissioner agrees with respondents that petitioners have failed to meet the four-prong test for the grant of injunctive relief in that (1) they have failed to provide evidence rather than mere speculation that irreparable harm will result to either the present or future financial condition of the Coastal Learning Center if the grant of a stay is denied; (2) they have not demonstrated a likelihood of prevailing on the merits of the Petition of Appeal, particularly in view of the fact that their allegations go to the facial validity of the regulations and violations of the Administrative Procedures Act, issues which do not fall within the jurisdiction of the Commissioner; (3) they have

failed to demonstrate that the harm which might occur to the public schools sending children to Coastal on a tuition basis is outweighed by the potential harm to Coastal; and (4) they have not shown that the public interest compels the grant of a stay; now therefore

IT IS ORDERED this 19 day of February 1991 that petitioners' Motion for a Stay is DENIED.


COMMISSIONER OF EDUCATION

FEBRUARY 19, 1991

DATE OF MAILING - FEBRUARY 20, 1991

Pending State Board

ADAM A. BROWER, III, ET AL., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION ON MOTION
BOROUGH OF POINT PLEASANT, OCEAN :
COUNTY, :
RESPONDENT. :
_____ :

For Petitioners, Jeannette C. Kellington, Esq.

For Respondent, Gelzer, Kelaher, Shea, Novy and Carr
(Milton H. Gelzer, Esq., of Counsel)

This matter, which concerns a lease purchase agreement for an elementary school to be built as a replacement of the Ocean Road School in respondent's district, was originally filed before Superior Court, Law Division of Ocean County on October 3, 1990 as an Action in Lieu of Prerogative Writ and Verified Complaint by petitioners seeking to restrain the Board from proceeding with a lease purchase plan, declaring the lease purchase plan unconstitutional, invalid and void and not the most thorough and efficient manner to provide for education. Petitioners further sought to require the Board to show that no other alternatives are available, and asked for counsel fees and costs; and

The Board filed its answer to said complaint on November 5, 1990 including eight affirmative defenses; and

On November 19, 1990 the Board filed in Superior Court, Law Division of Ocean County a Notice of Motion for Summary Judgment on behalf of the Board with brief and affidavit in support of said motion; and

On a motion raised by counsel for the Board, on December 18, 1990 Eugene D. Serpentelli, Appellate Judge of the Superior Court, transferred to the Commissioner of Education all matters relating to the aforestated action; and

On December 19, 1990 the Bureau of Controversies and Disputes of the New Jersey State Department of Education acknowledged receipt of the instant controversy as having been transferred from Superior Court; and

On January 7, 1991 counsel for the Board filed a supplemental brief, which resulted in counsel for petitioners being granted an extension in which to file a responsive brief to said supplemental brief and to the motion for summary judgment filed originally before Judge Serpentelli; and

Petitioners' responsive brief to the Board's motion for summary judgment was recorded on January 22, 1991; and

The Board raises eight points in its brief and supplemental brief in support of the motion for summary judgment, which are summarized, in pertinent part, below:

Points I and II

Relying on Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954), the Board contends there is no genuine issue of material fact in this matter and that summary judgment is therefore, an appropriate disposition. It denies petitioners' allegation that the Board has not presented alternative plans for

repair and/or addition for the Ocean Road School to the voters, and further submits that if such allegation were true, the issue raised is not material to the Board's action to seek approval of a lease purchase agreement to replace Ocean Road School. Rather, application for a lease purchase must meet the requirements set forth by the Department of Education and be approved by the Commissioner and the Local Finance Board. Likewise, the Board denies that the lease purchase plan will not provide a thorough and efficient education, and it claims again that facts in support of the allegation are not material to the instant dispute because no statutory language or other legal concept requires the Board to address the provision of a thorough and efficient education in its application for a lease purchase approval.

As to petitioners' contentions that there are flaws in the Board's application for lease purchase, the Board denies any such allegations and adds that such allegations are in no way material to the Board's application for approval of its lease purchase plan, in that to be successful in such application the Board must meet only the requirements of the Department of Education and obtain the approval of the Commissioner and Local Finance Board as provided for in N.J.S.A. 18A:20-4.2(f). Similarly, the Board submits that plaintiffs allege no facts in support of their contention that the lease purchase plan at issue is a denial of the constitutional or statutory rights to determine the school budget. The Board reiterates that it has made application to lease purchase and that said application has been approved.

Pertaining to the allegation raised by petitioners that the lease purchase statute requires the agreement contain a provision

for cancellation in the event of non-appropriation, the Board rebuts by charging that N.J.S.A. 18A:20-4.2(f) states the agreement "shall contain a provision making payments [under the agreement] subject to the annual appropriation of funds sufficient to meet the required payment or shall contain an annual appropriation clause (emphasis added)." (Board's Brief in Support of Summary Judgment, at p. 11) Further, the Board once again contends that any such allegations as to what is included in its proposed lease purchase agreement are not material to this dispute. It claims:

***Whatever is or is not included in the agreement will be determined by the agencies and officials who must approve Defendant's application as provided for in the pertinent statutes and regulations. Defendant asserts the same argument with respect to Fourth and Fifth Counts of Plaintiff's Complaint. That is, even if Plaintiff's allegations are true (which Defendant asserts they are not) the allegations are immaterial to Defendant's application for lease purchase approval and are, at best, an interpretation of an issue of law and, consequently, under no stretch of the imagination, an issue of fact. (emphasis in text)
(Id.)

The Board summarizes by suggesting that whatever allegations are raised by petitioners are only germane to the dispute with the Board's application for approval of a lease purchase application approved by the Commissioner and the Local Finance Board. It submits that the authority to lease purchase, if it exists, is based on law and there does not exist any factual dispute which would preclude summary judgment.

Point III

The Board contends it has the authority by law to enter into a lease purchase agreement to replace the Ocean Road School pursuant to N.J.S.A. 18A:11-1, N.J.S.A. 18A:33-1 and N.J.S.A.

18A:20-4.2(f) and, further, that officials of the Department of Education, including the county superintendent, concurred with the Board's determination to replace such facility. The Board believes it has discretion in determining how it will provide educational facilities and cites State v. Lally, 80 N.J. Super. 502, 513 (Law Div. 1963) in support of this contention.

Point IV

The Board submits it sought transferral of this matter from court to the Commissioner, which was accomplished by Judge Serpentelli's order of December 18, 1990.

Point V

The Board submits that petitioners instituted their suit in court on October 3, 1990, substantially in excess of the 45-day deadline for such action set forth in R.4:69-6(a). It avers that petitioners should have known or knew of the Board's course of action June 14, or at the latest, June 15, 1990. It claims additionally that petitioners have known of the issue of replacing the Ocean Road School for two years, through the defeats of the bond referenda. It notes that on June 14, 1990 at its regular public meeting, the Board authorized its officials to take such necessary steps in seeking approval of the Commissioner and the Local Finance Bureau to enter into a lease purchase agreement. The Board includes as Exhibit A an affidavit of the Superintendent of Schools and an agenda for the June 14, 1990 meeting, and states that such agenda was distributed to members of the public attending the meeting and including the lease purchase agreement as an item for consideration on such agenda. Moreover, the Board suggests the application for lease purchase approval was reported in the media, as noted in

Exhibit C and notes, too, that petitioners are members of the "Concerned Citizens Committee" and that some of its members, including members of the Board, attended the June 14, 1990 meeting. Accordingly, the Board avers petitioners knew or should have known of their cause of action on June 14 or June 15, 1990. Forty-five days from such date is July 29 or at the latest July 30, 1990. October 3, 1990, the date on which petitioners filed their complaint in court, was 66 or 65 days beyond the prescribed time period. However, even assuming arguendo that petitioners became aware of the lease purchase application at a meeting on July 29, 1990 at which it approved the minutes of the meeting of June 14, 1990 and answered other questions from the public regarding the plan, petitioners' deadline would have been September 9, 1990, in the Board's view. Claiming that no basis exists for exception to R. 4:69-6(a) because the issue in this matter does not involve an informal or ex parte determination, does not involve important and novel constitutional questions and does not involve concealment of the issue from the public, the Board submits that the instant matter is time-barred by law and must be dismissed.

Point VI

The Board suggests that petitioners rested on their rights in delaying the assertion of their claim, and, by not timely filing, it had reason to believe that petitioners had abandoned their objections to the lease purchase, warranting the application of the equitable defense of laches. Moreover, the Board avers that conditions during the period of delay have so changed that it is an injustice to now permit petitioners to assert their claim. The

Board contends that it had completed application for lease purchase, filed proper and necessary documentation as required, and planned to attend hearings before the Commissioner and the Local Finance Board, when, just days before the hearing to determine the outcome of the application, it received notice of petitioners' suit in Superior Court.

To restrain the Board at this juncture would mean that school construction, at best, would not begin before spring, the Board suggests. It adds that it has been warned by the Department of Education that it must have a replacement plan in effect at the end of this school year or it will not be authorized to continue use of the portable classrooms now housing students. Consequently, the Board asserts it has a meritorious defense of laches and petitioners' claim should be dismissed; and

In addition to the above six points, the Board submitted a supplemental brief elaborating on two other points, which are summarized, in pertinent part, below:

Point I avers that the Board's authority to lease purchase the Ocean Road School is constitutional and does not deny petitioners' lawful rights to determine school district debt. The Board suggests that petitioners' claim that use of lease purchase in this case violates their right to approve debt through referendum is without merit because petitioners have no constitutional right to approve debt created by the Board, in this case citing Bulman v. McCrone, 64 N.J. 105 (1973) for the proposition that a lease purchase transaction does not violate any such right as petitioners claim. The Board avers Bulman held "***that if the transaction is a lease and payments for rent are made from current appropriations, no

debt is created and there is no violation of constitutional prohibition against debt unless approved by voters in a referendum***." (Board's Supplemental Brief, at p. 4)

The Board avers that petitioners' claim that its lease purchase agreement violates their right to approve debt by referendum is also without merit, citing N.J.S.A. 18A:24-10(c), 18A:24-12(b), 18A:24-21(b), and 18A:24-29 in support of the proposition that the education statutes clearly distinguish school district indebtedness from a lease purchase arrangement. It also cites N.J.S.A. 18A:20-4.2(f) for the position that such statute permits a school board to finance the acquisition and construction of a school building without issuing promissory notes or bonds and consequently the statutory provisions for debt including those requiring voter approval do not apply to a lease purchase arrangement.

The Board notes that the lease purchase statute under which its proposed agreement was approved requires the appropriation of the rental payment in the annual budget which is submitted to the voters or a provision allowing annual cancellation of the agreement. The Board's agreement provides for appropriation of rental payments in the annual budget. Thus, the Board claims, petitioners' alleged constitutional rights to approve debt created by the Board are not violated by the instant lease purchase agreement.

At Point II, the Board contends the lease purchase agreement, including the clause with which petitioners find fault, is presumed correct. It claims that absent a showing of arbitrary action on the Board's part, said application for lease purchase

approval is entitled to a presumption of correctness. The Board submits that petitioners have not shown that the Board's exercise of its discretionary authority to apply for lease purchase was capricious, arbitrary or unreasonable, in that it was approved by the Commissioner and the Local Finance Board. It cites Parsippany-Troy Hills Ed Ass'n v. Bd. of Ed., 188 N.J. Super. 161 (App. Div. 1983) in support of this proposition. Accordingly, the Board avers its action is presumed correct in law; and

Petitioners' responsive brief seeks to rebut each of the points raised in the Board's briefs in support of motion for summary judgment, which rebuttals are summarized in pertinent part, as follows:

POINT I -- THERE IS AN ISSUE OF FACT AS TO WHETHER THE PROPOSED LEASE-PURCHASE COMPLIES WITH THE STATUTE

Petitioner argues that the final form of the lease purchase agreement has not been submitted for review and was not attached to the Board's motion. Petitioners cite N.J.S.A. 18A:20-4.2(f) as requiring a cancellation clause in the event of non-appropriation. They submit that the proposed non-substitution clause in the instant lease purchase clause has negated this statutory requirement and, thus, that the presumption of correctness upon which the Board relies, is rebutted. Therefore, petitioners aver, the Board's motion for summary judgment must be denied.

POINT II -- THERE IS AN ISSUE OF FACT AS TO WHETHER THE NEW FACILITY IS NECESSARY

Citing decreased enrollment and the fact that the new building proposed will house fewer students than the current building, as well as what petitioners aver is contradictory

statements made by the Board's architect, petitioners claim an issue of fact exists as to the needs of the district. It further argues that the Board has not shown the proposed lease purchase agreement is required to meet the standard of thorough and efficient education.

POINT III -- THE LEASE-PURCHASE STATUTE WILL DENY THE VOTERS THEIR RIGHTS TO DETERMINE THE SCHOOL BUDGET

Petitioners advance the contention that to allow the lease purchase will deny the voters the right to exercise control over the school budget. Petitioners reiterate their position that the mandate of the voters of Point Pleasant is that they do not wish to rebuild the Ocean Road School, as evidenced by three defeated bond referenda. They add that a bill has been advanced in the State Legislature to prohibit lease purchase agreements, demonstrating that our legislators are also concerned that the lease purchase provision of N.J.S.A. 18A:20-4.2(f) "***disenfranchises voters of their statutorial rights to vote on school facilities." (Petitioners' Reply Brief, at p. 5, quoting letter from Senator Connors and Assemblymen Moran and Connors) Petitioners submit that this is an important issue that should not be dealt with in a summary fashion.

POINT IV -- PLAINTIFFS ARE NOT GUILTY OF LACHES

Petitioners submit that although the Board of Education passed a resolution on or about June 14, 1990, the lease purchase public hearing did not take place until much later. Any resolution passed by the Board prior to the public hearings is not valid, petitioners contend. They further argue that until the Board received the approval of the Board of Education and the Local Finance Board, no lease purchase could be signed. Therefore,

petitioners' cause of action did not arise until those approvals were obtained. While making no mention of when such events transpired, petitioners submit that their complaint was filed in court on October 3, 1990, which was well within the time allowed by the rules. Further, relying on a letter dated October 2, 1990, petitioners urge that the statute requires that the Board submit final plans to the local Planning Board, and that the Board has failed to do so. They note that the Bureau of Facility Planning has not given its approval. They claim that a hearing as to the Planning Board is scheduled for later this month and that, therefore, no final approval exists.

Petitioners also aver that the defendant Board has not shown any harm due to any delay, claiming there is no reason to believe the approval of its replacement plan cannot be obtained within the appropriate time. Because these are critical issues, petitioners submit, the public good should be protected by a full and fair consideration of the facts and issues.

POINT V -- THE BOARD'S ACTIONS ARE ARBITRARY, CAPRICIOUS AND UNREASONABLE

because less expensive alternatives are available and because the overwhelming public sentiment is against the proposal. Petitioners contend that

While it may be true that the facility proposed to be financed by the lease-purchase agreement has received approval by necessary authorities -- there is no evidence that one or more of Mr. Thomas' [Board architect] alternatives would not also receive approval. Not only is the decision to replace Ocean Road School via lease-purchase unreasonable, arbitrary and capricious, the decision not to submit any other plan to voter or agency approval is even more unreasonable, arbitrary and capricious.

(Petitioners' Reply Brief, at pp. 9-10)

POINT VI -- THE LEASE-PURCHASE STATUTE GENERALLY, AND THIS LEASE-PURCHASE SPECIFICALLY, ARE IN CONTRAVENTION OF ABBOTT V. BURKE AND THE QUALITY EDUCATION ACT OF 1990

Petitioners aver that no consideration has been given to the effect of Abbott v. Burke, 119 N.J. 287 (1990). To expose taxpayers to a huge increase in the school budget before determining compliance with the new laws is unreasonable, in petitioners' opinion. They claim that the Board cannot have the authority to proceed with or without any approvals, until there is a showing of compliance. Further, relying on N.J.S.A. 18A:7D-1, petitioners contend that state aid for debt service will be paid in the same proportion as school aid, and that lease purchase payments are not considered debt service. Petitioners claim that this harm to the district has not been considered. Moreover, petitioners aver that the students the new law intends to protect must be considered.

The respondent has no authority to expend additional monies for a new school. The alleged difference between a new school and the repaired school is about \$5 million. Abbott has now said, essentially, that these monies cannot be spent if they deprive children in other districts of an equal education. The potential harm of the Board's intended lease-purchase now extends beyond our district. The respondent cannot decide to indulge in a new school where repairs are more than adequate. Not only will the taxpayers be harmed, but students in poorer school districts will also be harmed.

(Petitioners' Reply Brief, at p. 12)

Thus, petitioners' submit the Board's acts should be stayed until compliance with Abbott and N.J.S.A. 18A:7D-1 et seq. This is a novel question to be decided in accordance with recent case law and the new statute and should not be decided summarily, petitioners

advance. They seek denial of respondent's motion for summary judgment, and they ask that the Board be restrained from proceeding further with the lease purchase agreement pending further order.

On January 28, 1991 the Board filed a reply to petitioners' reply brief. Because the Board's remarks contained therein were submitted sua sponte, the Commissioner has not considered such submission in the disposition of this matter.

Upon a careful and independent review of this matter, the Commissioner finds and determines that there are no material facts at issue in this matter which would preclude summary judgment as set forth in Judson, supra, and grants the Board's motion for summary disposition for the reasons which follow. First, however, a discussion on the timeliness of the instant petition is appropriate.

It is uncontroverted that the instant matter was filed in Superior Court on October 3, 1990. It is also agreed by the parties that the Board's resolution directing its agents to undertake the steps necessary to commence a lease purchase application before the Commissioner of Education was duly passed on June 14, 1990. N.J.A.C. 6:24-1.2(b) the regulation governing timely filing of a petitioner of appeal before the Commissioner of Education, permits 90 days to elapse from the final action of a Board of Education before a matter is declared untimely filed before the Commissioner of Education. The court's time frame permits a 45-day period to elapse for timely submission of a complaint in lieu of prerogative writ. R. 4:69-6(a) Forty-five days from June 14, 1990 was July 29, a Sunday, which made petitioners' application to the court due on July 30, 1990. Forty-five days from that date was September 13,

1990, a Thursday. On the latter date, 90 days would have elapsed from the Board's decision and resolution to apply for lease purchase. In either event, petitioners untimely filed their claim before the court and, by operation of court transfer, before the Commissioner of Education on October 3, 1990. The Commissioner so finds. However, in light of the important question involving whether the lease purchase herein shall move forward, the Commissioner has resolved to consider the merits of the claims advanced.

It is fundamental to consideration of this matter to recognize that both the Commissioner of Education and the Local Planning Board of the Department of Community Affairs have painstakingly reviewed the application for lease purchase in this matter and have endowed such application with their respective and separate approvals, as required by N.J.S.A. 18A:20-4.2(f). See Schedule A, pages 1-3, Board's Answer, Commissioner of Education Endorsement Certificate. (See also Letter dated October 22, 1990 signed by Harry L. Mansmann, Executive Secretary, Local Finance Board and Resolution of Local Finance Board taken at its meeting of October 16, 1990 approving the Lease Purchase Application herein affixed to Board's Brief in Support of Motion for Summary Judgment.) In so approving the application of the Borough of Point Pleasant for lease purchase, it is plain that all requirements established by law and regulation have been met to this point in the process.

Upon careful review of the record before him, the Commissioner finds that petitioners have advanced no facts to

preclude the Board's going forward with the final stages of the lease purchase process, as discussed below.

First, the Commissioner dismisses as being without merit petitioners' contention that in the absence of a "final form of the document" (Point I, page 2, Petitioners' Reply Brief) having been submitted for the Commissioner's review, the Board somehow has not complied with N.J.S.A. 18A:20-4.2(f) because the exact terms and conditions of the lease purchase have not been finalized. To the contrary, the Board has received all approvals necessary under statute and regulation up to this point in the process, as memorialized in the following Commissioner of Education letter and resolution:

Mr. Gary Mitchell
Board President
Point Pleasant Borough Board of Education
2100 Panther Path
Point Pleasant, New Jersey 08742

Dear Mr. Mitchell:

I am writing to inform you that the lease with option to purchase and the ground lease agreement between the Board of Education of the Borough of Point Pleasant and Municipal Capital Construction Corporation, Inc., pursuant to N.J.S.A. 18A:20-4.2, 20-8.2(b) and N.J.A.C. 6:22A-1.1 et seq is approved as to your need for construction of a new elementary school. Approval is also granted to provide personal property/equipment necessary for educational purposes pursuant to N.J.S.A. 18A:18A-42 and 18A:20-2. This recommendation is based on the assurance of counsel that all schedules, agreements, including the ground lease agreement, meet existing federal and state statutes. I have also relied on the assurances of the officials of the school district, that the same has obtained all other applicable statutory approvals necessary for the settlement of the above-described lease purchase transaction.

It is our understanding that this agreement will be signed on or about December 1, 1990. The filing of a final schedule of payments, agreed to by both parties, will provide a schedule of payments beginning June 15, 1991 and ending December 15, 2015, subject to receipt of negotiated rates. Any revisions to this schedule must be communicated immediately to the Division of Finance.

My approval is contingent upon the favorable review of these agreements by the Local Finance Board.

Sincerely,

John Ellis
Commissioner
(Schedule A, Board's Answer, at pp. 1-2)

See also,

ENDORSEMENT CERTIFICATE OF
STATE COMMISSIONER OF EDUCATION

I, DR. JOHN ELLIS, State Commissioner of Education of the State of New Jersey,

HAVING CONSIDERED the lease with option to purchase agreement and leased land agreement for the Board of Education of the Borough of Point Pleasant, in the County of Ocean, New Jersey, duly submitted to me on October 11, 1990 by said board of education for consideration under Section 18A:20-4.2, 20-8.2(b), 18A-42 and 20-2 of the Revised Statutes of New Jersey and Section 6:22A-1.1 et seq of the New Jersey Administrative Code.

DO HEREBY CERTIFY THAT I AM SATISFIED, AND DO HEREBY RECORD IN WRITING MY ESTIMATES, that existing educational facilities in the school district of the said Borough of Point Pleasant, in the County of Ocean are less than eighty per centum (80%) adequate to meet the specified goals and objectives under the Public School Act of 1975, that the educational facilities to be financed pursuant to said proposal will, within ten years, be fully utilized and

DO THEREFORE AND HEREBY ENDORSE my consent on the copy annexed hereto of said proposal, for all the purposes and with the effect provided by said Section 18A:20-4.2, 20-8.2(b), 18A-42 and 20-2 of the Revised Statutes of New Jersey and Section 6:22A-1.1 et seq of the New Jersey Administrative Code.

IN WITNESS WHEREOF, I have hereunto set my hand on this 15th day of October 1990.

John Ellis
State Commissioner of Education
(Schedule A, Board's Answer, at p. 3)

Similarly, petitioners' papers are devoid of reference to a specific statutory or regulatory citation stating that unless there are public hearings before a resolution is passed by the board to seek approval of a lease purchase agreement, such resolution is void. Moreover, the record before the Commissioner indicates that at least one public hearing has taken place. (See Petitioners' Reply Brief, at p. 2; See also, Third Count, paragraph 3, page 3 of Complaint, and Page 4 of the Board's Brief citing Exhibit B regarding the "business meeting and public hearing on the lease purchase concept" held on July 26, 1990.) Although one of the legislative bills submitted by petitioners speaks to a public hearing before a board seeks approval from the Commissioner of Education, such bill is not the law currently. Thus, any claim to a requirement for such hearing is without merit.

It bears emphasizing that the lease purchase method of financing school construction is specifically designed by the Legislature to provide an alternate means of financing school facilities construction without resort to bonding. N.J.S.A.

18A:20-4.2(f) Consideration of whether to rely on the provisions of such statute thus fall within the ambit of the Board's discretionary authority through completion of the application process which has now been completed before the Division of Finance on the Local Finance Board. The Commissioner's authority in the face of such discretionary authority is limited. Cardman and Millburn Ed. Assoc. v. Bd. of Ed. of the Twp. of Millburn, 1977 S.L.D. 746 states succinctly the limitations on the Commissioner's consideration of Board discretionary actions:

The Commissioner will not substitute his judgment for that of a local board of education where the controverted action is within the discretionary authority of the board absent a showing that the action is arbitrary, capricious, or unreasonable. Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966) (at 750)

While such public hearings advance the laudable goals of sharing with the public information and decisions bearing upon the public's business, the determination to seek approval of lease purchase is vested in the board, without recourse to the public before resolving to make such application. In the absence of statutory authority or regulation specifying that a public hearing is required before seeking lease purchase approval, petitioners have failed in their burden of persuading the Commissioner that said resolution is invalid.

Similarly, by resort to the statutory prescription for lease purchase, the Board cannot be held to have violated the public's constitutional right to determine the school budget. It is uncontested in this case that the voters on three separate occasions defeated bond referenda to build a new elementary school in the

district. By this process of submitting the bond issue for public consideration, the public voice was heard. Thereafter, the Board exercised its statutory discretionary authority by availing itself of the lease purchase option in the face of three failed bond referenda. Again, that there may be bills before the Legislature now to alter the Board's authority to elect lease purchase is of no moment since no such bill has been passed into law. The state of the law currently provides the lease purchase mechanism through which the Board may acquire land and buildings other than through bond referenda. The Point Pleasant Borough Board, with the imprimatur of the County Superintendent and the Assistant Commissioner of Education for County and Regional Services, chose to avail itself of that mechanism. In no way was the public's constitutional right to determine the school budget compromised in such course of events. The Commissioner so finds.

Likewise, the Commissioner finds no merit in petitioners' argument that the instant lease purchase statute specifically, and the lease purchase statute generally, are in contravention of Abbott v. Burke and the Quality Education Act of 1990. The Commissioner finds this argument largely unfathomable. If petitioners' claim is that because the taxpayers of the district rejected a bond referendum, the Board is somehow foreclosed from expending monies for a new school without consideration of how any such expenditures will square with the Quality Education Act and the ramifications of the Supreme Court's landmark decision in Abbott v. Burke, they labor under the misapprehension that the lease purchase statute somehow fails to take into account the statutory requirements of a thorough and efficient education for all of the children of the state, as

well as the district of Point Pleasant Borough. Any such argument fails to consider the approval process altogether. Further, to suggest that there is no need for the new facility (which they contend the three defeated bond referenda imply) but then to declare that a bond issue is the only way to proceed in this matter because state aid is enhanced by a district's debt service while lease purchase rent payments are not considered debt service is to talk out of both sides of their mouths. In either case, petitioners' arguments in this regard are so obtuse as to be meritless.

Additionally, the Board is imbued with the discretion to determine that the lease purchase option chosen is the best plan for the district's educational needs even if the public had not rejected a bond referendum. Whether the lease purchase plan chosen is the best proposal among other options, or whether in fact the facility is necessary are matters for Board determination, subject to the approval process conducted by the Division of Finance of the Department of Education and the Local Finance Board of the Department of Community Affairs. N.J.S.A. 18A:20-4.2(f) See also Township Committee of the Township of Delaware, Township Committee of the Township of East Amwell, Mayor and Common Council of the Borough of Flemington, Township Committee of the Township of Raritan, and Township Committee of the Township of Readington v. Board of Education of the Hunterdon Central Regional High School District, Hunterdon County, decided by the Commissioner October 18, 1989, aff'd State Board March 7, 1990. Moreover, review of the six claims made in petitioners' brief in response to the motion for summary judgment, as well as in their complaint before Superior Court, show that, although asserting that the Board's action in

seeking approval was arbitrary, capricious and unreasonable, they offer no facts to support that conclusion. The Commissioner so finds.

Finally, the Commissioner dismisses as being without merit petitioners' contention that the non-substitution clause in the proposed lease purchase agreement negates the statutory requirement of a cancellation clause in the event of non-appropriation. The Commissioner again harkens to the fact that the approval of the Commissioner and the Local Finance Board is dispositive of any question as to whether the document submitted for consideration to both agencies met the statutory and regulatory prescriptions. Based upon the aforesaid approval, it must be assumed that the clause in question fully met both the requirements of the Commissioner and the Local Finance Board. Had petitioners sought to challenge the approval of this lease purchase process, the Commissioner and State Department of Education would have been named as respondents. Failure to do so precludes the Commissioner's review of any such claims.

Accordingly, for the reasons stated above, the Commissioner finds and determines that there exist no material facts to preclude summary disposition of this matter, and that the instant motion for summary disposition is hereby granted the Board of Education of the Borough of Point Pleasant for petitioners' failure to state a cause of action cognizable before the Commissioner for which relief can be granted.

IT IS SO ORDERED.

FEBRUARY 20, 1991

DATE OF MAILING - FEBRUARY 20, 1991 - 21 -


COMMISSIONER OF EDUCATION

ADAM A. BROWER, III, ET AL., :
PETITIONERS-APPELLANTS, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF POINT PLEASANT,
OCEAN COUNTY, :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, February 20, 1991
For the Petitioners-Appellants, Jeanette C. Kellington, Esq.
For the Respondent-Respondent, Sinn, Fitzsimmons, Cantoli,
West & Pardes (Kenneth B. Fitzsimmons, Esq., of
Counsel)

In that we agree with the Commissioner of Education that
the instant petition was untimely filed, we affirm the decision of
the Commissioner and dismiss the petition.

July 3, 1991

Pending Superior Court



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

CONSOLIDATED

OAL DKT. NO. EDU 5577-89

AGENCY DKT. NO. 223-7/89

OAL DKT. NO. EDU 5851-89

AGENCY DKT. NO. 227-7/89

OAL DKT. NO. EDU 5576-89

AGENCY DKT. NO. 213-7/89

**ANNE F. PASZAMANT, RICHARD EVANS,
and DONALD RALPH,**

Petitioners,

v.

HIGHLAND PARK BOROUGH BOARD OF EDUCATION,

Respondent.

Steven E. Klausner, Esq., for petitioners (Klausner & Hunter, attorneys)

Frank N. D'Ambra, Esq., for respondent, **James L. Plosia, Jr., Esq.,** counsel of record
for respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross,
attorneys)

Record Closed: December 20, 1990

Decided: January 4, 1991

BEFORE **DANIEL B. McKEOWN, ALJ:**

Anne F. Paszamant, Richard Evans and Donald Ralph (petitioners) are employed by the Highland Park Borough Board of Education (Board) as teaching staff members. In separate Petitions of Appeal filed to the Commissioner of Education, since consolidated, they individually allege that the Board violated their seniority regarding assignments for the 1989-90 school year following a reduction-in-force. Petitioners Ralph

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and Evans individually allege that the Board also violated their respective tenure protections by establishing their salary during the 1989 summer months at an amount less than what they should have individually received. After the Commissioner transferred the matters on July 28 and August 8, 1989 to the Office of Administrative Law as contested cases under N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted November 28, 1989. After the parties were unsuccessful in stipulating all relevant and material facts in the matters, a plenary hearing was conducted July 31, 1990 at the Edison Township Municipal Court. Following that hearing, petitioners' counsel requested and was granted the opportunity to file letter memoranda on behalf of each of the three named petitioners. A letter memorandum was filed on behalf of petitioner Paszamant on September 5, 1990. Letter memoranda on behalf of petitioners Evans and Ralph were not filed. While the Board was granted the opportunity to file a reply letter, it waived that opportunity.

In the meantime, however, petitioners Ralph and Evans filed new petitions to the Commissioner regarding the 1990-91 year. Those cases since have been assigned to this judge. On December 18, 1990 a telephone conference call was conducted with both named counsel of record to determine whether all cases should be consolidated for purposes of adjudication. Counsel to the parties advised that the new petition filed by petitioner Evans is to be withdrawn, with prejudice, as having been rendered moot. Counsel also expressed the desire that the allegations contained within the new petition filed by petitioner Ralph should not be so consolidated. The record in this case, therefore, closed December 20, 1990.

Findings are reached in this initial decision that petitioner Paszamant has acquired a tenure status in the Board's employ as a guidance counsellor; petitioner Evans has acquired tenure as a supervisor in the Board's employ; and, petitioner Ralph acquired tenure as a supervisor in the Board's employ. In addition, it is also found in this initial decision that petitioner Paszamant had a superior claim over anyone else by virtue of her seniority in the Board's employ to the position of "Coordinator of 7 and 8 Grade Program"; petitioner Evans had a superior claim by virtue of his seniority over anyone else in the Board's employ to a position of supervisor of instruction; and, it is found in this initial decision that petitioner Ralph had a superior claim by virtue of his seniority over anyone else in the Board's employ to the position of supervisor of social studies or supervisor of English. Conclusions are reached that the Board violated the seniority protections of

each named petitioner during the 1989-90 year. The evidence produced by petitioners Evans and Ralph fails to support their separate claims of improper salary during the 1989 summer months of July and August.

FACTS

Anne F. Paszamant

The evidence in the record establishes the following facts. As of June 30, 1989 petitioner Paszamant was initially employed by the Board as a teacher of English. Approximately three years after that initial employment, Paszamant was employed by the Board full-time as a guidance counselor which employment continued for 15 years through June 30, 1989. There is no dispute that petitioner Paszamant acquired tenure as a teacher and as a guidance counselor in the Board's employ, nor is it disputed that petitioner Paszamant has earned 18.5 years seniority as a teacher of English and 15 years as a guidance counselor.

During April 1989 while petitioner was employed full-time as a guidance counselor she was notified that that full-time position was to be abolished for the following school year, 1989-90. Petitioner was then assigned for 1989-90 to a 3/5ths of a full-time guidance counselor position, and 2/5ths of full-time position as a teacher of English. In the meantime, however, the Board had adopted a job description (P-1) for the new position of "Coordinator of 7 and 8 Grade Programs."

The nature of the position as set forth in the discription itself is as follows:

The Coordinator of Grades 7 and 8 shall serve as a regular member of the teaching staff and shall be directly responsible to the building principal. He/she shall be responsible for the daily supervision of students in grades 7 and 8. The Coordinator of grades 7 and 8 shall be key to the smooth running of the program for grades 7 and 8. He/she shall have a thorough understanding of the psychological make-up and physiological needs of younger adolescents and provide the guidance and leaderships necessary to assure a successful program for these students.

Among the qualifications adopted by the Board for this position were that the applicant must possess an instructional certificate and must possess the educational services certificate endorsement to perform as a guidance counselor, or the student personnel services endorsement set forth at N.J.A.C. 6:11-11.11. In addition, the very first duty of the Coordinator as stated in the job description is to "serve as guidance counselor for all seventh and eight grade students."

While petitioner testified that the person who was appointed to this job for 1989-90 did have tenure in the employ as a guidance counselor petitioner also explained that that person, who remains unidentified, had less seniority than she. But in the letter memorandum filed on behalf of petitioner Paszamant, the statement is made that the Board assigned a person who did not have tenure to this position. In either case the Board offered no contrary evidence regarding its appointment to this position. Therefore, I find that the person who was employed to this position of coordinator either had less seniority as a guidance counselor than petitioner Paszamant or the person had not been employed by the Board a sufficient period of time to have acquired tenure or seniority. Moreover, I specifically find that the position of Coordinator is that of guidance counselor with additional clerical duties for which clerical duties no certificate issued by the State Board of Examiners would be necessary.

During the hearing petitioner Paszamant offered testimony with respect to the salary she would have earned as the coordinator during 1989-90 compared to the salary she did receive as a part-time guidance counselor and part-time teacher of English. Petitioner's testimony is that she would have received a 5% differential to her base salary had she been appointed to the position of coordinator for 1989-90. Petitioner calculates that had she been properly appointed to the position of coordinator for 1989-90 she would have earned \$5,115 more than she did earn.

Richard Evans

Petitioner Richard Evans began his employment with the Board in September 1957 as a guidance counselor. Evans was appointed director of guidance for the 1962-63 and has held that position until June 30, 1989. The Board does not dispute that the position of director of guidance was, in fact, a position as supervisor. Petitioner possesses an instructional certificate, with endorsements in social studies, science, and driver

education. He possess an educational services certificate with an endorsement in pupil personnel services, and he holds an administrative certificate with endorsements as a supervisor and as an administrator. Petitioner Evans acquired tenure and seniority in the position of supervisor.

During May 1989 petitioner Evans was advised by the Board that his full-time position as director of guidance was to be abolished for 1989-90. Evans was reassigned to the full-time position of guidance counselor. However, the Board was simultaneously interviewing candidates for five positions of "Supervisor of Instruction" as set forth in a revised job description (P-2) adopted by the Board May 15, 1989. This 'supervisor of instruction' was a position adopted by the Board for five curriculum areas of the humanities, mathematics/technology, lab and life sciences, cultural and social studies and physical education, co-curricular operations. Petitioner Evans communicated to his principal his interest in being appointed to one of these five areas. The principal advised Evans not to apply for any one of the supervisory positions because he, Evans, was not qualified. Evans persisted, nevertheless, and submitted an application to the superintendent of schools for consideration for appointment to one of the five supervisory positions. Evans failed in his bid for appointment to one of these positions for 1989-90; rather, he was appointed as a full-time guidance counselor during that year. Evans testified under oath, without contradiction, that at least one non-tenure person was appointed to one of these five supervisory positions in the area of cultural and social studies.

Evans' claim regarding his 1989 summer salary being established at a level less than that to which he claims entitlement is anchored upon his naked contention that when the Board abolished his 12 month position as director of guidance, it fail to reduce his specific employment from 12 to 10 months a year.

Donald Ralph

Petitioner Donald Ralph began his employment with the Board as a guidance counselor during September 1969, a position he held until June 1973. Ralph was appointed for the 1973-74 year to be the coordinator of the Board's DEAL program which is an acronym for Department of Education Alternatives for Learning. Ralph is in possession of an administrative certificate with endorsements as a supervisor and as a principal. The

DEAL program is, according to Ralph, designed for potential high school dropouts, remedial work for high school pupils, and a program for handicapped pupils. The program itself is operated in the community, outside the high school facility. As examples, Ralph explained that the program functioned in a hospital, a local church rectory, and a local YM/WCA. Ralph testified that he had groups of teachers assigned him; that he interviewed and then recommended other teachers for employment at his program; and, that he evaluated both tenure and non-tenure teachers who were assigned the DEAL program. Ralph testified that he was always housed in the administrative wing of the high school and that he never was assigned to an office outside the high school facility.

Ralph says that as coordinator of the DEAL program he was, in fact and in law, a supervisor. (See P-3) The Board offered no evidence to counter Ralph's claim to have performed as a supervisor while assigned as coordinator of the DEAL program. Consequently, I **FIND** that petitioner Ralph, as coordinator of DEAL, performed the duties of supervisor. I also find that petitioner Ralph served 16 years in the Board's employ as a supervisor.

During April 1989, Ralph was advised that his position was being abolished for the 1989-90 year. Ralph, knowing that the five supervisor of instruction positions were then opened for applications, communicated his desire to be appointed to one of the five positions. (See P4, P5, and P6). Ralph was unsuccessful in his bid for appointment to one of the five supervisory positions for 1989-90. Ralph identified a Joe Stringer as having been appointed to the supervisor of instruction for social studies who, Ralph says without contradiction from the Board, had served an insufficient period of time in the employ of the Board to have acquired tenure and hence to have acquired seniority. In addition, Ralph testified that the person appointed to be supervisor of humanities had less seniority than he.

Ralph's claim regarding his 1989 summer salary being established at a level less than that to which he claims entitlement is anchored upon his naked contention that when the Board abolished his 12 month position as coordinator, it failed to reduce his specific employment from 12 to 10 months a year.

tenure was achieved as defined by the certification under which a teacher actually served. Therefore, in the board's view, petitioner had never served as an elementary teacher and thus had no tenure rights to an elementary assignment.

The State Board agreed with the ALJ decision, specifically the judge's conclusion that

Petitioner acquired tenure as a teacher pursuant to N.J.S.A. [18A:28-6]. Having acquired tenure as a teacher, he could be reassigned within the scope of his instructional certificate to any assignment covered by the endorsements on his instructional certificates. When this position as "teacher" was abolished he became entitled to any teaching assignment covered by the endorsements on his certificate to which respondent Board had assigned non-tenured teachers. Notwithstanding that the respondent Board believes it had educational reasons for not appointing petitioner to one of the elementary school positions, lack of service as an elementary teacher cannot thwart petitioner's tenured rights over non-tenure individuals. Initial decision at 12.

The State Board went on to say

Given the statutory scheme, we have no choice but to conclude that tenure is achieved in and tenure protection attaches to all endorsements upon a teacher's instructional certificate, not just those under which the individual has actually served for the requisite period of time pursuant to N.J.S.A. 18A: 28-5 or 18A:28-6. Tenure attaches to a position, and "teacher" is a separately tenurable position under N.J.S.A. 18A:28-5. See Howley v. Bd. of Ed. of Ewing Township, decided by the Commissioner, 1982 S.L.D. 1554. Petitioner was authorized to served under all the endorsements on his instructional certificate, including his elementary education endorsement. N.J.A.C. 6:11-6.1 et seq. We stress that , as correctly pointed out by the ALJ, Petitioner could have been transferred by the Board to any other assignment within the scope of his endorsement within that tenurable position. Thus, he could properly have been transferred without his consent to an elementary teaching assignment, even if he had never previously served under his elementary education endorsement. See Howley, supra. We find no basis in Capodilupo or Bednar for concluding that tenure is obtained "within an endorsement on an instructional certificate." To the contrary, we find that those Appellate Division decisions are clear expressions of Petitioner's assertion that the scope of his tenure protection extends to all endorsements on his instructional certificate. The scope

Petitioner Ralph, having acquired tenure as a supervisor, was entitled to be appointed to one of the five supervisory positions during the 1989-90 year over a non-tenure supervisor. That the Board assigned a non-tenure individual to one of the five supervisory positions during 1989-90 constitutes a violation of petitioner Ralph's tenure. Therefore, petitioner Ralph must be made whole. Petitioner Ralph is entitled to the difference between the salary he would have earned as a supervisor during 1989-90 compared to the salary he did earn during the same year. Petitioner Ralph is also entitled to all other emoluments he would have received had the Board not violated his tenure. Petitioner Ralph is not entitled to separate relief for the 1989 summer to failure to carry his burden.

No authority is cited by either petitioner Evans or petitioner Ralph for the proposition that when a board abolishes an employee's 12 month position of employment and reassigns that person to a 10 month position, it must also take separate action to formally reduce the employment of the affected person from 12 to 10 months. Here, it is apparent that when the Board abolished both petitioners 12 month positions of employment is also effectively abolish their employment unless, by virtue of tenure or seniority as occurred in this case, either petitioner had a super claim against all others to some other position of employment be it a 10 month or 12 month position. Consequently, count two of the Petitions file by Evans and Ralph is and are hereby **DISMISSED**.

It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 4, 1991
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Jan. 8, 1991
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

JAN 15 1991
DATE

Mailed To Parties:
Jayne L. Luchessa
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

- P-1 Job description
- P-2 Job description
- P-3 Memorandum June 4, 1976
- P-4 Letter May 9, 1989
- P-5 Letter May 15, 1989
- P-6 Letter May 22, 1989

ANNE F. PASZAMANT, RICHARD EVANS, :
AND DONALD RALPH, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE :
BOROUGH OF HIGHLAND PARK, : DECISION
MIDDLESEX COUNTY, :
RESPONDENT. :

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The exceptions submitted by the Board were untimely filed pursuant to N.J.A.C. 1:1-18.4 notwithstanding the Board's belief to the contrary.

Upon review of the record and initial decision in this matter, the Commissioner does not agree with the ALJ's findings and conclusions with respect to Anne Paszamant. Initially, there is a need to emphasize that the record is barren of any documentation that the unrecognized title of "COORDINATOR OF 7 AND 8 GRADE PROGRAMS" (Exhibit P-1) was submitted to the county superintendent of schools in accordance with N.J.A.C. 6:11-3.6(b) (recently recodified as 3.3(b)) for approval of the use of the title and designation of appropriate certification. The same is true of Donald Ralph's position as coordinator of the "DEAL" program. The Board is, therefore, admonished that all unrecognized titles, including that of coordinator, must be submitted to the county superintendent pursuant to the above-cited regulation.

As to Paszamant's petition, the Commissioner is unable to accept, based on the record as it exists, the ALJ's conclusion on page 3 of the initial decision that Petitioner Paszamant has 15 years of seniority as a guidance counselor. In accordance with the regulations governing seniority, a person functioning under an educational services certificate, acquires seniority in the elementary category, the secondary category or on a district-wide basis. N.J.A.C. 6:3-1.10(1) 19iii - iv and 20ii-iii.

The record is barren of any facts as to the grade level(s) within which Paszamant functioned as a guidance counselor so as to determine her seniority category(ies). Nor is there any factual finding as to how the 7th and 8th grades are organized in Highland Park, i.e. whether or not they are considered elementary or secondary as dictated by the above-cited regulations. There is also no specific finding of fact supported by the record as to the seniority status of the individual who was assigned to the disputed 7th and 8th grade coordinator position. What is set forth on page 4 of the initial decision is wholly inadequate. It is not Paszamant's role to determine that she has greater seniority than the person filling the position. Such a critical conclusion is to be made by the ALJ and ultimately the Commissioner based upon a precise set of findings of fact supported by documentation in the record.

Accordingly, the Commissioner is unable to adopt the initial decision as it relates to Paszamant. Further, the Commissioner modifies the initial decision with respect to Evans and Ralph as follows.

The ALJ concludes on pages 2 and 3 of the initial decision that both Evans and Ralph had a superior claim by virtue of their seniority over anyone else in the Board's employ to a position of supervisor of instruction and that the Board violated the seniority protections of each of these petitioners.

The ALJ erred in reaching these conclusions because the facts of this matter clearly indicate that the seniority rights of neither Evans nor Ralph are implicated in this case. The gravamen issue is not employment protections by virtue of seniority but employment protections based on Evan's and Ralph's status as tenured supervisors. N.J.A.C. 6:3-1.10(1)12 specifically mandates that each supervisory title shall be a separate category. Thus, while the ALJ is correct in concluding that both Evans and Ralph are tenured in the position of supervisor, he is incorrect in concluding that their seniority accrued in the category of supervisor. For Evans, seniority accrued in the separate category of guidance supervisor while for Ralph, seniority accrued in the separate category of supervisor of alternative education. Thus, neither Evans nor Ralph has seniority entitlement to either of the two supervisor of instruction positions cited by the ALJ in the initial decision, i.e. supervisor of instruction for humanities and supervisor of instruction for cultural and social studies.

The ALJ was correct, nonetheless, in concluding that because of their status as tenured supervisors, Evans and Ralph had entitlement to appointment to any supervisor of instruction position held by a nontenured individual. It is noted that the ALJ failed to make a specific finding of fact as to precisely which supervisor of instruction positions were held by nontenured staff. However,

the factual circumstances as set forth in the initial decision reveal that Petitioners Evans and Ralph are claiming that only one position was held by a nontenured individual, Joe Stringer's cultural and social studies supervisory position. (Initial Decision, at pp. 5-6) As such, the ALJ erred in determining that both Evans and Ralph had entitlement to the difference between the salary which would have been received as a supervisor and that which was actually received.

As set forth in the matter entitled Schienholz et al. v. Board of Education of the Township of Ewing, Mercer County, decided June 19, 1989, aff'd in part/rev'd in part State Board February 7, 1990, aff'd New Jersey Superior Court, Appellate Division November 19, 1990, when two or more individuals are eligible by virtue of their tenure rights versus their seniority rights for a position held by a nontenured person, a board of education may interview those tenured staff members who are eligible for the position and determine which one it desires to fill the position. Thus, if the disputed position herein were held by a nontenured individual, the Board could interview Ralph and Evans and determine which of the two it wished to fill it. In which case, only that one person would receive back pay.

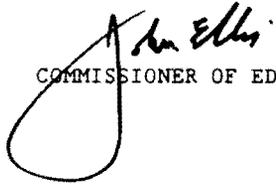
Notwithstanding the above, the Commissioner notes that he has previously determined in the matter entitled James Rogers v. Board of Education of Highland Park, Middlesex County, decided May 10, 1990, aff'd State Board of Education September 5, 1990 that Rogers, a tenured supervisor, was entitled to the supervisor of cultural and social studies position.

Accordingly, this consolidated matter is remanded to the Office of Administrative Law in order to determine precisely in what category(ies) Paszamant and the individual who was assigned the coordinator position have acquired seniority. From that shall be determined what entitlement, if any, Paszamant has to the disputed position. Also to be determined is whether or not James Rogers was placed in the supervisor of cultural and social studies position as ordered by the Commissioner and State Board. If this occurred as ordered, then no entitlements are forthcoming to either Evans or Ralph insofar as that position is concerned.

IT IS SO ORDERED.

FEBRUARY 20, 1991

DATE OF MAILING - FEBRAURY 20, 1991


COMMISSIONER OF EDUCATION



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1805-91
AGENCY DKT. NOS. 223-7/89;
227-7/89; 213-7/89
ON REMAND FROM
OAL DKT. NOS. EDU 5577-89;
5851-89; 5576-89

**ANNE F. PASZAMANT, RICHARD EVANS
and DONALD RALPH,**

Petitioners,

v.

HIGHLAND PARK BOROUGH BOARD OF EDUCATION,

Respondent

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

James L. Plosia, Jr., Esq., for respondent (Sills Cummis Zuckerman Radin Tichman
Epstein & Gross, attorneys)

Record Closed: October 19, 1991

Decided: November 7, 1991

BEFORE DANIEL B. McKEOWN, ALJ:

This case is on remand from the Commissioner of Education following his declaration on February 20, 1991 that he " * * * is unable to adopt the initial decision as it relates to [petitioner] Paszamant * * *" after which he proceeded to modify and remand the initial decision with respect to petitioners Evans and Ralph.

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BACKGROUND FACTS
PROCEDURAL HISTORY

The background of the consolidated matters is as follows. Petitioners are employed by the Highland Park Borough Board of Education (Board) as teaching staff members. In separate petitions of appeal they individually alleged that the Board violated their seniority regarding assignments for the 1989-90 school year following a reduction-in-force. Petitioners Ralph and Evans had also individually alleged that the Board violated their respective tenure protection by establishing their salary during the 1989 summer months at an amount less than what they should have individually received.

Prior to the issuance on January 4, 1991 of the original initial decision, petitioners Ralph and Evans had filed new petitions to the Commissioner regarding the 1990-91 year. A telephone conference call was conducted with counsel to determine whether all cases should have been consolidated for purposes of adjudication prior to the time of the issuance of the original initial decision. Counsel to petitioner advised that the petition regarding Evans was to be withdrawn, with prejudice, as having been rendered moot while the petition regarding Ralph should not be consolidated. Consequently, the 'new' petition filed by petitioner Ralph, OAL DKT. NO. EDU 8344-90, had not been considered on its merits. Nevertheless, there is pending a motion from the Board to dismiss that complaint on its merits. An initial decision on that motion is to be rendered simultaneously, though separately, to this initial decision on remand.

Returning to the background facts, findings based on the issues presented had been reached in the original initial decision that petitioner Paszamant had acquired a tenure status in the Board's employ as a guidance counsellor; petitioner Evans had acquired tenure as a supervisor in the Board's employ; and, petitioner Ralph acquired tenure as a supervisor in the Board's employ. It was also determined that petitioner Paszamant had a superior claim over anyone else by virtue of her seniority as a guidance counsellor, as was stipulated originally by the parties, to the position of Coordinator of seven and eight program, a position determined to be that of a guidance counsellor. It was also concluded in the original initial decision that petitioner Evans had a superior claim by virtue of his seniority over anyone else in the Board's employ to a position of

supervisor of instruction and it was found that petitioner Ralph had a superior claim by virtue of his seniority over anyone else in the Board's employ to the position of supervisor of social studies or supervisor of English. Conclusions were reached that the Board violated the seniority protections of Paszamant, and the tenure of Evans and Ralph during the 1989-90 year while the conclusion was reached that petitioners Evans and Ralph failed to support their separate claims of improper salary during the 1989 summer months of July and August.

In his final decision the Commissioner remanded the matter for the following reasons:

Accordingly, this consolidated matter is remanded * * * in order to determine precisely in what category(ies) Paszamant and the individual who was assigned the coordinator position have acquired seniority. From that shall be determined what entitlement, if any, Paszamant has to the disputed position. Also to be determined is whether or not James Rogers was placed in the supervisor of cultural and social studies position as ordered by the Commissioner and State Board. If this occurred as ordered, then no entitlements are forthcoming to either Evans or Ralph insofar as that position is concerned.

Earlier in the final decision the Commissioner made passing mention that the record contained no evidence regarding county superintendent approval under N.J.A.C. 6:11-3.3(b) of the two unrecognized titles in use by the Board; coordinator of seven and eight grade programs and coordinator of the DEAL program. The original initial decision found and concluded that based on Paszamant's 15 years stipulated seniority as guidance counsellor and that because the position coordinator of seven and eight programs was that of guidance counsellor, combined with an absence of evidence submitted by the Board whether the then existing incumbent had tenure or had greater seniority than Paszamant, the inference was logically drawn that Paszamant was entitled to that full-time position coordinator of seven and eight grade programs either by tenure or seniority. Petitioner Evans, in the same original initial decision, was found to have acquired tenure as a supervisor in the Board's employ and was entitled to be appointed to one of five supervisory positions then in existence for 1989-90 because the evidence did show the Board had employed at least one nontenure supervisor for that year. Evans, having acquired tenure as a supervisor, had a superior claim to the supervisory position held by

the nontenure supervisor. Ralph was found to have acquired tenure as a supervisor and was entitled, by virtue of that status, to a supervisor's position held by any nontenure supervisor. Finally, as mentioned by the Commissioner, there was no evidence in the record regarding county superintendent approval of the two unrecognized titles because the parties to the action did not raise that matter as an issue in the case. After having raised the matter of county superintendent approval as an issue in the case, the Commissioner disposed of the matter in the following manner:

The Board is, therefore, admonished that all unrecognized titles, including that of coordinator, must be submitted to the county superintendent pursuant to the above-cited regulation.

The Commissioner's remand demands additional information as to the category, elementary, secondary or district-wide, into which Paszamant's seniority falls. In addition, the Commissioner demands to know whether, under seniority regulations, the Board's seventh and eight grades are considered elementary or secondary and he demands to know the specific seniority status of the individual who had been assigned or who is assigned to the position coordinator of seven and eight grade programs. As far as petitioner Evans and Ralph are concerned, the Commissioner ruled " * * that the seniority rights of neither Evans nor Ralph are implicated" and whatever claim Evans or Ralph may have to a supervisory position must be predicated upon their tenure status. Accordingly, the Commissioner demands to know on remand which supervisor of instruction positions were held by nontenure staff. If only one nontenured supervisor had been employed, then the Commissioner says, it is clear that both Evans and Ralph cannot assert a dual claim for that one position. The Commissioner proceeded to comment as follows:

As set forth in the matter entitled Schienholz et al. v. Board of Education of the Township of Ewing, Mercer County, decided June 19, 1989, aff'd in part/rev'd in part State Board February 7, 1990 November 19, 1990, when two or more individuals are eligible by virtue of their tenure rights versus their seniority rights for a position held by a nontenured person, a board of education may interview those tenured staff members who are eligible for the position and determine which one it desires to fill the position. Thus, if the disputed position herein were held by a nontenured individual, the Board could interview Ralph and Evans and determine which of the two it wished to fill it. In which case, only that one person would receive back pay.

Notwithstanding the above, the Commissioner notes that he has previously determined in the matter entitled James Rogers v. Board of Education of Highland Park, Middlesex County, decided May 10, 1990, aff'd State Board of Education September 5, 1990 that Rogers, a tenured supervisor, was entitled to the supervisor of cultural and social studies position.

Accordingly, this consolidated matter is remanded to the Office of Administrative Law in order to determine precisely in what category(ies) Paszamant and the individual who was assigned the coordinator position have acquired seniority. From that shall be determined what entitlement, if any, Paszamant has to the disputed position. Also to be determined is whether or not James Rogers was placed in the supervisor of cultural and social studies position as ordered by the Commissioner and State Board. If this occurred as ordered, then no entitlements are forthcoming to either Evans or Ralph insofar as that position is concerned...

When the matter on remand was returned to this judge, counsel to the parties were advised by letter dated March 7, 1991 that a plenary hearing was scheduled to be conducted April 5, 1991 on the issues raised in the Order of Remand. On March 14, 1991 a telephone conference call was conducted among counsel and this judge which call is memorialized in writing by letter to the parties on March 18, 1991. That letter states as follows:

It was agreed during the conference that the hearing on the remand now scheduled for April 5, 1991 shall be cancelled because the parties agree to develop a joint stipulation of fact and to submit on cross-motions for summary decisions.

Consequently, it was further agreed that a fully executed stipulation of fact shall be filed no later than May 15, 1991; initial letter memoranda shall simultaneously [be] filed no later than June 15, 1991; and, the reply letter memoranda may be filed through July 1, 1991.

As an aside, Mr. Klausner [counsel for petitioners] is to submit a letter withdrawing the newly filed Evans case and Board counsel is intending to file a motion presumably to dismiss the newly filed Ralph case, both of which have been docketed EDU 8345-90 and 8344-90, respectively.

By letter dated May 16, 1991 Board counsel advised as follows:

You will recall that on March 18, 1991, following a telephone conference which included yourself and the attorneys in the above-captioned matter, you established a schedule by which the remaining issues in this case could be disposed of by cross-motions for summary decision. In that letter you ordered that fully executed stipulations of fact were to be filed no later than May 15, 1991.

At the end of March of this year, I faxed to Mr. Klausner, attorney for Petitioners, a draft of my proposed stipulations of fact and asked that he review the stipulations and get back to me so that we would be able to reach agreement prior to May 15. I did not hear from Mr. Klausner despite having reminded him several times by telephone of the necessity for his office to review these proposed stipulations. I have also broached the issue orally with Brian Cige, Esq., who is an attorney in Mr. Klausner's office.

On May 3, 1991, I sent a letter to Mr. Klausner again reminding him of the necessity to review the proposed fact stipulations, stressing again that they were due to Your Honor on May 5, 1991. I have no responses either to my telephone inquires or the letter of May 3, 1991. At this point the Highland Park Board of Education respectfully requests that the Petition of Appeal be dismissed with prejudice due to Petitioners' refusal to comply with an Order of the Court.

Your Honor will recall that the parties had similar problems agreeing to Stipulations of Fact in the spring of 1990, and Petitioners' failure to agree to fact stipulations resulted in the July, 1990 hearing. That hearing, due in large part to Petitioners' failure to stipulate to facts, did not present Your Honor with facts sufficiently clear to render a proper decision, and the case was therefore eventually remanded by the Commissioner of Education back to the Office of Administrative Law...

Board counsel included a copy of the letter, which is dated May 3, 1991, to which he faxed to petitioners' counsel and which is referenced in the foregoing. That letter is reproduced in full as follows:

Over a month ago I forwarded Proposed Fact Stipulations in the above-captioned matter. You will recall that Judge McKeown established a schedule which would allow the parties to address the legal issues in this matter by motion. The Fact Stipulations are due to Judge McKeown on May 15, with Initial Briefs due on June 17 and Reply Briefs due on July 1.

I have not received any reply or input from you concerning these fact stipulations. You may remember this was something of a problem last year when we attempted to stipulate to the facts in this matter. Please review my proposed fact stipulations immediately and advise me if you have any proposed changes so that we may comply with the Judge's reasonable deadline.

Finally, on May 30, 1991 petitioners' counsel responded as follows:

Please be advised that Petitioners, by their attorney, shall rely upon prior papers previously submitted regarding the above matter. I enclose a copy of my brief to your Honor and the Commissioner.

Please be further advised that it is the position of Mr. Evans and Mr. Ralph that Mr. Rogers and the Highland Park Board of Education both have violated the OAL rules relating to notice. At no time prior to the Decision being released by the Commissioner were we aware that litigation between Rogers and the Board was pending. Had either noticed my clients, or I, we would have moved to consolidate all cases. Further, it is our position that, since no job descriptions were approved by the County Superintendent of Schools "a supervisor is a supervisor is supervisor" and both Evans and Ralph have greater seniority as supervisors than Rogers and others who remained in these positions.

In their motion to dismiss Mr. Ralph's case, the Board argues that Mr. Ralph's petition must be dismissed because he rejected a position in March. It is the position of Mr. Ralph that he was entitled to a supervisory position in September, not March.

Further, it is his position, that the supervisory position that was proffered required him to work evenings and weekends which is a substantially different position than an instructional position. For that reason, as well, he had no obligation to accept it.

Note that no mention is made at all of the basis for petitioner's claim that the Board violated 'OAL rules relating to notice.' Ostensibly, this claim relates to a much earlier motion petitioners' counsel brought prior to the original initial decision which issued in this matter seeking to enjoin the Board from complying with a decision of the Commissioner in another case between a teacher in this Board's employ, James Rogers, and this Board on the asserted grounds that that decision had a substantial impact upon the asserted rights of petitioner Evans and petitioner Ralph in this case. By letter dated June 27, 1990 I issued a ruling as follows:

In view of the fact you seek an Order from the Commissioner which would essentially authorize the Board to ignore an adjudication of the Commissioner, the Commissioner must be served as a party in interest in your motion. There is no indication in your moving papers that a copy of your motion was served on anyone other than counsel for the Board.

Obviously, petitioners' counsel did not nor would not serve the Commissioner because what petitioners sought was a ruling which could only be issued by the State Board of Education or higher authority. The Office of Administrative Law was not and is not the forum within which to seek a restraint against any board of education from complying with a final decision of the Commissioner for any reason. Furthermore, it is interesting to note that counsel for petitioners state 'In their motion to dismiss [petitioner] Ralph's case, the Board argues that Mr. Ralph's petition must be dismissed because he rejected a position in March * * *.' The Board's motion to dismiss petitioner Ralph's claim for 1990-91 is dated June 5, 1991 and was filed here June 6, 1991, at least two and perhaps three days after petitioners' response set forth above was received.

Nevertheless, on June 6, 1991 the Board did file a letter memorandum seeking to dismiss the instant consolidated appeals and/or summary decision on various bases. Attached to the letter memorandum, and relied upon by the Board in support of its motion, are exceptions dated February 1, 1991 filed regarding the original initial decision issued in this matter, together with an affidavit of the superintendent of schools which, it is noted, had not been filed prior to the time the original initial decision issued. No response has been received from petitioners' counsel to that letter memorandum motion other than the letter dated May 30, 1991 recited above and an affidavit of petitioner Ralph, relevant only to his 'new' petition received September 18, 1991, and relevant only to his 'new' petition.

Moving on procedurally, on July 23, 1991 the Board filed a motion for summary decision on the 'new' petition filed by petitioner Ralph, OAL DKT. NO. EDU 8344-90, regarding 1990-91. The Board seeks summary decision in its favor. No response was received from petitioners' counsel to that motion other than the referenced affidavit from petitioner Ralph, through counsel, on September 18, 1991.

By letter dated September 19, 1991 the Board objected to a consideration of the affidavit on the basis that its motion for summary decision regarding the 1990-91 petition filed by Ralph was made July 24, 1991, more than ten days after Ralph through counsel received its papers. The Board claims that N.J.A.C. 1:1-12.2(c) provides that the party opposing a motion shall serve responsive papers no later than ten days after receiving the moving papers. Consequently, the Board says that because the affidavit is out of time it must not be considered.

Finally, on October 18, 1991 a letter was received from petitioners' counsel dated October 10, 1991 in which he states as follows:

As per our telephone conversation, this letter will serve to confirm the date correction made, March 30, 1990 to March 30, 1991, in Paragraph 9 of the Affidavit of Donald Ralph referenced the above captioned matter.

This judge has no recollection of such a telephone conversation having occurred regarding this matter. Nevertheless, the assertions contained therein are ministerial at best and relevant only in the companion case or 'new' petition filed by Ralph.

**MOTION TO DISMISS
AND FOR
SUMMARY DECISION**

The Board argues that the consolidated matters on remand must be dismissed for the following reasons. First, the Board claims that the flagrant failure of petitioners to comply with the earlier agreement to enter a joint stipulation of fact manifests their utter lack of cooperation and their dilatoriness in pursuing their claims and, as such, provides justification for dismissal of these matters with prejudice. The Board also contends that the argument raised by petitioners in their letter of May 30, 1991 regarding its asserted violation of unspecified OAL rules relating to notice had already been decided in this forum when their motion was denied to enjoin the Board from implementing the earlier Commissioner's decision in Rogers v. Highland Park Board of Ed, Supra, on June 27, 1990. Furthermore, the Board notes that this is the first time petitioners filed any kind of claim regarding that decision which is well beyond the 90 day period at N.J.A.C. 6:24-1.2(c) within which to file an action before the Commissioner.

The Board, in filing its letter memorandum, incorporates its exceptions already filed before the Commissioner to the original initial decision and which had attached to it an affidavit of the superintendent. As earlier noted, that affidavit had not been filed prior to the issuance of the original initial decision. In the absence of a

stipulation of fact and in the absence of responsive pleadings from petitioner, I shall accept the superintendent's factual attestation, but not his opinions. The superintendent's attestations are as follows:

1. I am the superintendent of schools * * * since July 1, 1990
* * *

2. Petitioner Paszamant is a tenured high school guidance counsellor first hired by the Board in 1970. She is certified in English, Student Personnel Services, and as a Principal/Supervisor. Raymond Gardner earned tenure as a elementary guidance counsellor, and holds certificates in English, Speech, Arts & Dramatics, Teacher of Reading, Reading Specialist, and Student Personnel Services.

3. Paszamant earned the same salary for 1989-90 as a teacher/guidance counsellor that she would have earned as a full-time guidance counsellor.

4. The collective bargaining agreement between the Highland Park Education Association and the Board provides that the 7th - 8th Grade Coordinator will receive an added 4% to their base salary.

[No further attestations by the superintendent are made regarding the identity of Raymond Gardner, or the coordinator for seventh and eighth grade programs or whether seventh or eighth grade is organized elementary or secondary.]

5. Petitioner Richard Evans possesses the following certificates: Teacher of Social Studies; Teacher of Science and Driver Education; Director, Administrator or Supervisor of Guidance and

Student Personnel Services; and Principal/Supervisor. Evans served as the Director of Guidance for the Highland Park school system for 1969 until 1989. At the end of the 1988-1989 school year, the position of Director of Guidance was abolished[.] Richard Evans served as a Guidance Counsellor during the 1989-1990 school year. Evans currently served as the Supervisor of the Guidance and Special Education.

6. Petitioner Donald Ralph holds the following certificates: Supervisor/Principal; Director of Student Personnel Services; Teacher of the Handicap; and Student Personnel Services. Ralph worked as chairperson of the Department of Educational Alternatives for Learning ("DEAL") and as a Guidance Counsellor from 1972 through 1989. At the end of the 1988-1989 school year, the DEAL chairperson position was abolished, and Ralph worked as a guidance counsellor for the 1989-1990 school year. Ralph continues to work as a guidance counsellor during the current school year of 1990-1991.

7. At the end of the 1988-1989 school year, the Highland Park Board of Education reorganized and consolidated its supervisory position. The nine supervisory positions which existed at the end of the 1988-1989 school year were consolidated into five supervisory positions for the 1989-1990 school year. Richard Klawunn, a tenured supervisor, served as chairperson of the Mathematics and Technological Science Department for the 1989-1990 school year. Jay Dakelman, a tenured supervisor, served as the Supervisor of Physical Education and also as Director of Athletics for 1989-1990 school year. Irene Gilman, a tenured supervisor, served as the Humanities Chairperson for the 1989-1990 school year. Marilyn Williams, a tenured supervisor, served as the Chairperson of the Lab & Life Science Department for the 1989-90 school year. These

four persons were all tenured supervisors as of June 1989 when they were appointed to the newly created positions. The only non-tenured supervisor appointed by the Highland Park Board for the 1989-1990 school year was Joseph Stringer, a tenured Social Studies teacher but nontenured supervisor who was named chairperson of the Cultural and Social Studies Department.

8. James Rogers was the tenured Social Studies Supervisor during the 1988-89 school year. When Joseph Stringer was named to the Chairperson of the Cultural & Social Studies Department, Mr. Rogers filed a Petition with the Commissioner of Education, alleging he had an entitlement to the position held by Mr. Stringer. The Commissioner eventually granted the relief sought by Mr. Rogers * * * As a result of that decision, Highland Park Board of Education paid Mr. Rogers \$4,917, representing the difference between Mr. Rogers' pay as a teacher and what he would have earned as a Cultural & Social Studies Chairperson * * *. The Highland Park Board of Education also appointed Mr. Rogers as the Cultural & Social Studies Chairperson for 1990-91 school year * * *. [T]here was only one nontenured supervisor for the 1989-1990 school year, and Mr. Rogers had already successfully challenged the Highland Park Board's appointment of Mr. Stringer to that position, thereby obtaining the differential pay and appointment to the Cultural & Social Studies job. Based upon the Commissioner of Education's decision in the Rogers case and the Highland Board's having made Rogers whole based on the success of his Petition, Mr. Rogers in effect "served" as Cultural & Social Studies Chairperson for the 1989-1990 school year * * *

9. Highland Park supervisors are required to possess an instructional certificate in at least one of the subject areas they are supervising * * * in addition, most supervisors, including the Cultural & Social Studies Supervisor and all the nontenured supervisors employed at the beginning of the 1990-1991 school year, teach two classes a day in one of the subject areas they are supervising. The only nontenured supervisor who does not at

- 12 -

present teach is Joseph Policastro, who was appointed to the Physical Education/Athletic Director position beginning January 1, 1991. The Physical Education Supervisor might well be called upon to teach Physical Education in the future.

10. * * * Evans already holds a supervisory position for the current school year [1990-91] * * * As to Ralph's claim for a supervisory position * * * [the Board's] job description requires that a supervisor must possess a teaching certification in an area being supervised, and if more than one area is being supervised, the chairperson must have certification in at least one of the subjects being supervised. [It is noted that attached to the affidavit is the Board's job description for department chairpersons [supervisors], policy 2122. While the superintendent refers to this description as exhibit R-3, on its face it is marked R-1. Nevertheless, the superintendent attests that the job description provides that supervisors 'shall normally be expected to teach.' I have read, reread, and read again that job description. Nowhere does that job description provide that supervisors 'shall normally be expected to teach.' * * *

11. For the 1990-1991 school year, the Board has employed James Rogers as the Cultural & Social Studies Supervisor. Rogers is, as noted above, a tenured supervisor. Richard Evans is the Guidance & Special Education Supervisor; Mr. Evans is also clearly tenured. The Physical Education Supervisor's position was held by Jay Dakelman, a tenured supervisor, until the end of 1990. A nontenured supervisor currently holds that position. Terry Jern, a nontenured supervisor, is the supervisor of the Mathematics & Industrial Arts Department. Carol E. Levy, a nontenured supervisor, is the Head of the Lab & Life Sciences Department, and Carol Lefelt, a nontenured supervisor is the Head of the Humanities Department. Mr. Ralph does not possess any of the instructional certificates necessary to work or teach [under the asserted local Board rule] in the supervisory positions held by the nontenured supervisors for the 1990-1991 school year * * *

The Board's letter memorandum in support of its motion to dismiss and/or summary decision argues that the flagrant and willful refusal of petitioners to fail to agree to fully executed stipulations of fact as ordered by this forum in the letter of March 18, 1991, together with their willful refusal to make an attempt to reach an agreement despite Board counsel's efforts by telephone and mail to reach such an agreement and because of its exceptions filed to the Commissioner opposing any relief to petitioner Paszamant regarding the coordinator's position for 1989-90, and that because the Commissioner already decided James Rogers was entitled to the supervisory position of cultural and social studies for 1989-90, the entire matter on remand including all consolidated petitions of appeal filed by petitioners Paszamant, Evans, and Ralph must be dismissed.

PETITIONER'S RESPONSE TO MOTION TO DISMISS/SUMMARY DECISION

As noted above petitioners did not respond to the Board's motion to dismiss or summary decision. Consequently, the motions shall be decided on the facts presented and the Board's arguments.

ANALYSIS AND DISCUSSION

Initially, the 'new' petition filed by Richard Evans in which he complains of his assignment for 1990-91 is considered withdrawn as having been moot. In regard to petitioner Paszamant, the parties were directed by the Commissioner to determine the categories in which petitioner Paszamant has seniority. Based upon the superintendent's affidavit, Paszamant's seniority is in the secondary category. The parties were directed to determine whether the Board's seventh and eighth grade were classified as elementary or secondary. The parties, both the Board and petitioners, failed to address this issue. However, because the evidence to respond to that demand is uniquely in the control of the Board and because it failed to produce any evidence whether its seventh and eighth grades are elementary or secondary, the inference is drawn that the evidence it could have produced would establish that its seventh and eighth grades are classified as secondary for purposes of seniority. Therefore, the conclusion is drawn that petitioner Paszamant has a superior seniority claim to the position of coordinator of seventh and eighth grade programs over the incumbent who still is not clearly identified in this record. However, it

is inferred that Raymond Gardner is the incumbent. According to the Superintendent's affidavit, Gardner acquired tenure as an elementary guidance counsellor with no claim by the superintendent that Gardner has greater seniority at the secondary level than does Paszamant. Therefore, Paszamant continues to be entitled to the position of coordinator for seventh and eighth grade programs because that position has already been declared to be that of a guidance counsellor position, a declaration with which the Commissioner has not taken issue.

In regard to petitioners Evans and Ralph, the declaration that both have acquired tenure as a supervisor in the Board's employ is not disputed. The only supervisory position in which a nontenure supervisor was employed during 1989-90 was that of cultural & social studies supervisor. While that position was initially held by Joseph Stringer, James Rogers prevailed in his claim that he was entitled to that position over all other claimants for 1989-90. Consequently, and consistent with the ruling already entered in this record by the Commissioner that if Rogers had been placed in this supervisory position for 1989-90 no entitlements are forthcoming to either Evans or Ralph insofar as this position is concerned, neither petitioner Evans nor Petitioner Ralph are entitled to any relief for 1989-90.

Accordingly, and in regard to 1989-90, only petitioner Paszamant was entitled to have been named as coordinator of seventh and eighth grade programs by virtue of her seniority in the secondary category. Neither petitioner Evans nor petitioner Ralph are entitled to any relief for 1989-90 by virtue of their tenure as supervisor because, as the Commissioner has already ruled, Rogers held the position of supervisor of cultural & social studies supervisor during that same period of time and, consequently, neither petitioner has any entitlement to that position. No other nontenured supervisors were employed by the Board for 1989-90.

Upon the representations made by counsel for petitioner Evans, his 'new' petition, OAL DKT. NO. EDU 8345-90, is declared moot and considered withdrawn.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

November 7, 1991
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

November 12, 1991
DATE

Receipt Acknowledged:

Maureen Keller
DEPARTMENT OF EDUCATION

NOV 15 1991
DATE

Mailed To Parties:

Joyce Lubiano
OFFICE OF ADMINISTRATIVE LAW

tmp

ANNE F. PASZAMANT, RICHARD EVANS	:	
AND DONALD RALPH,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE BOROUGH	:	DECISION ON REMAND
OF HIGHLAND PARK, MIDDLESEX	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

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

Petitioners aver in their exceptions that the ALJ chose to ignore the issue of back pay for the 1989-90 school year for Paszamant. In support of this they quote that section of the first initial decision on page 4 which states that Paszamant testified to an entitlement to a 5% differential in pay amounting to \$5,115. They then cite a subsequent portion of that initial decision on page 9 which accorded her whatever salary she would have earned during 1989-90 as coordinator compared to what she actually earned together with all other emoluments had the Board not violated her rights.

Petitioners further except to the ALJ's recommendations regarding Ralph and Evans for the 1989-90 school year which afford them no relief given the disposition of the matter in Rogers.

supra. As to this they reiterate their arguments relative to the failure to have been noticed about the Rogers matter and that the Board did not attempt to comply with the dictates of Schienholz, supra, by failing to interview Evans and Ralph. Moreover, they assert that Ralph, given his background and experience as a general supervisor, had a greater entitlement to the newly created supervisory positions than those appointed.

Petitioners also aver, inter alia, that given the recent decision of the court in Dennery v. Passaic Valley Regional High School Board of Education, 251 N.J. Super. 144 (App. Div. 1991), Ralph, by virtue of being tenured and being the holder of a principal's certificate, was entitled to a principal or vice-principal position held by any nontenured individual in such positions.

Upon review of the record, including the exceptions of the parties, the Commissioner agrees with the findings and conclusions of the ALJ with respect to Paszament's entitlement to the coordinator of guidance position for grades 7 and 8. Moreover, the Commissioner agrees with petitioners that the ALJ did not specifically address the issue of back pay in the instant initial decision as he did in the first one. Given the determination that Paszament was entitled to the coordinator position for the 1989-90 school year, there is no question that she has entitlement to the difference in salary between her earnings for that school year and that which she should have received had her rights not been violated, together with all emoluments and benefits. The precise

amount of entitlement, however, shall be dictated by the collective bargaining agreement in effect at that time and is not determined by the Commissioner herein.

All other exceptions set forth by petitioners are found to be without merit, including the pay issue raised with respect to Ralph which is the subject of another separate matter before the Commissioner for which Petitioner Ralph did not submit exceptions. Also, Dennery, supra, is not deemed applicable to this matter as principal and vice-principal positions are clearly separately tenurable positions set forth in law. N.J.S.A. 18A:28-5 Lastly, petitioners' complaints relative to failure to notice them in the Rogers matter are not a subject properly before the Commissioner in the instant matter.

Accordingly, the initial decision on remand is adopted by the Commissioner, as clarified above with respect to back pay for Paszaman.


ACTING COMMISSIONER OF EDUCATION

DECEMBER 24, 1991

DATE OF MAILING - DECEMBER 24, 1991

Pending Superior Court



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 5284-90

AGENCY DKT. NO. 173-5/90

CHRISTOPHER J. DELAY, SR.,

Petitioner,

v.

BOARD OF EDUCATION,
TOWNSHIP OF NEW HANOVER,
BURLINGTON COUNTY, AND
THOMAS S. KING, JR.,

Respondent.

Paul Innes, Esq., for petitioner

Robert A. Baxter, Esq., for respondent Thomas S. King (Joseph F. Betley, Esq.,
on the brief)

Denis C. Germano, Esq., for respondent Board of Education, New Hanover
Township

Record Closed: November 15, 1990

Decided: December 31, 1990

BEFORE JOSEPH LAVERY, ALJ:

Christopher J. Delay, Sr. (petitioner) brings suit against the New Hanover Board of Education (Board) and one of its members, Thomas S. King, Jr. (respondents).

New Jersey Is An Equal Opportunity Employer

Petitioner asks that respondent King be removed from office for lack of qualifications, and that he be replaced by an appointment of the County Superintendent.

The Board and respondent King move for dismissal of the petition. Both it and respondent King deny that he should or can be removed for lack of qualification.

PROCEDURAL HISTORY

This matter was initiated by petitioner, through petition filed with the Commissioner on May 14, 1990, and through amended petition filed May 25, 1990. After timely answer by both the Board and respondent King, the Commissioner declared the matter a contested case and filed it in the Office of Administrative Law (OAL) on July 5, 1990.

Prehearing was scheduled for September 14, 1990, but adjourned at the request of petitioner, who had recently engaged counsel. Prehearing was again scheduled for October 5, 1990, and on that date the parties agreed that the matter would be addressed through motion for summary decision grounded on an executed stipulation of fact. A stipulation was filed on November 1, 1990. Briefs followed, the last of which was filed on November 15, 1990. On that date the record closed.

ISSUES

The issues are:

1. Whether, because respondent King was not a registered voter at the time of the nominating petition filing or the election, and despite his status as a registered voter at the time he took office as a Board member, respondent King should be removed from office for lack of qualifications required by N.J.S.A. 18A:12-1, and, if so
2. Whether the vacancy left by respondent King's removal should be filled by the County Superintendent or the Board itself.

More specifically, the issues are as stipulated by letter of October 29, 1990:

1. Must a candidate for a seat on a Board of Education meet all the qualifications of Board members, as detailed in NJSA 18:12-1, at the time of the filing of the nominating petition?
2. Is a nominating petition defective, within the meaning of R.S. 18A:14-12, if a candidate for a Board of Education seat erroneously states that he is qualified to be elected to a seat on the Board of Education when, in fact, he is not a registered voter in the district at the time the nominating petition is filed?
- 2a. If so, is the defect cured pursuant to NJSA 18A:14-12 if the defect is not discovered and reported to the candidate as of the 45th day preceding the election?
3. Is a person who is not registered to vote in the district qualified to be a candidate for election to membership on a local board of education?
4. Was Thomas S. King subject to removal for "lack of qualifications" within the meaning of RS 18A:12-15(a) at any time subsequent to May 10, 1990?
- 4a. Of, if Thomas S. King is subject to removal, will the resulting vacancy be one resulting from one of "all other cases" within the meaning of 18A:12-15(f), and will the Board, therefore, have the right to fill the vacancy?

Burden of Proof:

Petitioner must carry the burden of proof by a preponderance of the credible evidence.

Undisputed Facts:

The parties, pursuant to petitioner's submission following prehearing conference of a stipulation of facts and issues, do not dispute any material facts:

1. Thomas S. King was not registered to vote in the district when he filed his nominating petition.
2. Mr. King's nominating petition was not found or alleged to be defective on or before the 49th day preceding the date of the school election.
3. Mr. King was not registered to vote in the district at the time of the election, April 24, 1990.

OAL DKT NO. EDU 5284-90

4. Mr. King was registered to vote on May 10, 1990, the date he took the oath of office as a member of the school board.
5. Mr. King satisfied the qualifications of N.J.S.A. 18A:12-1 on May 10, 1990, the date he took the oath of office.
6. At no time was Mr. King disqualified as a voter pursuant to R.S. 19:4-1.
7. Thomas S. King was initially appointed to the school board in October of 1983 to serve out a term. He was reelected for three (3) year terms in April 1984 and again in April of 1987.

It is on these facts that the present motion for summary decision is brought.

ARGUMENTS OF THE PARTIES

Petitioner Delay's Argument:

In his letter brief, petitioner contends that N.J.S.A. 18A:12-1 established the minimal qualifications for members of a board of education. Among those qualifications is included the requirement that the board member be registered to vote in the district. Yet, at the time of filing the nominating petition, and at the time of the election itself, respondent King was not registered.

In petitioner's view, a reasonable interpretation of the statute is that all qualifications must be satisfied prior to election so that voters who concluded the candidates were qualified would not cast their ballots in futility. Additionally, N.J.S.A. 18A:14-10 requires that signers of the nominating petition state that the candidate is qualified, and that the candidate himself declare that he is not disqualified, pursuant to R.S. 19:4-1. Moreover, even the signers of the nominating petition must be qualified to vote (petitioner signed his own petition). It would be anomalous to require ability to vote of a signer, and not a candidate. N.J.S.A. 40A:9-1.13 also requires that candidates for local elective office be registered to vote in the unit where the office lies. That unit is the New Hanover School District in this case. Since respondent King was not, he should be removed from office.

The vacancy which follows should be filled pursuant to N.J.S.A. 18A:12-15, by the County Superintendent.

Respondent King's Argument:

In response to petitioner's motion for summary decision, respondent **Thomas S. King** moves to dismiss the petition of appeal:

In countering brief, respondent King concedes the stipulations that he was not registered, either at the filing of the nominating petition or at the time of election. He contends, however, that this was mere oversight. More important was the legislative intent of Chapter 12, of Title 18A. The intent of that Act is to assure that, at the time an elected board member takes office, he is qualified. The language of N.J.S.A. 18A:12-1 supports this emphasis on membership, as opposed to candidacy. If the Legislature intended candidates to meet the eligibility requirements, it could have easily provided this having specifically prescribed for preconditions for taking an oath of office. It implicitly excluded such a mandate for earlier stages of the election process.

Another example of explicit provision is a timetable for residency. No such specifics are required for registration to vote. This tribunal may not add such qualification where the Legislature was silent.

Additionally, public policy should preclude discouraging citizens from running for public office, and should avoid artificial barriers, such as is proposed by petitioner. The statutory section N.J.S.A. 18A:12-2.1 supports the position that the focus of the Legislature was on qualifications at the time of the oath of office. Petitioner, before taking any action as a member, had satisfied the need to register and was fully qualified.

Finally, respondent King argues that the legislative history of the Act (which he submits) demonstrates that the Legislature's intent was to provide automatic disqualification of board members having criminal convictions. Its purpose is to remove members whose disqualifications, for any reason thereunder, take place during membership, not candidacy.

Petitioner's reference to N.J.S.A. 19:4-1 would not apply to the present circumstances.

OAL DKT. NO. EDU 5284-90

The Board's Argument:

In its letter brief, the Board adopts the argument of respondent King, but adds that N.J.S.A. 40A:9-1.13 defining a local unit cannot apply in this instance. That statutory section applies only to municipal elections and political subdivisions which are not governed by Title 18A, such as school districts.

ANALYSIS

While a number of legal arguments have been made, it is the import of petitioner's failure to register to vote which is the crucial issue here. At N.J.S.A. 18A:12-1, the legislature has addressed the qualifications of a board member:

Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to R.S. 19:4-1.

If, as petitioner asserts, registration to vote exists as a qualification, given the plain wording above, it becomes significant only when the person involved (here respondent King) becomes a *member*, i.e. when he takes the oath of office. It is stipulated that he had registered to vote by then.

Additionally, N.J.S.A. 18A:12-2.1 demands that, *before entering upon the duties of his office the member of a board shall possess the qualifications of membership prescribed by law*. Specifically, that section states:

Each member of a board of education shall, before entering upon the duties of his office, take and subscribe:

- (1) An oath that he possesses the qualifications of membership prescribed by law, including a specific declaration that he is not disqualified as a voter pursuant to R.S. 19:4-1, and that he will faithfully discharge the duties of this office, and also
- (2) The oath prescribed by R.S. 41.1-3 of the Revised Statutes.

In the case of a Type I school district the oath shall be filed with the clerk of the municipality and in all other cases it shall be

filed with the secretary of the board of education of the district.

From the stipulated facts, it is apparent that, at the time of taking the oath and becoming a member, respondent King had satisfied the "qualifications of membership prescribed by law". Thus, petitioner cannot rely on either of the above-quoted statutory sections to support his motion. However, there is one interpretive difficulty in this case. It lies in a different section, that which governs nominating petitions.

The contents of a nominating petition are controlled by N.J.S.A. 18A:14-10. That section directs that signers of a nominating petition be qualified voters of a school district. These signers also must certify that the person they endorse is legally qualified to be elected to the office involved. Beyond the duties of the signers, the person endorsed must sign a separate certificate:

[A]ccompanying the nominating petition and to be filed therewith, there shall be a certificate signed by the person endorsed in the petition, stating that:

- a. He is qualified to be elected to the office for which he is nominated, including a specific affirmation that he is not disqualified as a voter pursuant to R.S. 19:4-1;
- b. He consents to stand as a candidate for election; and
- c. If elected, he agrees to accept and qualify into said office.

The phrasing "qualified to be elected" is rated by petitioner as an insurmountable issue for respondent King. Nevertheless, nothing of record demonstrates that registration to vote is a qualification subsumed within this rubric. Neither does the legislative history behind this statutory section buttress petitioner's argument. The Legislature, in its most recent amendment of this section, seems to have been preoccupied with assuring only that the candidate is not disenfranchised under R.S. 19:14-1, See Senate Education Committee and Assembly Education Committee statements to the bill, S 2230. Such a focus of legislative concern is a far remove from the circumstance of respondent King's merely failing to register to vote. At the time of the oath taking, petitioner did "qualify into said office". None of the statutes quoted above at any point specifically preconditions that qualification on the prior registration of a board member, either at the time of submission of a nominating petition, or at the time of election. Petitioner may reasonably puzzle over the anomaly of what seems to him more specific qualifications for nominating petition

signers. This tribunal, however, may only adhere to the plain language of legislative intent as it applies to board members.

It is important to remember that, while qualification is as essential as election to the right to hold public office, a lack of qualifications must be clearly demonstrated, Stothers v. Martini, 6 N.J. 560, 564 (1951). Just as important is the public interest in assuring that the will of the electorate is not thwarted. Our Supreme Court has made clear that the right to hold public office is a valuable one. Its exercise should not be declared prohibited or curtailed except by plain provisions of the law. Neither should disqualification follow unless there is clear ineligibility under some constitutional or statutory provision, In re Ray, 26 N.J. Misc. 56, 59, 63 (Cir. Ct. 1947). Here, in addition to being elected in 1990, petitioner previously had been qualified to fill out one expired term of board membership, and had been elected in his own right on two prior occasions to that office (stipulation of fact no. 7).

Consequently, neither the facts of this case nor the statutory sections cited above disclose cause for depriving petitioner of board membership. The judicial decisions cited by counsel, in their statements of law, only treat the power of the Legislature to enact reasonable qualification requirements. No one argues to the contrary here. As to the facts thereof, none of those decisional facts are apposite to this case.

CONCLUSION

I **CONCLUDE**, therefore, that the board membership of respondent Thomas S. King of the New Hanover School District Board of Education was attained lawfully, and cannot be invalidated, on this record.

ORDER

I **ORDER**, therefore, that petitioner Christopher J. Delay's motion for summary decision be, and hereby is, **DENIED**.

I **ORDER further** that the joint motion by respondent Thomas S. King and the New Hanover Township Board of Education to dismiss the petition of appeal be, and hereby is, **GRANTED**.

I hereby FILE this initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

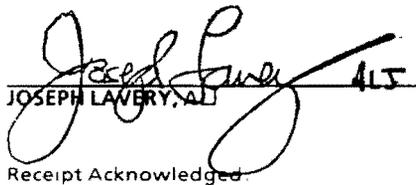
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

December 31, 1990
DATE

DEC 31, 1990
DATE

JAN 27 1991
DATE

ml


JOSEPH LAVERY, ALI

Receipt Acknowledged


DEPARTMENT OF EDUCATION

Mailed to Parties:


OFFICE OF ADMINISTRATIVE LAW

DOCUMENT IN EVIDENCE

Official copy reprint, Senate No. 2230, with Senate Committee Amendment and
Assembly Education Committee Statement

CHRISTOPHER DE LAY, SR., :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF NEW HANOVER, BURLINGTON :
COUNTY, AND THOMAS S. KING, JR., :
RESPONDENTS. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner were untimely filed and are consequently excluded from consideration herein, together with the reply thereto submitted by the Board of Education.*

Upon careful deliberation, the Commissioner finds that he cannot concur with the reasoning and conclusions of the ALJ in this matter. Rather, for the reasons set forth below, the Commissioner determines that, by virtue of his not having met statutory requirements for candidacy, Respondent King must be removed from office for lack of qualification and replaced by an appointment of the County Superintendent of Schools.

* The Commissioner notes that petitioner's exceptions essentially reiterate his previous argument with respect to N.J.S.A. 40A:9-1.13 (see initial decision at p. 4), a statute which, both by its own terms and the definitions controlling them, does not apply to school districts.

Initially, the Commissioner notes that qualifications for school board membership are set forth in N.J.S.A. 18A:12-1:

18A:12-1. Qualifications of board members

Each member of any board of education shall be a citizen and resident of the district, or of such constituent district of a consolidated or regional district as may be required by law, and shall have been such for at least one year immediately preceding his appointment or election, he shall be able to read and write, shall be registered to vote in the district, and, notwithstanding the provisions of N.J.S. 2C:51-1 or any other law to the contrary, he is not disqualified as a voter pursuant to R.S. 19:4-1.
(emphasis supplied)

As both respondents and the ALJ observe, this statute, in itself, offers no clear guide as to the time when its requirements, other than residency, must be satisfied. Respondents and the ALJ consequently argue that this tribunal may not impose what are effectively "preconditional" requirements on board membership in the absence of explicit legislative directive. The Commissioner, however, holds that such "preconditions" already exist in the form of school election law requirements with which 18A:12-1 must be read in concert:

18A:14-10. Contents of petition

Each nominating petition shall be addressed to the secretary of the board of education of the district and therein shall be set forth:

- d. [A statement] that the person so endorsed is legally qualified to be elected to the office.

Accompanying the nominating petition and to be filed therewith, there shall be a certificate signed by the person endorsed in the petition, stating that:

- a. He is qualified to be elected to the office for which he is nominated, including a specific affirmation that he is not disqualified as a voter pursuant to R.S. 19:4-1;
- b. He consents to stand as a candidate for election; and
- c. If elected, he agrees to accept and qualify into said office. (emphasis supplied)

Compelling precedent for the Commissioner's construing 18A:12-1 in conjunction with requirements for nominating petitions is found in the Attorney General's treatment of a similar question with respect to candidates for the State Legislature:

***Although the Constitution provides no definitive guide as to the time when this constitutional requirement must be satisfied, the procedural provisions of the election laws do impose certain requirements. In this regard, a candidate for the Legislature is obliged to file a petition with the Secretary of State to appear either on the primary election ballot or directly on the general election ballot. N.J.S.A. 19:13-3, 19:13-9, 19:23-6, 19:23-14. A candidate nominated for office in a petition must annex to such petition a certificate indicating, among other things, that "the candidate is a resident of and a legal voter in the jurisdiction of the office for which the nomination is made." N.J.S.A. 19:13-8, 19:23-15. Likewise, an individual nominated by write-in votes must thereafter file a similar certificate of acceptance. N.J.S.A. 19:23-16. In view of these statutory requirements, a candidate for the Legislature must be entitled to the right of suffrage at the time of filing a petition or, alternatively, at the time of filing a certificate accepting a write-in nomination.
(Formal Opinion No. 5-1980)

Having thus found that N.J.S.A. 18A:14-10 may fairly be applied to the requirements of 18A:12-1, the Commissioner turns to the specific wording of that statute (18A:14-10) in view of the ALJ's discussion. Initially, the Commissioner rejects the ALJ's contention, at page 7 of the initial decision, that "nothing of

record demonstrates that registration to vote is a qualification subsumed within [the] rubric ['qualified to be elected to said office']. In the Commissioner's estimation, "qualified to be elected to said office" can mean nothing other than meeting the qualifications for board membership plainly set forth in N.J.S.A. 18A:12-1, among which is registration to vote in the district. Neither do 18A:14-10(c) ("[i]f elected, he agrees to accept and qualify into said office") and 18A:12-2.1 (oath of office, quoted at page 6 of the initial decision) alter this view, as these requirements serve in the first instance to bind the candidate to continue qualification past the election and into his term of office (e.g., by not moving out of the district), and in the second to ensure continued qualification upon actual assumption of duties.

Nor is the Commissioner persuaded by the ALJ's discussion of the recent amendment to N.J.S.A. 18A:14-10 effected by P.L. 1987, c. 328 (Senate Bill 2230):

Neither does the legislative history behind this statutory section buttress petitioner's argument. The Legislature, in its most recent amendment of this section, seems to have been preoccupied with assuring only that the candidate is not disenfranchised under R.S. 19:14-1. See Senate Education Committee and Assembly Education Committee statements to the bill, S 2230. Such a focus of legislative concern is a far remove from the circumstance of respondent King's merely failing to register to vote.

(Initial Decision, at p. 7)

An examination of Senate Bill 2230 and its legislative history plainly demonstrates that the bill's original purpose was to preclude persons convicted of certain crimes from ever holding school board office (not merely to oust current members so convicted, as Respondent King claims), and that its subsequent

amendment to focus on disenfranchisement pursuant to R.S. 19:4-1 reflects the Legislature's attempt to accomplish the bill's intent in a way more consistent with New Jersey's general treatment of the civil rights of persons convicted of serious crimes.* Moreover, review of the bill makes it clear that the amendment of N.J.S.A. 18A:14-10 relied upon by the ALJ in his discussion above is simply a technical consequence of the bill's primary thrust, which was to amend 18A:12-1 (requirements for membership) and provide penalties for misrepresenting one's enfranchisement status. Amendments to the sections of law regarding oaths and nominating petitions constitute nothing more than referential adjustments to related statutes in order to more clearly and fully effectuate S 2230's purpose; they certainly do not arise from independent, systematic or comprehensive review of those statutes such as would render valid the ALJ's characterization of the Legislature as being particularly concerned about disenfranchisement as opposed to other grounds for

* R.S. 19:4-1 reads in pertinent part:

***No person shall have the right of suffrage --

- (1) Who is an idiot or is insane; or
- (2-5) (Deleted by amendment.)
- (6) Who has been convicted of a violation of any of the provisions of this Title, for which criminal penalties were imposed, if such person was deprived of such right as part of the punishment therefore according to law unless pardoned or restored by law to the right of suffrage; or
- (7) Who shall be convicted of the violation of any of the provisions of this Title, for which criminal penalties are imposed, if such person shall be deprived of such right as part of the punishment therefore according to law, unless pardoned or restored by law to the right of suffrage; or
- (8) Who is serving a sentence or is on parole or probation as the result of a conviction of any indictable offense under the laws of this or another state or of the United States.***

disqualification within the framework of requirements for nominating petitions.*

The Commissioner therefore holds that candidates for school board office must meet the qualification requirements of that office, other than residency, at the time they certify pursuant to N.J.S.A. 18A:14-10 that they are so qualified. In the instant case, Respondent King undisputedly did not, notwithstanding his affirmation to the contrary and the resultant good faith belief of the voters who signed his nominating petition and cast ballots for him based on that affirmation.

As to whether such a defect could be cured by the candidate pursuant to N.J.S.A. 18A:14-12, and concomitantly, whether it was automatically cured by operation of that statute because not discovered and reported to the candidate as of the 45th day preceding the election, the Commissioner holds that, as prior case law makes abundantly clear, a "defect" of the type involved in this case is not within the purview of defects envisioned by 18A:14-12:

The purpose of this statute is to eliminate technical imperfections which could otherwise invalidate a nominating petition to the detriment of a potential candidate and those citizens who support his candidacy.

The Commissioner observes that once a nominating petition is filed, the responsibility of the Board Secretary is to insure that the blanks on the form are filled in, that ten signatures of endorsement are recorded, that one of those ten signatures also verifies the petition, that the verification is notarized, and that the candidate signs the petition.

Any question with respect to the oath of the signatory who verifies that petition, or any

* See also footnote at p. 18 below.

question with respect to the qualifications of the signatures thereon are not within the authority of the Board Secretary to address. These are matters to be adjudicated only by a court of competent jurisdiction. See T.W.D. v. Board of Education of the Town of Belleville, Essex County, 1975 S.L.D. 26. While T.W.D. dealt with an affidavit pupil, the holding there is equally applicable here. When a person who verifies a nominating petition attests through his/her oath, or certifies that he/she is qualified to endorse a nominee's candidacy, such oath or certification is subject to question only in a court of competent jurisdiction. (In the Matter of the Election Inquiry of the School District of the Township of Monroe, Gloucester County, 1976 S.L.D. 233, 236) (See also In the Matter of the Annual School Election Held in the School District of Carteret, Middlesex County 1974 S.L.D. 233.)

Because this matter reaches to Respondent King's substantive qualification and the veracity of the attestation he made at the time of his nomination, it is not subject to the provisions of N.J.S.A. 18A:14-12, so that that statute cannot be construed to have cured the "defect" of King's lack of qualification so as to protect him from subsequent challenge and loss of privilege.

In sum, King was not qualified to hold school board office at the time he filed his nominating petition, so that his candidacy for school board membership was void and of no effect notwithstanding the fact that he received a plurality of votes and registered to vote on the day he took his oath of office. The Commissioner concurs with the ALJ that the right to hold public office is a valuable one and that its exercise should not be curtailed except by plain provisions of the law, and that officeholders or candidates should not be disqualified unless clearly ineligible under some constitutional or statutory provision. Strothers, supra, and In re Ray, supra. He also holds, however, that a school board member "is a creature of the statute, and he must comply with its requirements in order to be vested with

the right to the enjoyment of the office" and that "electors have no right to vote [for persons not qualified to hold office]" as the court in Strothers goes on to say in the passages immediately following those cited by the ALJ. (6 N.J. at 565, 566) The Commissioner further notes that the court declined to find Ray disqualified due to his lack of voter registration only because the statutes then controlling borough council membership required a certification that the candidate was a "legal" voter (i.e., entitled to right to suffrage), not a "registered" one--a distinction without meaning for the school board membership statute, which explicitly requires registration. Finally, as to the ALJ's reliance on King having been elected in his own right on two prior occasions, the Commissioner observes that, in addition to not being registered to vote at the time of his nomination, King is alleged in the Petition of Appeal to have been removed from voter registration since 1985 due to his failure to have voted since 1981. If this allegation, which King does not deny in his Answer to the petition, is in fact true, King has actually been ineligible for Board membership since December 22, 1987.*

* Effective date of P.L. 1987, c. 328, which in addition to requiring board members to not be disqualified as voters, also added the requirement that they be registered to vote. The Commissioner here notes that this requirement was added to S 2230 not, as King claims at p. 5 of his November 2, 1990 letter brief, for reasons of internal consistency, rather, for reasons of legislative economy, the provisions of an earlier endorsed bill (S 956) were incorporated into a later one from the same session amending common statutes. Of interest with regard to the present matter is that S 956 specifically tied voter registration to 18A:12-1's new, shorter residency requirement (reduced from two years to one) as a means of ensuring familiarity with and interest in community affairs. Thus, contrary to the impression created by respondents and the ALJ in their various discussions, the Legislature was very much concerned with voter registration for school board candidates. See bill and Senate Education Committee statements for S 2230 and S 956, 1986 session.

With King thus subject to removal for lack of qualification, the question arises as to appointment of his replacement. Here the Commissioner holds that the plain language of N.J.S.A. 18A:12-15 directs that such appointment be made by the County Superintendent of Schools pursuant to subsection (a) of that statute:

18A:12-15. Vacancies

Vacancies in the membership of the board shall be filled as follows:

- a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;
- b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking;
- c. By special election, if in the annual school election two or more candidates qualified by law for membership on the school board receive an equal number of votes. Such special election shall be held only upon recount and certification by the commissioner of such election result, shall be restricted to such candidate, shall be held within 60 days of the annual school election, and shall be conducted in accordance with procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes. The vacancy shall be filled by the county superintendent if in such special election two or more candidates qualified by law for membership on the school board receive an equal number of votes;
- d. By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and

shall be conducted in accordance with the procedures for annual and special school elections set forth in chapter 14 of Title 18A of the New Jersey Statutes;

- e. By the commissioner if there is a failure to elect a member at the annual school election due to improper campaign practices; or
- f. By the board in all other cases.***

The Commissioner is unpersuaded by the Board's argument (letter brief of November 8, 1990) that because petitioner is challenging King's qualification for candidacy, subsection (a), which speaks to membership, does not apply. It is a duly elected and sworn member of the Board who has been shown by these proceedings not to have been eligible to run for the office he now holds, thereby rendering him disqualified within the meaning of 18A:12-15 notwithstanding that the grounds for his disqualification arose as a corollary of his candidacy and not of his actual membership.

Accordingly, for the reasons stated herein, the initial decision of the Office of Administrative Law is reversed and summary judgment granted to petitioner. Thomas S. King, Jr., is deemed disqualified from office and the seat vacated by his removal is to be filled forthwith by the Burlington County Superintendent of Schools.

IT IS SO ORDERED.

FEBRUARY 21, 1991

DATE OF MAILING - FEBRUARY 22, 1991


COMMISSIONER OF EDUCATION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8028-90

AGENCY DKT. NO. 223-6/90

**JERSEY CITY ADMINISTRATORS AND
SUPERVISORS ASSOCIATION, JOHN
PHILLIPS, GERALD DYNES, CHARLES
SILVER, JOHN NAGY, WILLIAM SMITH,
JOSEPH WARD, PAUL RAFALAIDES,
EARLENE ROBINSON, MARSHA LEFF
AND LENNON ROSS,**

Petitioners,

v.

**THE STATE-OPERATED SCHOOL
DISTRICT OF THE CITY OF JERSEY CITY
AND STATE DISTRICT SUPERINTENDENT
DR. ELENA SCAMBIO,**

Respondents.

Robert M. Schwartz, Esq., for petitioners

Kathleen S. Johnson, Assistant Counsel, for respondents
(Charlotte Kitler, General Counsel, attorney)

Record Closed: January 10, 1991

Decided: January 18, 1991

BEFORE JAMES A. OSPENSON, ALJ:

Jersey City Administrators and Supervisors Association, a duly recognized professional association representing principals, vice principals and supervisors in the State-Operated School District of Jersey City, in a petition of appeal filed against the State-Operated School District of the City of Jersey and state district superintendent, Dr. Elena Scambio, noting that the Commissioner of Education had established by

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rule certain procedures and criteria for evaluation of building principals in the District, effective January 2, 1990, pursuant to N.J.S.A. 18A:7A-49, alleged that the individual parties petitioner here, all principals in the District, received the first of a requisite of three on-site evaluations on May 10, 1990, but that none of the principals was consulted by an assessment unit created by N.J.S.A. 18A:7A-45, as required by other regulations governing policy and procedure in the evaluative process under N.J.A.C. 6:3-1.21(h)(5). The Commissioner's regulations governing on-site evaluations, published as N.J.A.C. 6:7-1.1 et seq., it was alleged, though containing criteria for evaluation in N.J.A.C. 6:7-2.2, nevertheless contained no delineation of standards and/or factors that were to make up the criteria, contained no indicators of performance and/or expectation and/or progress for those evaluated, contained no standards and/or factors by which those evaluated were to be judged to have exhibited "consistent and effective leadership" in any of the six criteria in N.J.A.C. 6:7-2.2, and resulted in evaluations that were devoid of any consistent or uniformly applied objective standard. The District, it was alleged, had not itself adopted any policy or guidelines for application of the regulatory criteria.

Judgment was demanded by petitioners finding that the initial principals' evaluations of May 10, 1990 were violative of their due process rights, that such evaluations were therefore null and void, that the District should be ordered to consult with the principals in formulation and implementation of the evaluative process as set forth otherwise in regulations in N.J.A.C. 6:3-1.21; ordering that evaluations be based on "on-site" observation; ordering that the District establish and adopt a written set of standards and/or factors upon which each of the criteria in N.J.A.C. 6:7-2.2 were to be based and upon which they were to be implemented; ordering the District to establish and adopt before further evaluation written indicators of performance in which evaluatees would have input; and, finally, enjoining the conduct or issuance of further evaluations until such time as the District adopted such written standards and/or performance indicators congruent with procedures heretofore set forth in N.J.A.C. 6:3-1.21.

The District filed an answer to the petition of appeal, admitted prefatory allegations of a factual nature generally, but denied petitioners were otherwise entitled to relief as demanded. It raised affirmative defenses that the petition failed to state claims upon which relief could be granted and that the petition should be dismissed for lack of subject matter jurisdiction.

The petition was filed in the Bureau of Controversies and Disputes of the Department of Education on June 29, 1990. The District's answer was filed there on August 8, 1990. The Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on October 2, 1990 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

Filed with the District's answer and transmitted here was a motion to dismiss the petition on the ground the Department of Education lacked jurisdiction over the subject matter of the petition. The District's memorandum of law accompanied the motion; it was opposed by petitioners' memorandum of law filed September 11, 1990.

On July 19, 1990, petitioners filed an amended petition of appeal, which deleted the name of individual petitioner Lennon Ross but was otherwise without change.

On December 13, 1990, petitioners filed a motion for interim and emergent relief for orders enjoining further action by the district in conducting further evaluations of the affected principals, having the matter placed on an expedited track for disposition by final decision of the Commissioner no later than March 1, 1990, having the particular matter assigned to and heard by another particularly named administrative law judge. Filed first in the Department of Education, the Commissioner transmitted the motion to the Office of Administrative Law for disposition on December 13, 1990. Petitioners' motion was accompanied by a letter memorandum of law. It was opposed by the District. The entire matter was assigned to the undersigned administrative law judge by D/CALJ Jaynee LaVecchia; petitioners' motion for assignment of another administrative law judge was summarily rejected.

On notice to the parties, the matter was set down for status conference and consideration of procedure for disposition of motions on January 2, 1991; at request and/or with consent of the parties the conference was adjourned to January 10, 1991. By agreement, the District's motion to dismiss the petition and amended petition of appeal for lack of subject matter jurisdiction was addressed first, the issue having been deemed ripe for disposition under N.J.A.C. 1:1-12.3. Petitioners'

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motion for emergent interim relief was held in abeyance, to be addressed and resolved, if necessary, thereafter.

DISCUSSION

It should be noted at the outset the District's motion to dismiss the petition entails no consideration of material disputed facts. Akin to the common law demurrer, the motion assumes the truth of all well-pleaded material facts. The bulk of the factual allegations by petitioners, including allegations containing both factual and legal assertions, have been substantially admitted by the answer. There is no quarrel between the parties, for example, that acting pursuant to N.J.S.A. 18A:7A-34, the State Board of Education on or about October 4, 1989 issued an administrative order removing the local district board of education and creating a State-Operated School District in the City of Jersey City, to be conducted by a state district superintendent appointed pursuant to N.J.S.A. 18A:7A-35. Under the statute, the state district superintendent is empowered to make, amend and repeal district rules, policies and guidelines for proper conduct, maintenance and supervision of all schools in the district. N.J.S.A. 18A:7A-35(f). The state district superintendent is authorized to perform all acts necessary and proper for conduct and maintenance of public schools in the district, under N.J.S.A. 18A:7A-38. Acting pursuant to N.J.S.A. 18A:7A-45, the Commissioner of the Department of Education proposed and adopted procedures and criteria for evaluation of building principals in the District. Codified in N.J.A.C. 6:7-2.1 and 2.2, they became effective January 2, 1990.

(Although at the time the petition was filed only one set of principals' evaluations had been conducted, it was suggested in argument on the motion that a second and a third set of such evaluations had been conducted by the end of December 1990 and that some principals had received from the District notices of inefficiencies with obligation to cure within 100 days of notice on pain of tenure charges for failure to do so. At the moment, it seems clear, none of the nine individual petitioners faces tenure charges for inefficiencies under N.J.S.A. 18A:6-10 et seq. or N.J.S.A. 18A:7A-45 and N.J.A.C. 6:7-1.3.)

In support of motion, the District in its memorandum of law argued the assessment process initiated by state district superintendent has been clearly

established by specific statute and regulations for conduct by an assessment unit for on-site evaluations of each building principal. It argued the administrative code in N.J.A.C. 6:7-2.1 and 2.2 sufficiently establish criteria to be employed in evaluations, which are an examination of a principal's performance within identified areas of school building leadership/management, in curriculum/program, supervision of instruction, staff development, assessment of pupil progress, community relationships, and school climate, although the state district superintendent may examine other areas of leadership and management generally accepted to be the responsibility of school principals. N.J.A.C. 6:7-2.2. It was the District's position that the challenge petitioners raise to the evaluation process is but a challenge to validity of the regulations adopted a year ago by the Commissioner. Such a challenge properly and exclusively belongs in the Appellate Division of Superior Court under R. 2:2-3(a)(2) and not before the Commissioner. The rule provides:

... Appeals may be taken to the Appellate Division as of right ... (2) to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer ... except that review pursuant to this subparagraph shall not be maintainable so long as there is available a right of review before any administrative agency or officer, unless the interest of justice requires otherwise ...

The District urged the actions challenged were taken pursuant to statute and code; if petitioners wished to challenge the validity of the standards incorporated in regulatory code, they should have instead presented their appeal not to the Commissioner of the Department of Education under his disputes resolution jurisdiction of N.J.S.A. 18A:6-9 but originally to the Appellate Division of Superior Court. That they did not requires dismissal of petition for lack of subject matter jurisdiction.

Opposing the motion, petitioners vigorously urged their challenge was not to validity of the evaluation regulations in N.J.A.C. 6:7-2.1 and 2.2 but rather to improper failure of the state district superintendent to establish by written policy under N.J.S.A. 18A:7A-35(f) the necessary standards for evaluation such as are required elsewhere in the administrative code, for example, under N.J.A.C. 6:3-1.21, which requires consultation between supervisors and evaluatees.

Ordinarily, review of both the quasi-judicial and regulatory action of a state administrative agency must be sought in the first instance in the Appellate Division. In Pascucci v. Vagott, 71 N.J. 40 (1976), appeals were taken from a county court and from the Department of Institutions and Agencies that challenged validity of a regulation of the Division of Public Welfare setting assistance levels. The appeals were certified in the Supreme Court while pending unheard in the Appellate Division. The Supreme Court held that where classification conflicted with legislative standard on levels of assistance, the regulation had to be set aside and that initial jurisdiction of questions presented, because they involved validity of state administrative regulation, belonged in the Appellate Division under R. 2:2-3. The Court noted that every proceeding to review action or inaction of a state administrative agency should be by appeal to the Appellate Division. In the case, one of the appellants questioned not only the regulation as such but also suggested that the local welfare director's discretionary authority to grant relief was greater than that set by state regulation. The Court wondered whether the additional claim against the director negated the exclusive mode of review of the regulation itself in the Appellate Division. It approved a finding by the trial judge, however, that the "essence" of the case, its primary character, sought review of the regulation and that, therefore, exclusive jurisdiction did repose in the Appellate Division. Id. at 52. It added the Appellate Division might properly review the administrative regulation and might exercise such other original jurisdiction as was necessary to complete determination of any matter on review. Id. at 53. One reason for the jurisdictional requirement was the "entire controversy" doctrine, providing a single forum for expeditious handling. Thus, if urgency of relief and imminence of irreparable harm would so indicate, the Appellate Division through its plenary powers to interpose interim protection of rights would be available. Id. at 54.

The question here that must first be addressed, therefore, it seems to me, is what is the "essence" of the claims made by petitioners. I think the essence is in broadest terms an attack on the standardlessness of the regulations promulgated by the Commissioner, mandated by N.J.S.A. 18A:7A-45(a), in N.J.A.C. 6:7-2.1, 2.2. While petitioners vigorously argue that challenge is not their primary intent and that there are open fact questions still to be determined precluding application of the Appellate Division's jurisdiction, factors apparent from the petition itself and from argument contradict them. Petitioners' memorandum of law of December 13, 1990, at 2-3, noted expressly the criteria of N.J.A.C. 6:7-2.1, 2.2 were adopted without any

input from Jersey City Administrators and Supervisors Association either locally or on a statewide basis. Petitioners asserted that in a letter of December 26, 1989 to the rules analyst for the New Jersey Department of Education, the Jersey City Administrators and Supervisors Association noted the criteria of the regulations "lacked any definition or standard so as to provide both the evaluators and the evaluatees a more objective understanding of their respective responsibilities." The memorandum charged components of the criteria were required to be set forth "so as to avoid and/or minimize arbitrariness in the process of evaluation." Petitioners made the same complaint to the state district superintendent in January 1990. Pm at 3, December 13, 1990.

Paragraph 33 of the petition, moreover, alleged "neither the procedures nor criteria found in N.J.A.C. 6:7-1.1 et seq. delineate the standards and/or factors that are to make up the criteria adopted by the Commissioner upon which building principals in the state-operated school district are to be evaluated." Paragraph 36 of the petition alleged the District itself "has not adopted . . . nor has it advised petitioners of the standard and/or factors by which principals shall be judged to have exhibited consistent and effective leadership in any of the six criteria set forth in N.J.A.C. 6:7-2.1." Nor, petitioners alleged in paragraph 37, has the District adopted any "indicators of performance and/or expectation and/or progress regarding any of the six criteria set forth in N.J.A.C. 6:7-2.2." Nor has the District adopted any policy defining the standards to be employed by the assessment team, according to paragraph 39. Thus, it is alleged in paragraph 38, evaluations of petitioners are "devoid of any consistent and uniformly applied objective standard."

From the above, therefore, I HOLD that the "essence" of the petition, under the Pascucci doctrine, is a concerted attack on validity and sufficiency of the evaluation criteria of N.J.A.C. 6:7-2.1, 2.2, specifically, an assertion of legal insufficiency for standardlessness. It follows the attack mounted is one more properly and exclusively within jurisdiction of the Appellate Division of Superior Court under R. 2:2-3(a)(2). I REJECT arguments that such is not petitioners' intent or design. I REJECT petitioners' arguments that there are open fact questions that necessarily must be established before appellate review and that, therefore, they should not be ousted of jurisdiction under N.J.S.A. 18A:6-9 before the Commissioner. In fact, they are not ousted of jurisdiction for their challenge if, in future, they become subject to tenure charges under N.J.S.A. 18A:7A-45. They may then

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challenge standardlessness as such regulations are "applied" to them. No other administrative review is presently available under R. 2:2-3(a)(2). See, generally, LeFelt, Administrative Law and Practice, 1988, par. 70 at 68-69. I make no finding and draw no conclusion on the question whether N.J.A.C. 6:3-1.21 is applicable or in pari materia with N.J.A.C. 6:7-2.1, 2.2.

CONCLUSION

Respondents' motion to dismiss the petition and amended petition of appeal for lack of subject matter jurisdiction is **GRANTED**; the petitions are **DISMISSED** without prejudice to whatever other relief is available to petitioners in the appropriate forum.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 18, 1991
Date

1/23/91
Date

JAN 25 1991
Date
amr

James A. Ospenson
JAMES A. OSPENSON ALJ
Receipt Acknowledged:

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:
Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

OAL DKT. NO. EDU 8028-90

JERSEY CITY ADMINISTRATORS AND	:	
SUPERVISORS ASSOCIATION <u>ET AL.</u> ,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
THE STATE-OPERATED SCHOOL	:	DECISION
DISTRICT OF THE CITY OF JERSEY	:	
CITY AND STATE DISTRICT SUPERIN-	:	
TENDENT, DR. ELENA SCAMBIO,	:	
	:	
RESPONDENTS.	:	
	:	

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

Petitioners advance three exceptions to the initial decision, which are summarized, in pertinent part.

Preliminarily, petitioners summarize the arguments presented in the Petition of Appeal, recite their version of the procedural history of this matter, and then quote from page two of the initial decision. They claim that while the ALJ made a correct statement of the case, he ignored the nature of the allegations and the factual disputes set forth in the amended petition. Arguing that the initial decision constitutes a summary judgment in favor of the Board, petitioners claim that the matter was not ripe for summary judgment because there exist genuine issues of material fact entitling petitioners to a trial on the merits. They cite DePrimo

v. Lehn and Fink Products Co., 223 N.J. Super. 265 (Law Div. 1987) among other cases in support of this proposition. They also claim that an opportunity to complete discovery was not afforded in this matter by virtue of the ALJ's deciding the matter summarily.

Petitioners' first exception states:

THE 'ESSENCE' OF THE PETITION IS NOT AN ATTACK
UPON N.J.A.C. 6:7-2.2 AS ALLEGED BY THE
RESPONDENT AND CONCLUDED BY THE COURT

Petitioners claim they do not have any dispute with the criteria set forth in N.J.A.C. 6:7-2.2 but, rather, with respondent's failure to consult with the Association as to their job descriptions, the district's policies, and, ultimately, the standard by which the criteria set forth in N.J.A.C. 6:7-2.2 are to be applied. Without such standards, petitioners submit, the evaluations are entirely subjective judgments of the assessors employed by the district, without uniformity or consistent pattern as to what is expected of a principal. They also allege that the evaluations that have been conducted contain conclusions that are without basis in fact, rendering them arbitrary and capricious. Petitioners also claim that the evaluations were not based on observations as required, nor were they on-site, as required by the statute.

Exception two states:

THE STATE-OPERATED SCHOOL DISTRICT IS OBLIGATED
TO FOLLOW THE REQUIREMENTS FOUND IN N.J.A.C.
6:3-1.21

Petitioners reiterate the contention raised below that the district must conform to the prescriptions of N.J.A.C. 6:3-1.21 which govern the evaluations process for tenured staff members. They claim Jersey City is not exempt from said regulation and seek

to rebut respondent's exclusive reliance on N.J.A.C. 6:7-2.1, 6:7-2.2 and N.J.S.A. 18A:7A-45 as the only requirements for the evaluation of Jersey City's principals.

Neither the aforementioned statutory provision or administrative code sections implicitly or expressly state that the procedures contained therein are to be applied to a State-operated School District exclusive of any other requirement which may be found in any other statutory or administrative code provisions.
(Exceptions, at p. 5)

Instead, petitioners rely on N.J.S.A. 18A:7A-40 captioned "Effect of removal or reestablishment of local control or collective bargaining agreements and rights and privileges of employees," which states at paragraph b that:

Except where otherwise expressly provided in this amendatory and supplementary act, all teaching staff members and other employees of a State-operated district shall retain and continue to acquire all rights and privileges acquired pursuant to Title 18A of the New Jersey Statutes.
(Id.)

Exception three states:

JURISDICTION PROPERLY BELONGS BEFORE THE
COMMISSIONER OF EDUCATION

Petitioners except to the ALJ's conclusion that the Petition of Appeal herein is a challenge to the validity and the sufficiency of the evaluation criteria found in the Administrative Code which is more properly and exclusively within the jurisdiction of the Appellate Division pursuant to Court Rule 2:2-3(a)(2). Once again, petitioners assert that the petition does not contest the criteria adopted by the Commissioner but, rather, contests the district's failure to consult with the principals as to the standards to be applied in the evaluation of them. They claim that such inquiry requires an interpretation and determination as to

whether the requirements of N.J.A.C. 6:3-1.21 have as much force and application in a State-operated school district as in other districts. Such determination "****ought not be made by the Appellate Division, but rather by the administrative agency responsible for promulgating the administrative regulation and which is professed to have the expertise in the area over which the administrative regulation applies." (Exceptions, at p. 6)

Further, petitioners submit that the issue before the Commissioner is also whether respondent has in fact complied with N.J.A.C. 6:7-1.11 et seq. They claim the evaluations were not on-site as required and, moreover, were not based on observations. They further claim that the conclusions expressed in the evaluations were not factually substantiated. They claim such issues of fact are properly decided before the Commissioner.

Finally, petitioners seek to rebut the ALJ's reliance on the entire controversy doctrine as one reason for denying jurisdiction by suggesting that that doctrine dictates the opposite conclusion. They claim the net effect of the ALJ's decision "****is to ignore the factual issues, misinterpret the essence of Petitioner's legal contention and thus abdicate the proper and necessary jurisdiction of the Commissioner in this matter pursuant to N.J.S.A. 18A:6-9." (Exceptions, at p. 7)

Petitioners submit the ALJ erred in summarily dismissing the instant Petition of Appeal based on the lack of jurisdiction of the Commissioner of Education. Petitioners seek a prompt determination as to the merits raised in the petition in light of the fact that nine principals have been given notices of

inefficiency which they are required to correct within 100 days, three of whom are petitioners specifically named herein.

Upon his careful and independent review of the record of this matter, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law for the reasons expressed therein. In so doing, the "essence" of petitioners' arguments brought before this forum are not lost upon the Commissioner. (Initial Decision, at p. 7) They argue that the provisions of N.J.A.C. 6:3-1.21, which govern the evaluation of tenured teaching staff members are applicable to the State-operated school district notwithstanding the provisions of N.J.S.A. 18A:7A-45 and N.J.A.C. 6:7-2.1 and N.J.A.C. 6:7-2.2.

As part of the legislative provisions under which a State-operated school district shall function, N.J.S.A. 18A:7A-45(a) establishes that the Commissioner of Education shall adopt criteria for the evaluation of building principals in such a State-operated district. Said criteria are embodied in N.J.A.C. 6:7-2.1 through 2.2.

SUBCHAPTER 2. CRITERIA FOR EVALUATION OF
BUILDING PRINCIPALS IN STATE-
OPERATED SCHOOL DISTRICTS

6:7-2.1 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings:

"Assessment of Pupil Progress" means a system of evaluating pupil performance in school programs.

"Community Relationships" means the interaction of school personnel with parents and other residents.

"Curriculum/Program" means the sum total of all programs of study in the school.

"School Climate" means the physical and social environment of the school.

"Staff Development" means a planned program that ensures the continual growth of school staff.

"Supervision of Instruction" means a process of assessment of the professional staff.

6:7-2.2 Criteria for evaluation of building principals in State-operated school districts

(a) An evaluation shall include, but not be limited to, an examination of the principal's performance based on the following criteria within the identified areas of school building leadership/management established pursuant to N.J.S.A. 18A:7A-45a:

1. Curriculum/Program: The principal exhibits consistent and effective leadership in curriculum and program by directing efforts to meet students' academic needs.
2. Supervision of Instruction: The principal exhibits consistent and effective leadership in the supervision of instruction by demonstrating that the observation of teaching and learning is a major priority.
3. Staff Development: The principal exhibits consistent and effective leadership in promoting staff development by utilizing time, human and material resources to construct a quality program.
4. Assessment of Pupil Progress: The principal exhibits consistent and effective leadership in establishing and maintaining an assessment program that measures individual and group achievement.
5. Community Relationships: The principal exhibits consistent and effective leadership in community relationships by successfully communicating school programs and priorities to the community and by demonstrating an understanding of the importance of community involvement; and
6. School Climate: The principal exhibits effective and consistent leadership in creating a positive school climate by ensuring that pupil and teacher behaviors support a productive learning environment.

(b) The areas in (a) above shall not be read to limit the State district superintendent's examination of the principal's performance. The State district superintendent may examine other areas of leadership and management that are generally accepted to be the responsibility of the school building principal.

The Commissioner's review of the case law discussed in this matter, Pascucci v. Vagott, 71 N.J. 40 (1976) leads him to the same conclusion as that of the ALJ, that is, that the "essence" of the claims advanced by petitioners is "***in the broadest terms an attack on the standardlessness of the regulations promulgated by the Commissioner, mandated by N.J.S.A. 18A:7A-45(a), in N.J.A.C. 6:7-2.1, 2.2." (Initial Decision, at p. 6)

It must be observed that the Legislature mandated in N.J.S.A. 18A:7A-45(a) that standards for evaluating the performance of building principals in a State-operated school district be promulgated by the Commissioner of Education, not the State District Superintendent. The Commissioner carried out such mandate in promulgating N.J.A.C. 6:7-2.1 and 2.2. The Legislature further decreed in N.J.S.A. 18A:7A-45(c) that upon completion of the assessment cycle established through the regulations for such evaluation of building principals

Notwithstanding any other provision of law or contract, the State district superintendent, after completion of an assessment cycle of not less than 12 months, may dismiss any tenured building principal for inefficiency, incapacity, unbecoming conduct or other just cause as defined by the criteria for principal performance in State-operated districts established by the Commissioner pursuant to subsection a of this section.

(emphasis supplied) (N.J.S.A. 18A:7A-45(c))

Based on the plain language as cited above, it can only be concluded that petitioners' argument that respondent did not follow

all of the procedures set forth in the regulations governing the evaluation of tenured teaching staff members as set forth at N.J.A.C. 6:3-1.21 must fail. The regulations which petitioners would implicate in the evaluation of the principals in the State-operated School District of Jersey City, N.J.A.C. 6:3-1.21, were developed by the State Board of Education as a process for evaluating all tenured teaching staff members. However, both N.J.S.A. 18A:7A-45 and N.J.A.C. 6:7-2.1 and 2.2 provide a separate and distinct process for evaluating the performance of principals in a State-operated school district, thus precluding application of other criteria and procedures for evaluation of teaching staff members. Had the Legislature wished that the provisions of N.J.A.C. 6:3-1.21 be criteria in addition to those extant for the evaluation of principals in State-operated school districts, it could have so stated. It did not do so.

Those laws and regulations pertaining to the evaluation of tenured principals in a State-operated district thus clearly supercede and supplant any regulations governing tenured teaching staff members in other than State-operated districts.

It is well established the meaning of a statute first must be sought in the language of the statute. Sheeran v. Nationwide Mut. Ins. Co., Inc., 80 N.J. 548 (1979) If the language of a statute is clear and unambiguous on its face, one may not go beyond the words of the statute in order to define the Legislature's intent. State v. Butler, 89 N.J. 220 (1982) In such cases, the language of the statute is the full expression of what the Legislature intended, and, although legislative history may be utilized to provide reassuring confirmation of literally apparent

meaning, e.g., Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), extrinsic materials may not be used to create ambiguity or to determine that the Legislature intended something other than that which it actually expressed. Safeway Trails, Inc. v. Furman, 41 N.J. 467 (1964), appeal dismissed and cert. denied 379 U.S. 14; Gauntt v. City of Bridgeton The Commissioner finds that the words of the statutes involved here are clear and unambiguous, and that application of the language of the instant statute and regulations neither results in conflict between them nor leads to absurd or anomalous results. Robson v. Rodriguez, 26 N.J. 517 (1958)

As noted by the ALJ, petitioners claim the regulatory scheme devised by the Commissioner lacks specificity in standards and performance indicators. However, any such dissatisfaction is not a matter cognizable before the Commissioner, who promulgated the regulations at issue. Rather, as noted in Respondent's Brief, at page 6, "***[t]he Supreme Court, in pursuance of its constitutional responsibility, has vested review of State administrative actions exclusively in the Appellate Division." (Pascucci, supra, at 52) Should petitioners wish to challenge the validity of the standards embodied in the regulatory scheme promulgated for State-operated school districts, their avenue for recourse lies with the Appellate Division of the Superior Court, not with this forum. The Commissioner so finds.

While the ALJ's initial decision correctly captures the "essence" of petitioners' petition, there does remain one procedural argument wherein it is averred that in contravention of N.J.S.A. 18A:7A-45(b)

At no time did the assessment unit or members thereof conduct "on-site evaluations" of any of the Petitioners named herein or any principals employed in the State-operated School District as required by N.J.S.A. 18A:7A-45. (Petition of Appeal, at paragraph 30)

Respondent denies this allegation.

The Commissioner's careful consideration of this fact-specific question leads him to conclude that such allegation is premature as presented herein insofar as no member of the petitioning Association has as yet been injured due to any alleged improper application of said statutory and regulatory scheme. Should any member of the Association be subject to tenure charges brought pursuant to N.J.S.A. 18A:7A-45(c), that individual is not precluded from raising such allegation of impropriety in his or her defense. Accordingly, such inquiry raised at this juncture is dismissed as being not ripe for adjudication.

Accordingly, for the reasons expressed in the initial decision, as amplified herein, Respondent's Motion to Dismiss the Petition and Amended Petition of Appeal for lack of subject matter and for failure to state a cause of action cognizable before the Commissioner at this time is granted. The petition and amended petition are dismissed without prejudice to petitioners to seek whatever other relief is available to them on the issue of a challenge to the regulations at issue herein before the Appellate Division.

IT IS SO ORDERED.

FEBRUARY 25, 1991

DATE OF MAILING - FEBRUARY 25, 1991

Pending State Board


COMMISSIONER OF EDUCATION

- 19 -



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6858-90

AGENCY DKT. NO. 313-8/90

**THOMAS & SONS BUILDING
CONTRACTORS, INC.,**

Petitioner,

v.

**BOARD OF EDUCATION OF
OCEAN COUNTY VOCATIONAL
TECHNICAL SCHOOL DISTRICT,
WILLIAM RAUH & SON, INC.,
AND JOTTAN, INC.,**

Respondents.

Dennis Poane and Edward Donini, Esqs., for petitioner (Donini & Donini, attorneys)

Milton H. Gelzer, Esq., for respondent Board of Education (Gelzer, Kelaher, Sheda,
Novy & Carr, attorneys)

Blair C. Lane, Esq., for respondent Jottan (Ridgway & Stayton, attorneys)

No appearance by or on behalf of respondent Rauh

Record Closed: December 20, 1990

Decided: January 16, 1991

BEFORE JEFF S. MASIN, ALJ:

This matter originally was opened to the Office of Administrative Law following transmittal of an application for interim relief and a stay which was filed by petitioner with the Commissioner of Education. Hearings on the application were held before Administrative Law Assignment Judge Jeff S. Masin in September 1990 and Judge Masin issued an interlocutory order denying emergent relief on September 4, 1990.

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Thereafter, the matter proceeded to plenary hearing before Judge Masin at the Toms River Municipal Court on December 20, 1990. As will be noted below, following completion of the petitioner's proofs, counsel for the respondents Board of Education and Jottan moved for dismissal of the petition. After considering the proofs presented in the light most favorable to the petitioner, as required by the standard applicable to such motions, the Administrative Law Judge agreed with the movants and ordered the petition dismissed. The reasons for this determination will be set forth below.¹

Initially, this matter arises as a result of a determination on the part of the respondent Board of Education to have re-roofing projects performed on its two vocational schools located in Brick and Waretown. The Board issued a proposal for bids on the project, calling for bids to be received on July 26, 1990. The case revolves around a particular condition set forth in the bid specifications. That specification, which is contained in the instructions to bidders, Supplementary Instructions Number 19, provided:

Examination of Conditions. All prospective bidders shall attend a Pre-Bid Conference to be held on July 19, 1990 at Brick OCVTS at the hour of 9 a.m. and at Waretown OCVTS at the hour of 11:30 a.m. for the purpose of inspecting the job site [sic] and proper specification interpretation.

In addition, the Notice To Bidders Advertisement provided:

All prospective Bidders shall attend a Pre-Bid Conference to be held on the project sites on July 19, 1990, Brick at 9 a.m. and Waretown at 11:30 a.m. to inspect the sites. Attendance at this meeting is a prerequisite to bidding.

Finally, the Notice To Bidders Advertisement contained the following provision:

The Owner reserves the right to reject any or all bids, and to waive any informalities in any Bids, as may be deemed best for the interest of the Owner.

The problem raised by petitioner in seeking to overturn the award of the contract for this re-roofing project which was awarded to Jottan, Inc. as the lowest

¹ Rauh has not chosen to participate in these proceedings.

responsible bidder arises due to the fact that according to the petitioner, no representative of Jottan attended the second of the two scheduled site inspection meetings which was held at the Waretown site at 11:30 a.m. on July 19, 1990. In petitioner's view, the failure of any representative to attend this meeting constituted a material and substantial deviation from the requirements of the bid specifications and therefore made it improper for the Board to consider Jottan as a responsible bidder to whom the contract could be awarded. In addition, Thomas, which was the third low bidder, contends that Rauh's bid, which was the second lowest, was also subject to disqualification because of Rauh's failure to file various documents which were part of the required package of documentation necessary for a proper bid. Once again, Thomas argues that Rauh's deviation from the specifications was material and substantial and acted to disqualify Rauh as a responsible bidder to whom the contract could have been awarded had the Board chosen not to grant the award to Jottan. In Thomas' view, these disqualifications would require that the Board award the contract to it.

EVIDENCE

Mr. Richard Bednarz, a project manager for Thomas & Sons for the past two and one-half years, with prior experience with other companies in the roofing business, testified that he is familiar with job supervision and job estimating for various types of roofs including metal, shingle, sheet metal, built-up, etc. According to Bednarz he probably would have been the manager for the job sites in question had the contract been awarded to Thomas. In addition, Bednarz has been involved in the submission of hundreds of bids and claims to be familiar with the bidding laws. He was familiar with the type of roofing material which was to be used on the particular buildings in question. He was offered and accepted following voir dire as an expert in the inspection of roof projects and installation of roofs.

According to the witness, he prepared the bid proposal submitted by Thomas. He was aware of the requirement for bidders to attend the pre-bid meetings to be held at the two sites. He attended both meetings. His understanding of the purpose of the site visits was to provide potential bidders with a clear understanding of site conditions and, where as here, the specifications call for "specification interpretation", the meetings provide an opportunity for prospective bidders to ask questions concerning specifications or plans, as actual project conditions are never quite the same as those which may appear

from drawings. The ultimate concept behind such specification interpretation meetings is to provide all bidders with the same information at the same time so that they can bid on the same understandings.

According to the witness, he was present at the Waretown meeting held at 11:30 a.m. A representative from the office of Mr. Massimo Francis Yezzi, Jr., the architect for the Board, was present as was Mr. Kelsey Peglar, a representative of Trumco, the manufacturer of the roofing material. Representatives of other bidders were also present, except for Jottan. He also believes that a representative of the Board of Education was present at the Brick meeting, but he is not sure if one was present at the Waretown meeting.

Mr. Bednarz testified that at the Waretown site those present originally met inside the school and then everyone went up on the roof. Several groups formed up on the roof and there were some discussions which took place concerning site conditions, placement of dumpsters, and the fact that school would be in session. There was also a discussion with an engineer from Mr. Yezzi's office concerning the installation of new metal flashing as opposed to the use of existing flashing.

Contractors generally provide dumpsters and the number of dumpsters was not a factor in Thomas' bid. Hypothetically, in certain circumstances the number of dumpsters could vary and might effect the amount of the bid.

The metal flashing discussion occurred amongst several people gathered at one spot on the roof. Other groups were scattered around the roof while this discussion was going on. Bednarz could not recall whether this discussion was later extended to the whole group. The discussion generally centered around the fact that it might cost more to clean up and re-use the old flashing than to use new material. Mr. Bednarz could recall nothing specific about who spoke during this "general discussion." There were about four or five people present. According to Mr. Bednarz the decision concerning whether to use old or new flashing affected the Thomas bid in the range of 5 to 8 thousand dollars.

In addition to this discussion the manufacturer's representative at the Waretown site gave out a price sheet for materials. This was a photocopied sheet which contained unit cost of materials to be obtained from Trumco, which was going to be the sole supplier. According to Bednarz, he used this information in preparing his bid.

On cross-examination, Mr. Bednarz testified that he was present at both the Brick and Waretown meetings. He identified a number of people present from different contractors and remembered that there was a lady present from Jottan at the first session. She was absent from the second session. He could recall no one else from Jottan identifying themselves as such at the Brick meeting.

Mr. Bednarz recalled that during the meeting at Brick there was discussion about moving on to the Waretown site. Directions were given and the lady from Jottan, whose name was Cheryl, requested from Mr. Larry K. Uher, an architectural designer from Yezzi Associates, that she be excused from attending the Waretown visit. She said, "Is it necessary for me to go to Waretown" and his recollection of the response was that it was "not necessary." Mr. Bednarz did not object to this when he heard it.

The witness was shown a document O-1 in evidence, an addendum dated July 19, 1990, which provided that an alternate bid was to be quoted for a total job cost with existing metal gravel stops (flashing). He did not recall this addendum being handed out at the meetings, although he was aware of it. Addendum 3, which dealt with the flashing question "had nothing to do with the \$400,075 bid which Thomas submitted."

On cross-examination Mr. Bednarz acknowledged that a question and answer session took place at the initial meeting at Brick, which served as an overview of both sites which were bid as a lump sum in accordance with the bid requirements. He also acknowledged that the difference in the bids submitted by Thomas for using the existing flashing or replacing it with new flashing was ten dollars, a discrepancy which he could not explain. He had calculated the anticipated profit for Thomas at approximately \$85,000, quoting the cost at \$390,000. He did not have a breakdown of costs available at the hearing.

Mr. Bednarz acknowledged that any potential bidder who sought to bid in accordance with the bid specifications and was thus aware of the supplier of the material to be used on the project could obtain the manufacturer material costs from the supplier and would in fact have to do so in order to calculate the bid.

Mr. Massimo F. Yezzi, the architect for the Board of Education testified that he was contacted by bidders for bid packages for the proposed work. Mr. Larry Uher of his office attended the pre-bid meetings. He acknowledged that a letter had been issued

by his office over the signature of Mr. Uher on July 31, 1990 in which Uher advised Mr. Herbert Koffler, Jr. of the Ocean County Vocational-Technical schools that Jottan had sent a representative to the Brick meeting which lasted for approximately 30 to 45 minutes and that upon completion of the meeting the representative had asked if she was required to go up on the roofs and also indicated that "her boss wanted to inspect the roofs himself." Mr. Uher noted that he told this woman that she did not have to go on the roofs and that "the prerequisite was for the meeting that we just completed."

Mr. Yezzi was questioned about the language in the bid specifications, which he testified he had chosen. The "attendance at this meeting is a prerequisite to bidding" language was put in because he wanted the potential bidders to come to the job sites, exchange ideas and look at the project, as well as have any questions answered. A representative of the Board and of the manufacturer would be present to answer any questions raised by the contractors. He acknowledged that there was no difference between the roofs on the Waretown and Brick sites and that the flashing details were the same. He also believes that Jottan received the addendum.

In addition to the testimony presented the parties placed in evidence various exhibits which were part of the record considered at the time that the motion to dismiss was ruled upon. These documents included the bid specifications contained in the project description J-1; the bid proposal form submitted by Thomas, P-1; the bid proposal submitted by Rauh P-2; the letter from Mr. Uher of July 31, 1990, P-3; and O-1, the July 19, 1990 addendum.

THE MOTION FOR DISMISSAL

(a) Standard for Deciding the Motion

As noted, following completion of the presentation of evidence by the petitioner, counsel for the respondents Board of Education and Jottan moved to dismiss the petition on the basis that even if the petitioner were given the benefit of all reasonable inferences arising from the testimony presented no reasonable determiner of the case could conclude that the petitioner was entitled to the relief sought based upon an application of the applicable legal standards. This standard of review has been adopted by the Supreme Court in State v. Reyes, 50 N.J. 454 (1967); Dolson v. Anastasia, 55 N.J. 2 (1969) and Realmuto v. Straub Motors, Inc., 65 N.J. 336 (1974). If, upon a mechanical

review of the evidence the judge concludes that under the best of circumstances the petitioner's proofs cannot reasonably permit judgment in its favor, then a motion for dismissal can appropriately be granted.

(b) Applicable Bidding Standards

In the present case, the motion must of course be viewed in the context of the applicable legal provisions effecting the bidding process. Public bidding is a matter which is imbued with the public interest. The Legislature has established rules for public bidding and specifically in the context of school and educational matters. N.J.S.A. 18A:18A-37 provides that:

All purchases, contracts or agreements which require public advertisement for bids shall be awarded to the lowest responsible bidder.

Numerous statutory and regulatory provisions govern the bidding process. When reviewing bids, a Board of Education must do so with the understanding that "the award thereof shall be made . . . on the basis of the lowest quotation received, which quotation is most advantageous to the Board of Education, price and other factors considered. . ."

In Hillside v. Sternin, 25 N.J. 317 (1957) the New Jersey Supreme Court held that a school board may waive minor, inconsequential, technical or other such omissions and deviations from bidding specifications so long as such waiver does not prevent the spirit of the statute from being carried out and equitable results being achieved. In general, the function of bid specifications and the requirement to fully comply with them is derived from a concern for fairness and equality in bidding opportunity. While all bidders may not be the same, having different capacities, levels of reliability, financial strength, etc., the concept of the bidding statutes is generally to provide all potential bidders with the same information, the same specifications, the same data upon which to compute their bids, upon which to make determinations whether or not to file a bid, etc. So long as the essential equality of opportunity amongst prospective bidders is maintained, the courts have permitted the award of contracts to bidders whose bid have to some slight, inconsequential degree deviated from the bid specifications.

In the selection of a bid, the "municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and prefatory

role. It has inherent discretionary power and what is more, a duty to secure, through competitive biddings, the lowest responsible offer and to effectuate that accomplishment, it may waive minor irregularities." Byron Construction Co., Inc. v. Board of Trustees, 31 N.J. Super. 200 (19). The Commissioner of Education has stated in connection with the bidding process and the minor irregularity issue ". . . the pivotal point is whether the lowest bid was materially and substantially in accord with the specifications." Aetna Supply, Inc. v. Board of Education of the City of Camden, 1971 S.L.D. 1951.

(c) Merit of The Motion

A review of the evidence presented in this case by the petitioner Thomas & Sons indicates that it is without dispute that the bid specifications called for attendance of representatives of prospective bidders at meetings to be held on July 19, 1990 at the Brick and Waretown sites. The language of the notice to bidders advertisement provided that the bidders "shall attend a pre-bid conference to be held on the project sites. . . Attendance at this meeting is a prerequisite to bidding." Although the "meeting" referred to in the second sentence might by itself seem to indicate the necessity of attending only one meeting, the opening language calling for a "conference to be held on the project sites" and a listing of both sites and times for meetings at both sites indicates without question that attendance at both meetings was the specified requirement. Further, in the Instructions To Bidders, Number 19, the bidders were directed to attend the pre-bid conference. Thus, a reasonable finder of fact in this matter could conclude without any question that both the intention of the drafters of the bid specifications and the information conveyed to the prospective bidders was that they were to attend both meetings for site examination and clarification of any questions.

In addition to the above, the evidence presented, giving all reasonable inferences arising therefrom to the petitioner, indicates that a female representative of Jottan was present at the Brick meeting, but that no representative of Jottan was at the second meeting. Testimony from Mr. Bednarz, as well as the letter from Mr. Uher, provides a basis for a conclusion that the female representative asked permission to skip the Waretown meeting and that Mr. Uher granted such permission. Although during examination of Mr. Bednarz there was some attempt to try to determine whether he was aware whether another representative of Jottan might have been present at the Brick meeting in addition to the female and whether that or some other individual might have been present at the Waretown meeting, there is no reasonable basis in the evidence as

OAL DKT. NO. EDU 6858-90

presented for any other inference but that the sole representative of Jottan at the first meeting was the female, whose name was Cheryl, and that she did not attend the second meeting and that no other representative of Jottan was present at the Waretown site. Thus, I think it is fair to conclude that a reasonable examination of the evidence presented permits a reasonable finder of the facts to conclude that Jottan did not comply with the exact terms of the specifications in that it did not send a representative to the Waretown meeting.

Given the findings above, which I **CONCLUDE** could reasonably be reached based on the evidence presented in the petitioner's case, the next and most significant question is whether based upon that evidence a reasonable finder of fact could possibly conclude that the failure to attend the second meeting was anything but a minor, technical and insubstantial deviance from the bid requirements. Since the failure to attend the Waretown meeting is the sole basis for petitioner's claim that the bid was improperly granted to Jottan, a conclusion that the failure of attendance was of a minor and inconsequential nature would necessitate a determination that the bid was properly awarded to Jottan.

The evidence presented by Mr. Bednarz as to the occurrences at the Waretown meeting, and the additional testimony concerning what occurred at the Brick meeting, allows a reasonable finder of fact to conclude that there was a general question and answer session and discussion at the first site and that the conditions at the first and second sites were essentially similar with respect to the nature and content of the roofing job, a conclusion buttressed by Mr. Yezzi's testimony. The description by Mr. Bednarz of the discussion held on the roof with a small but not completely inclusive group of those in attendance at the Waretown meeting concerning the metal flashing and possible replacement or use of the existing flashing was of some potential significance except that the addendum which was presented to all prospective bidders and which Mr. Yezzi testified had been received by Jottan included the requirement for an alternative bid, thus requiring the bidders, whether present at Waretown or not, to put together a bid package which provided alternatively for a job in which they would use the existing flashing and a job in which they would replace the flashing. Thus, each bidder, including Jottan, was provided with information about the need for provision of alternative bids and the substance of the alternative which was to be considered, that is either with new or with old flashing. In addition, Bednarz's testimony indicated that the siting and number of

dumpsters was essentially standard for this project and that his bid on behalf of Thomas was not affected at all by any discussions concerning the dumpsters. There is no evidence from which a reasonable finder of fact could conclude that anything about the discussions held at the Waretown site or anything about the site inspection at that location gave any information to those bidders present concerning dumpsters, flashing, material to be used on the roof, or any other such factors which was not otherwise available to Jottan through the provision of information by the Board through such items as the addendum. In addition, the handing out of the price list by the company representative at the Waretown's site was perhaps helpful to some of the bidders but as Mr. Bednarz readily and honestly acknowledged any bidder who was intending to bid on this project would have had to contact the manufacturer in order to determine the prices of necessary materials so that a proper bid could be put together. There is no evidence from which a finder of fact could conclude that such information was exclusively available to those who attended the Waretown meeting or that Jottan could not, did not or would not have known or taken advantage of the opportunity to make such a contact with the appropriate source.

Although the intention of the Board, and of Mr. Yezzi, was that bidders view the sites in question so that they could both hear what the Board and company representatives might say and so that they could have any questions answered or hear the answer to other questions raised at the meetings, given the testimony presented about what occurred at both sites, and given the additional testimony which clarifies the availability of such information as prices and the flashing addendum to one not present at the second meeting, it is extremely hard to see how any reasonable finder of fact could conclude that the failure of Jottan's representative to go to the Waretown site constitutes anything other than a minor, inconsequential, insubstantial and insignificant deviation from the bid requirements. While this does not in and of itself excuse the fact that the company did not choose to comply with the bid specs, at the same time its divergence from the exact language and requirements of those specs in this situation is clearly one which any reasonable decision maker would conclude was minor.

In addition to the above, it is perhaps important to note that the testimony in evidence indicates that Mr. Yezzi's representative advised the representative of Jottan that she did not have to go to the Waretown site. Although the bid specifications provided for this requirement, apparently Mr. Yezzi's representative felt that attendance at the first meeting was sufficient and that attendance at the second meeting was not an

absolute prerequisite. While such a waiver might not be effective if it dealt with something clearly material and substantial, here it may well reflect the relative insignificance of this requirement.

In determining a motion of this nature, a judge must be extremely careful not to engage in the weighing of credibility or of disputed facts. In this case a reasonable view of the evidence indicates that the material facts are not really in dispute. The evidence presented readily permits a finding of a bid requirement which was not complied with. Given this, and given the essentially undisputed evidence concerning what occurred at the two meetings, the task faced by the judge in deciding the motion comes down to whether or not some factor either in the evidence itself or arising from prior case analyses of similar circumstances indicates that this kind of deviation is anything but the kind of minor one which the courts have clearly allowed the Board to waive in its exercise of discretion. On the basis of the evidence presented I cannot conclude that this failure of attendance constitutes anything other than a minor failure to follow the exact requirements of the bid instructions and the specifications. No case has been cited, no factors have been put forth, which would reasonably lead to any other conclusion. There is nothing about what occurred at these meetings which gives any real hint that by failing to attend Jottan was put in a position, either to its benefit or its detriment of submitting a bid under circumstances which were inequitable. There is nothing which indicates that Jottan's lack of attendance placed it on some different footing as to the bidding process than the other bidders who did attend the meeting. While there may have been some inconsequential saving of time and/or money by not attending the meeting, no one has even asserted that that constitutes the kind of inequitable situation which would prevent a waiver.

Based upon the above, I **CONCLUDE** that upon a review of the evidence presented by the petitioner along with all reasonable inferences arising from that evidence viewed favorably to the petitioner, no reasonable finder of fact could conclude that the failure of Jottan to have a representative present at the second meeting held at Waretown constituted anything other than a minor and inconsequential deviation from the bid requirements which could be lawfully waived in the exercise of reasonable discretion by the Board of Education. Thus, I **CONCLUDE** that the Motion to Dismiss petition on behalf of Thomas & Sons Building Contractor, Inc., must be granted and the petition be **DISMISSED**. It is so **ORDERED**.

I hereby FILE this initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 16, 1991
DATE

1/17/91
DATE

JAN 24 1991
DATE

Jeff S. Masen
JEFF S. MASEN, ALJ

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

Mailed To Parties:
Jayne Lathwick
OFFICE OF ADMINISTRATIVE LAW

ij

OAL DKT. NO. EDU 6858-90

EVIDENCE LIST

J-1 Re-roofing Retrofit project Brick and Waretown sites 1990

On behalf of Petition:

P-1 Bid proposal form for Thomas & Sons Building Contractors, Inc.

P-2 Bid proposal form submitted by William Rauh & Son, Inc.

P-3 Letter of July 31, 1990 from Larry K. Uher

O-1 Letter of July 19, 1990 from Yezzi Associates

THOMAS & SONS BUILDING :
CONTRACTORS, INC., :
 :
 PETITIONER, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF OCEAN : DECISION
 COUNTY VOCATIONAL-TECHNICAL :
 SCHOOL DISTRICT, WILLIAM RAUH :
& SON, INC., AND JOTTAN, INC., :
 :
 RESPONDENTS. :
 :
 _____ :

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

Upon a careful and independent review of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the failure of Jottan, Inc., to have a representative present at the second meeting held by the Board and prospective bidders at a district warehouse was a minor and inconsequential deviation from the bidding requirements which could be lawfully waived in the exercise of reasonable discretion by the Board.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law granting the Motion to Dismiss the petition filed on behalf of Thomas & Sons Building Contractors, Inc., and adopts it as the final decision in this matter for the reasons expressed in the initial decision. The Petition of Appeal is, thus, dismissed with prejudice.



COMMISSIONER OF EDUCATION

FEBRUARY 27, 1991

DATE OF MAILING - FEBRUARY 27, 1991

M.G., on behalf of her minor child, K.G.; S.J., on behalf of her minor child, Y.J.; V.J., on behalf of her minor child, L.J.; M.W., on behalf of her minor child, L.W.; and S.W., on behalf of her minor child, B.W.,
PETITIONERS,
V.
BOARD OF EDUCATION OF MONMOUTH REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,
RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION ON MOTION

Robin S. Perry, Esq., for petitioners (Steinberg and Fellenz, attorneys)

Martin Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal and Motion for Emergent Relief filed on December 24, 1990. The emergent relief motion seeks the reinstatement of two students, L.J. and K.G. L.J was suspended by the Board of Education after expulsion hearings were conducted in late October and early November 1990. His suspension was for the remainder of the 1990-91 school year due to his participation in a serious fight on school grounds. K.G. withdrew from the district to attend school out-of-state shortly after he was initially suspended for participation in the fight; thus, the Board never actually acted

to expel or otherwise set a period of suspension for K.G. as he was no longer a student in the district. Petitioners' attorney stated to the record, however, that her client M.G. wishes to have K.G. return to school in the Monmouth Regional High School District.

By way of background, this matter is the second petition and Motion for Emergent Relief filed on behalf of K.G. and L.J. The Motion for Emergent Relief filed in October 1990 which sought to enjoin the Board from conducting an expulsion hearing regarding the students was denied by the Commissioner on October 29, 1990.

A hearing on the instant Motion for Emergent Relief was conducted by the Office of Administrative Law, Robert S. Miller, ALJ on January 18, 1991. His oral decision on motion was filed with the Commissioner of Education on February 6, 1991. No exceptions to the recommended decision were filed.

The Commissioner has reviewed the record in this matter, including the audiotape of the proceedings before the ALJ and agrees with the ALJ that petitioners have failed to meet the standards for granting emergent relief articulated by the New Jersey Supreme Court in Crowe v. De Gioia, 90 N.J. 126 (1982). Notwithstanding petitioners' arguments otherwise, they have failed to show that the students would experience irreparable harm if the Motion for Emergent Relief were denied. Further, petitioners have failed to demonstrate a likelihood of prevailing on the merits of the matter. It is clear from the record as it currently exists that the matter will ultimately rest on the credibility of the witnesses due to conflicting testimony which has apparently been provided by various students. Such credibility may be determined only after a full hearing of the matter and a review of the full transcripts of the

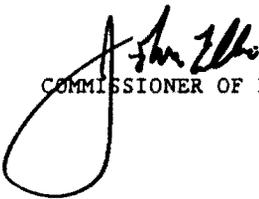
expulsion hearings, not just portions of the transcripts of the expulsion hearings, which have been provided for review. Moreover, petitioners' arguments presented at the emergent relief hearing and set forth in their Petition of Appeal do not demonstrate a likelihood of their prevailing on the allegation that K.G.'s and L.J.'s due process rights were violated by the Board by not conducting an expulsion hearing until at least October 29, 1990.

When weighing the potential hardship of the parties with respect to the granting of emergent relief, the Commissioner concludes that the Board has the potential for experiencing greater hardship than petitioners if they are ordered reinstated to school, given the seriousness of the alleged incident in which K.G. and L.J. are said to have participated and the need for the Board to assure a safe and orderly school environment for its students.

As to the fourth standard articulated in Crowe, supra, petitioners have failed to demonstrate that the public interest compels the granting of emergent relief to them.

Accordingly, IT IS ORDERED this 1st day of March that petitioners' Motion for Emergent Relief is DENIED. A hearing on the issues raised in the Petition of Appeal shall proceed as expeditiously as possible so that petitioners may present arguments on the expungement of K.G.'s and L.J.'s records and be provided with an opportunity to clear their reputations.

MARCH 1, 1991
DATE OF MAILING - MARCH 1, 1991


COMMISSIONER OF EDUCATION

- 3 -



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10754-90

AGENCY DKT. NO. 402-12/90

M. G., on behalf of her minor
child K. G.; S. J., on behalf of
her minor child Y. J.; V. J., on
behalf of her minor child L. J.;
M. W., on behalf of her minor
child L. W., and S. W., on behalf
of her minor child B. W.,
Petitioners,

v.

**MONMOUTH REGIONAL HIGH
SCHOOL BOARD OF EDUCATION,**
Respondent.

Kim Fellenz, Esq. and Robin S. Perry, Esq. (Steinberg and Fellenz, attorneys), on
behalf of petitioners

Martin M. Barger, Esq. (Reussille, Mausner, Carotenuto, Bruno and Barger,
attorneys), on behalf of respondent

Record Closed: July 9, 1991

Decided: August 21, 1991

BEFORE SOLOMON A. METZGER, ALJ:

This matter arises out of actions taken by respondent to discipline petitioners pursuant to N.J.S.A. 18A:37-1 et seq. as a result of their alleged involvement in an assault upon another pupil. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The primary record consists of transcribed testimony before respondent on October 29, November 2 and November 5, 1990. Some 28 witnesses appeared and presented testimony at that hearing. Brief supplementary testimony was taken in the OAL on

March 26 and April 10, 1991. The record closed on July 9, 1991, upon receipt of the last post-hearing memorandum.

The questions presented are whether petitioners were deprived of due process in the course of the investigation and/or during the hearing before respondent and whether respondent's decisions in the matter were arbitrary, capricious, or biased.

Certain facts are undisputed. On September 21, 1990, there was an altercation in the school parking lot involving a number of students. This occurred at about 2:30 p.m., after a pep rally, and lasted a few minutes at most. The entire student body was exiting the gymnasium and there were many students milling about and watching the fight. The administration commenced an investigation which resulted in the suspension of certain students pending an expulsion hearing. Letters of suspension were issued by Dr. William Kupersmith, school principal, on September 27, 1990. Thereafter, a hearing was held before respondent, after which it concluded that B. D. had been surrounded and beaten by a group of students, and those that could be identified were suspended. L. J. was suspended and placed on home instruction through June 30, 1991; L. W. was suspended and placed on home instruction through January 1, 1991, with probation through June 30, 1991; and B. W. was suspended through November 30, 1990, and placed on probation through June 30, 1991. No decision was made with respect to K. G. He now resides and attends school in Virginia and respondent decided that it would rule in his case should he return. Y. J. was suspended for ten days by the Administration, and respondent made no ruling in his case.

A number of witnesses were called by the school administration. K. S., J. D., and G. B. are all members of the field hockey team and they were waiting on a school bus after the pep rally to be taken to an away game. They each testified that they observed an incident in the parking lot and although they could not identify the attackers, they each noticed that B. D., a white student, was surrounded by a group of black students and was hit.

D. L., another member of the field hockey team, also noticed the group surrounding and hitting B. D., but she was able to identify participants. She saw B. W., L. J., Y. J. and L. W. She testified that she actually saw B. W. punch B. D. She ran out of the bus and found some teachers to come break the fight up.

OAL DKT. NO. EDU 10754-90

T. F., another member of the field hockey team, also saw a number of black students surround B. D. and specifically identified B. W. as one who hit B. D. She saw D. H., a white student, trying to help B. D. by pulling some of the other students off of him and she saw D. H. punch one of the black students.

B. D. also testified. He believed that this problem originated earlier in the day. Sometime around noon, he was walking to class from the lunchroom and had stopped to talk to someone. At that time, he was hit in the head by V. D., not very hard, but just enough to annoy him. V. D. then denied hitting him. When the pep rally began at about 1:50 p.m., B. D. approached V. D. to discuss the matter but V. D. was angry that he had been accused. At that moment someone else hit B. D. on the back of the head; he doesn't know who this was. After the pep rally, as he was making his way out of the gym, K. G. entered into his path and tried to block his way. B. D. shoved him aside lightly and was hit again in the back of the head. He saw K. G. and B. W. around him.

B. D. testified that he waited with a few of his friends as the student body exited the gym. He was quite angry at this point and just wanted to get home; he left the gym by himself. B. D. testified that as he leaned against a car, a group of black students, some of whom he had seen in the gymnasium, surrounded him and began to beat him. He saw B. W. and L. J. in the group, but could not determine who else was there. B. D. testified that he received a couple of bruises as a result of this incident, and also had dizzy spells for a few weeks thereafter.

D. H. also testified. He is a senior and president of the student council. During the pep rally he noticed some students bothering B. D. L. W. and B. W. were two he could identify. He and a few friends, J. G., D. C., and L. V., followed B. D. out of the pep rally to make sure that he didn't get hurt, but they stayed behind, because B. D. didn't seem to want anyone with him. The group that attacked B. D. swarmed in on him and began to hit him. L. W., B. W., L. J., Y. J. and K. G. were the individuals he could identify. L. J. did not throw any punches but was inciting the group and shouting for the others to "get him." D. H. testified that he then punched J. A., a student who was himself coming in to throw a punch at B. D., for which he received a ten-day suspension.

D. C. saw a group of students hitting B. D. in the gym as the pep rally was letting out. B. W. and L. W. were in this group and D. C. testified that B. W. definitely hit B. D. at this time. He and a few friends accompanied B. D. out of the gymnasium,

although they stayed back. Then a group of black students attacked B. D. He saw both L. W. and B. W. punch B. D. during this incident. The group dispersed when a teacher came running out. D. C. was trying to pull people off B. D.

J. G. was taking pictures for the school yearbook at the pep rally and noticed some students surrounding B. D. in the gymnasium, although he couldn't identify them. He did, however, see B. W., K. G. and L. W. in the parking lot among the group that had surrounded B. D. and they were hitting him. L. J. was riling the group up.

L. V. testified that he too saw the fight in the parking lot and that K. G., L. W. and L. J. were involved.

Petitioners presented a number of witnesses in their own behalf. E. T. testified that he noticed nothing unusual during the pep rally or as the student body exited the gym. He saw a mass of people fighting outside and these individuals included D. C., and D. H. He did not see any of the petitioners out there.

T. O. is a cheerleader and testified that she saw nothing unusual during the pep rally. Lots of kids were running by her, including B. D., as the student body exited the gym, and she saw the fight break out in the parking lot. The students charged here were fighting, but so too were B. D., D. C., D. H. and others. She testified that the fight was between groups of black students and white students and it appeared to start spontaneously. No one ganged up on B. D. She testified that many students were simply watching, and B. W. and Y. J. were among these. She did not see K. G. or L. J. in the fight.

L. O. testified that she saw V. D. hit B. D. leaving the lunchroom that day and that B. D. retorted "Don't mess with me." She told B. D. to forget about it and walked away with him. As they were leaving the pep rally, V. D. again hit B. D. and B. D. fell into L. O. A few of his friends helped B. D. up and C. W. ran by and yelled "If any of you want to fight come outside." A lot of students ran outside and a fight ensued between a group of white students and a group of black students. V. D. was hitting B. D. outside and L. O. saw B. D. covering up. She did not see L. J. or L. W. at the fight and B. W. was just standing around.

J. A. testified that the fight in the parking lot was between a group of white kids and a group of black kids and that no one particularly started it. He did not see L. J. or K. G. during the incident. D. H. hit him at one point and he fell down. J. A. was suspended for ten days.

Y. J. testified in his own behalf. V. D. had said on the way to the pep rally that he was going to get B. D. Nothing occurred at the pep rally itself and when it was over V. D. walked behind B. D. and hit him; B. D. fell down. Y. J. testified that he saw this event but just kept walking. As he left the gym, he heard C. W. yell, "If you want to fight come outside" and all the students started running. He and L. J. continued to walk. He saw the fight but was not involved. He received a ten-day suspension.

B. W. also testified in his own behalf. He acknowledged that he may have bumped B. D. in the gymnasium as they were leaving the pep rally, but this would have been an accident. He was standing outside and heard a student yell that there was going to be a fight, but he just watched.

L. W. also testified in his own behalf. He neither saw or heard anything at the time of the incident, and went from the gym to his ride home.

K. G., who now lives in Virginia, testified that he neither saw or heard anything and has no idea why he might have been named as a participant.

L. J., testifying in his own behalf, saw the commotion developing, but went the other way for fear that he might be blamed. He had no involvement.

Joseph Provenzano is the assistant principal at respondent's school and he was called as a witness by petitioners. He testified that V. D. admitted to him in time that he had slapped B. D. after lunch period while attempting to hit a third student. In the initial stage of investigation, it seemed that the incident was triggered by the T-shirt B. D. was wearing, which bore a slogan that could have been misinterpreted as derogatory to black people. Apparently that was not the cause of the fight. The investigation began immediately, and he brought various students in, who were either identified as participants or witnesses.

A number of other witnesses for both sides testified below that they saw something, but could not identify the participants. Their recollections will not be recounted here.

The additional testimony presented in the OAL concentrated on the due process and bias issues. Mr. Provenzano was recalled to provide further detail on the procedural steps of his investigation. Initially, he did not inform anyone that they were being charged, although students who were identified as participants were told of this, and allowed to present their side.

Dr. William Kupersmith, the principal of respondent's school, also testified. Assistant Principal Provenzano reported his findings to him and he called each student in, one by one, and told them specifically what they were being charged with and why they were being suspended. They denied their involvement. He sent them home in a school van and their parents were notified by telephone. He then followed up with letters of suspension.

September 21, 1990, was a Friday. The mothers of the subsequently charged students testified that they were telephoned by Mr. Provenzano early in the following week and asked to come in. Each was told that a student had been beaten, that an investigation was ongoing, and that her child was reported to be involved or at least was present. At this point, no accusations were made and each mother testified that her son told the assistant principal what happened according to his recollection. Within a day or two, each of the students charged here was suspended.

Additional testimony was also received from Willard L. Perkins, who now lives in Baltimore, Maryland, and is about to graduate from Montclair State University. He testified that he was at the expulsion hearing on the first night, and at a break heard Councilman Norman J. Field state to Martin Barger, attorney for respondent, "Obviously they're guilty. It's just a question of who did what." He was about 12 feet away when he heard this.

Dr. Norman J. Field, a member of the Board of Education for 33 years, testified that on October 29, 1990, during this break, he did have a conversation with Mr. Barger, but only asked him how much longer he thought the evening's testimony would take and Mr. Barger said it would take quite a while. He never said that they were all guilty or anything remotely like that.

This is the substance of the record.

Respondent's decisions in this matter carry a presumption of validity and it is petitioners who must show that the actions taken were arbitrary and unreasonable, if they are to be disturbed. Thomas v. Bd. of Ed. of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). There was a good deal of testimony below which specifically identified each of the individuals charged as having participated in this fight. The most comprehensive testimony came from D. L., who essentially saw the whole fight in the parking lot; from D. H., the president of the student council; and from B. D., the victim. Other students corroborated different bits of this testimony. The students called by petitioners saw the sequence of events differently. Some testified that they did not see one or more of the individuals charged during the fight, others felt that many students were fighting and that no one started it, while some thought that there was such bedlam that it was impossible to select individual participants. Each student charged denied his involvement. Respondent relied upon the former group and rejected the latter. The record amply supports this assessment.

Petitioners argue that respondent ought not to have credited the administration's witnesses, because their recollections were often in conflict. Yet, that is to be expected in an incident of this type. Neither does it appear that the range of penalties imposed was inappropriate. L. J., who received the longest suspension, was said to have incited the group. Respondent might well have perceived this as the day's most egregious behavior.

Petitioners allege also that the investigation and hearing were biased and lacking in due process. They point to the fact that these students were not told by Mr. Provenzano when he first questioned them that they were under investigation and subject to discipline; that they were not given a hearing within 21 days, contrary to the holding in R. R. v. The Board of Education, Shore Regional High School, 109 N.J. Super. 337 (Ch. Div. 1970); that the hearing itself was tainted as evidenced by the fact that Board members vigorously questioned petitioners' witnesses, and only lightly questioned the witnesses presented by the administration; and that one Board member, Dr. Field, had prejudged the case, which is reflective of the poisoned atmosphere of the hearing process.

These charges find little support in the record. Mr. Provenzano was a credible witness and he testified that all of the students questioned were told that an investigation was under way, and those who were under suspicion were made aware of this. No accusations were made early on and this seems proper. Petitioners argue that they should have been warned in advance that their cooperation could have adverse consequences, and that they were entitled to have counsel present. They did not support this assertion of rights with authority, and this is simply not the standard of due process under the Education laws. Mr. Provenzano seems to have explained adequately the nature of his inquiry. Moreover, Dr. Kupersmith called each student in separately, informed him of the charges, and gave him an opportunity to respond. No more is required. R.R. at 348.

As to the hearing process itself, it does not appear that Board members harassed petitioners' witnesses. Respondent is entitled to question witnesses as it chooses, and only in rare circumstances could this be construed as evidence of bias. There is a dispute of fact as to what Dr. Field may have said to Mr. Barger at a break. Considering that the individual who heard the comment was 12 feet away, and that Dr. Field denies that he said any such thing, I decline to make a finding on this point. Nothing in this record would indicate that respondent, or Dr. Field specifically, prejudged this matter. To the contrary, there were three long nights of hearing during which 28 witnesses were heard. Respondent deliberated for many hours after closing argument on the final night and rendered its decision.

Petitioners were not provided a hearing within 21 days as required, but respondent points out that this was because counsel for petitioners requested a delay. Moreover, petitioners filed an application for emergent relief on October 9, 1990, soon after receiving Dr. Kupersmith's letter, and the matter was then transferred to the OAL, heard, and reviewed by the Commissioner. I perceive no dilatory conduct by respondent in bringing the matter to a timely resolution.

In the course of the hearing, petitioners urged respondent to broaden the inquiry to include the racial disharmony within the school which they believe is at the root of this fight. Respondent chose to focus on the incident. That seems appropriate in a disciplinary proceeding and certainly does not evidence bias.

The only oddities in this record are respondent's decision not to decide K. G.'s case and its failure to make any decision with respect to Y. J. While it is unlikely that a record of suspension would follow K. G. to Virginia (see, N.J.A.C. 6:3-2.5(c)9),

OAL DKT. NO. EDU 10754-90

respondent has effectively cut off his right to clear his name. As the nature of all subsequent inquiries is to assess whether respondent has acted reasonably, no review of the facts and circumstances of K. G.'s case is now possible. The matter is in limbo, and with the passage of time, it will become increasingly difficult to reach a resolution. As to Y. J., he appeared with counsel at the hearing before respondent, he testified and was questioned about his involvement, and he seeks a decision. He seems to have been treated as a party. The mere fact that the proceeding was denominated an expulsion hearing does not alter these overriding considerations. As with K. G., no review is possible without respondent's determination. As a practical matter, there is no other forum in which Y. J. can vindicate himself, the record is already there, and reason requires that it be used.

Based on the foregoing, it is my conclusion that respondent's actions are fully supported by the record and except with respect to K. G. and Y. J., are **AFFIRMED**. With respect to K. G. and Y. J., the matter is remanded for a decision.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

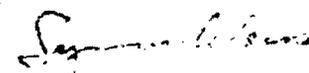
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8/21/91
Date


SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

8/22/91
Date


DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 28 1991
Date


OFFICE OF ADMINISTRATIVE LAW

tp

OAL DKT. NO. EDU 10754-90

WITNESSES

On behalf of petitioners:
(In the OAL)

S. J., mother of Y. J.
V. J., mother of L. J.
M. G., mother of K. G.
M. W., mother of L. W.
S. W., mother of B. W.
Larisha Watson
Willard L. Perkins

On behalf of respondent:
(In the OAL)

Joseph Provenzano
Dr. William Kupersmith
Dr. Norman J. Field

EXHIBITS

Jointly submitted:

- J-1 Charges dated October 4, 1990
- J-2 Letters of suspension dated September 27, 1990
- J-3 Depiction of Monmouth Regional High School
- J-5 Memorandum of Dr. Kupersmith and Mr. Provenzano to Mr. Barger dated October 2, 1990

M.G., on behalf of her minor :
child, K.G. ET AL., :
 :
 PETITIONERS, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 BOARD OF EDUCATION OF THE :
 MONMOUTH REGIONAL HIGH SCHOOL : DECISION
 DISTRICT, MONMOUTH COUNTY, :
 :
 RESPONDENT. :
 _____ :

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

Petitioners except to the whole of the initial decision and rely upon the Statement of Facts and Legal Arguments raised in their trial brief in objecting to the findings of fact and conclusions of law of the Office of Administrative Law. More specifically, petitioners contend the ALJ did not comment upon or explain inconsistencies in the testimony of those students who testified on behalf of the Board, which inconsistencies they find fatal and render said witnesses incredible. Petitioners' exceptions stress that the testimony they and their witnesses advanced must be held to be more credible than the inconsistent and unbelievable testimony of the various student witnesses testifying for the Board.

Further, petitioners claim that in addition to offering incredible witnesses, other witnesses for the Board, such as D.L., tendered testimony that was inconsistent with facts presented by

other Board witnesses. As an example, petitioners refer to the testimony of D.L. as being inconsistent with that of other members of the field hockey team who testified that because of the distance between the bus and the fight participants, coupled with the fact that there were many students between the bus and the fight participants, they could not see who was fighting. Petitioners also offer D.L.'s testimony as inconsistent with facts alleged by other Board witnesses such as B.D., the victim. Petitioners suggest D.L. contradicted B.D.'s statement that he was never knocked to the ground. Petitioners also find D.L.'s testimony regarding an unrelated incident involving B.W. and L.J. during the week following September 21, 1990 to be a fabrication. Petitioners note that these inconsistencies were not discussed by the ALJ and that such silence constitutes an abuse of discretion in reviewing and weighing all of the evidence in the matter.

Petitioners also assert that the initial suspensions were not in accordance with due process, for which they again rely upon the arguments in their brief.

Further, petitioners allege the ALJ's decision to remand the issues regarding K.G. and Y.J. was in error, maintaining that they had "clear and cognizable injuries by way of their short term suspension that required a hearing as held by the Respondent Board of Education." (Exceptions, at p. 3) Petitioners advance the argument that the record made before the Board was sufficient enough to support a decision in favor of said students and that remand is therefore not necessary.

Last, petitioners reassert their argument that the Board's decision was tainted by the statements made by one of its members to the Board's attorney indicating that the Board member had pre-judged the guilt of the student petitioners. For that reason alone, as elaborated upon in their post-hearing brief, petitioners contend that the Board's decision should be overturned.

Petitioners request that the initial decision be overturned. They seek a setting aside of the student petitioners' removal from Monmouth Regional High School, the return of any and all student petitioners' names to the school register, and the restoration of all privileges and rights lost by said pupils, as well as expungement of the complaints made against them.

The Board's exceptions object to that portion of the initial decision rendered by ALJ Metzger which determined that the matter should be remanded for decisions as to K.G. and Y.J. The Board states that K.G. is not a student at Monmouth Regional and was not a student during the hearings regarding the altercation at issue in this case. Thus, the Board finds it inappropriate to render a decision as to him. It finds there is no reason to "clear the record" (Board's Exceptions, at p. 1) for one who is no longer attached to the school. It claims his records have been forwarded to Virginia, as requested by his family.

The Board also submits that a decision as to Y.J. is inappropriate, in that the 10-day suspension meted Y.J. was an administrative one, which issue is not appealable to the Board of Education. The Board suggests that if petitioners question the administration's action against Y.J., they should file a petition with the Commissioner of Education. It claims it does not rule on suspensions and does not accept appeals of such administrative

action and, thus, the issue of Y.J.'s status is not a matter for intervention by the Board.

Upon careful and independent review of the record of this matter, the Commissioner adopts the initial decision with the following clarifications.

First, clarification is necessary as to what was earlier decided by the Commissioner in this case. Petitioners reassert their claim in exceptions regarding due process. The Commissioner disposed of such issue in his Decision on Motion of October 29, 1990. See pages 16-21. See also initial decision at pp. 7-8. Accordingly, said determinations render the matter concerning due process in this matter res judicata and, thus, may not be reheard in this forum.

Moreover, the issue of K.G.'s status in this case has been discussed in the second Decision on Motion issued by the Commissioner on March 1, 1991. Therein the Commissioner determined that petitioners failed to meet the standards enunciated under Crowe v. DeGioia, 90 N.J. 126 (1982), finding that petitioners failed to demonstrate irreparable harm and also a likelihood of prevailing on the merits of either a violation of their due process rights or the merits of whether the actions taken by the Board against them were arbitrary, capricious or unreasonable. Following the directive of the Commissioner from the Decision on Motion of March 1, 1991, the ALJ heard testimony from K.G. at the plenary hearing on the question of his alleged participation in the events of September 21, 1990. However, it was not determined on the record before the ALJ whether K.G.'s permanent record, which followed him at the time of his departure from the district to Virginia, mentioned the September 21, 1990 events or of penalties that may have been

assessed against him resulting from said episode. It is the Commissioner's judgment that a determination clarifying whether said permanent record included any such information must be made before a remand for a hearing of any kind need be held. K.G. has no right to "clear his name," per se. If, however, his permanent record mentions a penalty pertaining to the events of September 21, 1990, then and only then, may he be afforded an opportunity before the Board to seek expungement of the record based on an argument that the said Board actions were arbitrary, capricious or unreasonable. N.J.A.C. 6:3-2.7(b) In the absence of any reference to these events on his permanent record, K.G. is hereby found to be without recourse before the New Jersey Commissioner of Education in that he is no longer subject to the Commissioner's jurisdiction, he having left the state, and also because he fails to advance a cause of action for which the Commissioner may grant relief at this time.

As to Y.J.'s status, he, too, is entitled to an appearance before the Board to determine whether his penalty was arbitrary only if his permanent record reflects a penalty was assessed against him as a result of his involvement in the events of September 21, 1990. However, if the Board's policy is such that the record of penalties for infractions of school rules is purged as a matter of course upon the elapsing of a specified period of time, Y.J., like K.G., has no recourse before the Board.

As to the merits of this case, in reviewing the record herein, the Commissioner is guided by the court's direction in assessing credibility. In Parker v. Dornbierer, 140 N.J. Super. 185, (1976) the Appellate Court held:

We are mindful that the standard of judicial review of factual determination made by an administrative agency is rather narrow, i.e., whether the findings could reasonably have been reached on sufficient credible evidence present in the record considering the proofs as a whole and with due regard to the opportunity of the one who heard the witnesses to judge their credibility. (Citation omitted) (emphasis in text) (at 188)

Moreover, in matters pertaining to board actions, the Commissioner's review is also limited. The Commissioner has previously said in Boult and Harris v. Board of Education of the City of Passaic, 1939-49 S.L.D. 7 (1946), aff'd State Board of Education 15, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd 136 N.J.L. 521 (E.&A. 1948):

*** it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards.*** (at 13)

The Commissioner notes that those arguments raised in petitioners' exceptions bring no new evidence to bear in this matter. Rather, petitioners rely on the post-hearing submission presented for the ALJ's consideration as proof of their position. Neither do petitioners advance any new issues but, instead, would have the Commissioner arrive at different conclusions from those of the ALJ regarding the matters presented at hearing. The Commissioner notes that in challenging the credibility determinations of an administrative law judge, petitioner bears the burden of presenting transcript citations relevant to the exceptions filed so that the Commissioner might assess the judge's findings. The

transcript citations cited in the post-hearing submission petitioners proffer with their exceptions are not of the hearing conducted by the Office of Administrative Law but, rather, are transcripts of the special hearings of the Monmouth Regional High School Board of Education Assault and Expulsion Hearings conducted on October 29, 1990, November 2, 1990 and November 5, 1990. Such citations are of no help to the Commissioner in deciding whether the credibility determinations arrived at by the Administrative Law Judge were sound. See In re Morrison, 216 N.J. Super. 143 (App. Div. 1987). Having reviewed the record before him, the Commissioner agrees with those findings of fact and conclusions of law of the Office of Administrative Law below which were predicated upon his credibility determinations in the absence of the transcripts of the Administrative Law Hearing.

Based on such conclusions, the Commissioner finds and determines that the Board's actions are fully supported as found by the ALJ below and are thus adopted for the reasons expressed in the initial decision of the Office of Administrative Law as clarified herein. The matter is remanded to the Board for disposition consonant with N.J.A.C. 6:3-2.7(b) if K.G.'s and Y.J.'s permanent records memorialize the disciplinary actions disputed herein.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

OCTOBER 4, 1991

DATE OF MAILING - OCTOBER 4, 1991
Pending State Board



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3239-90

AGENCY DKT. NO. 64-3/90

BOARD OF EDUCATION OF
THE TOWNSHIP OF MAURICE RIVER,
CUMBERLAND COUNTY,
BOARD OF EDUCATION OF THE
TOWNSHIP OF COMMERCIAL,
CUMBERLAND COUNTY,
BOARD OF EDUCATION OF THE TOWNSHIP
OF WOODBINE, CAPE MAY COUNTY

Petitioner,

v.

BOARD OF EDUCATION OF THE
CITY OF MILLVILLE, CUMBERLAND
COUNTY

Respondent.

Frank DiDomenico, Esquire, for the petitioner (Milstead, Gruccio & Hall, attorneys)
Marvin M. Wodlinger, Esquire, for the respondent

RECORD CLOSED: DECEMBER 4, 1990 DECIDED: JANUARY 16, 1991

BEFORE: LILLARD E. LAW, ALJ

New Jersey Is An Equal Opportunity Employer

**STATEMENT OF THE CASE
AND PROCEDURAL HISTORY**

Petitioners - Boards of Education have entered into a sending-receiving relationship with respondent Millville Board of Education (Millville). The petitioners sending districts challenge the receiving districts's (Millville) calculation of tuition rates for its Local Area Vocational School District (LAVSD) pupils attending the Millville School. Petitioners also allege that Millville denies sending pupils access to the Cumberland County Vocational-Technical (VO-Tech) School.

This matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) on April 27, 1990. A telephone prehearing conference was conducted on June 28, 1990. The hearing was held on November 29, 1990, at The City of Vineland City Hall Chambers. The hearing record closed on December 4, 1990 with the receipt of the last document submitted by respondent.

ISSUES

The issues to be resolved by this tribunal, as revised and refined at the hearing, are these:

1. What is the proper formula for calculating the tuition rate for sending pupils enrolled in the receiving school district's regular high school program? Its LAVSD program?
2. Are sending school district pupils enrolled in the receiving school district's LAVSD program (three periods of a seven period day) considered part-time regular high school pupils and part-time LAV pupils rather than full-time LAV pupils?
 - a. If so, what is the proper formula to calculate the pupil tuition rates?
3. Is it permissible for the receiving school district to deny sending school pupils access to the County Vo-Tech school when access to the County Vo-Tech school is afforded receiving school district pupils?
 - a. If it is impermissible for the receiving school district to deny access to receiving school district pupils, what formula is to be used to calculate the proper tuition rate to charge the sending school district?

FINDINGS OF FACT

Based upon the pleadings, documents offered into evidence and testimony proffered at the hearing, I **FIND** the following **FACTS** in this case:

Petitioners, Maurice River Township Board of Education, Commercial Township Board of Education and Woodbine Board of Education are sending districts currently engaged in a sending-receiving relationship with respondent, Millville Board of Education. Millville has been designated as a Local Area Vocational School District (LAVSD) pursuant to N.J.A.C. 6:46-2.1 et seq. Petitioners, Maurice River, Commercial and respondent, Millville are located within Cumberland County. Petitioner, Woodbine, is located within Cape May County. Cumberland County also operates the Cumberland County Vocational-Technical School (Vo-Tech). The parties receive Categorical Program Support (categorical aid), including LASVD aid, pursuant to N.J.S.A. 18A:7A-20.

Pursuant to applicable regulations, the parties entered into written agreements setting forth tentative tuition charges as calculated by Millville, based upon actual cost per pupil and the results of an audit conducted by the New Jersey State Department of Education. However, Millville now requests that in addition to these tuition charges, all categorical aid LAVSD moneys received by the petitioners be paid over to Millville. Petitioners differ on this issue, contending that no additional LAVSD moneys are owed to the respondent.

The tentative tuition rates as prepared by Millville reflect a different LAVSD tuition rate per pupil for each of the sending districts. Petitioners contend that the tuition rates should be uniform for all petitioners and should reflect actual pupil attendance in the high school and LAVSD programs. Thus, petitioners contend that the proper formula for calculating the tuition rate for their pupils is one-half of the audited LASVD rate plus one-half of the audited high school rate.

Millville admits that it bars students from attending Cumberland County Vo-Tech and diverts those students into its own LAVSD program. Petitioners argue that this practice should be held to be invalid and that students be given access to the program of their choice.

DISCUSSION

I. **Method of determining tuition rates for sending pupils enrolled in the receiving school district's (a) regular high school and (b) its LAVSD program.**

N.J.S.A. 18A:38-19 (tuition of pupils attending schools in another district), which authorizes a receiving board of education to determine the tuition rate to be paid by the board of education of the sending district, reads as follows:

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

The State Board of Education has provided a detailed method for annually determining the actual costs per pupil enrolled in high school, junior high school, elementary school and special education classes. **N.J.A.C. 6:20-3.1** provides, in pertinent part, as follows:

Method of determining tuition rates

- (a) The term "actual cost per pupil" for determining the tuition rate or rates for a given year referred to in N.J.S.A. 18A:38-19 shall mean the cost per pupil in average daily enrollment, based upon audited expenditures for that year for the purpose for which the tuition rate is being determined that is, four year high school, senior high school, junior high school, elementary school, and special education classes.
1. All expenditures for each purpose except Federal and State special project expenditures shall be included, regardless of the sources of revenue.
 2. "Average daily enrollment" for the purpose of determining the "actual cost per pupil," shall be the sum of the days present and absent of all pupils enrolled in the register or registers of the program for which the rate is being determined during the year divided by the number of days school was actually in session.
- (b) The Commissioner shall certify the "actual cost per pupil" for each tuition category for a given year for each receiving district board of education based upon either:

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1. An optional report submitted annually by the receiving district board of education indicating the actual amounts expended for each applicable item in the program for which the tuition rate is

required, according to the prescribed bookkeeping and accounting system; or
2. A report prepared annually by the Commissioner for each receiving district board of education in accordance with (d) below.
- (c) Once having determined to submit the optional report annually to the Commissioner pursuant to (b)1 above a receiving district may not have the Commissioner certify the 'actual cost per pupil' pursuant to (b) 2 above without the approval of the Commissioner. A receiving district requesting a change from the optional report must submit a written request to the Commissioner. The request must indicate the reason (s) for the change.
- (d) The share of each item of expenditure for each program shall be determined on a pro rata basis in accordance with the following ratios: (not recited here).

The regulations permit a sending board and receiving board to agree to a tentative tuition rate based upon the estimated cost per pupil for the ensuing school year, as reflected in the proposed annual school budget of the receiving a school district. N.J.A.C. 6:20-3.1 (e) provides for:

A tentative tuition charge shall be established for budgetary purposes by written contractual agreement between the receiving district board of education and the sending district board of education, and such tentative charge shall equal an amount not in excess of the receiving district's estimated cost per pupil for the ensuing school year for the purpose or purposes for which tuition is being charged, multiplied by the estimated average daily enrollment of pupils expected to be received during the ensuing school year. Such written contract shall be on a form prepared by the commissioner.

When a tentative tuition rate is utilized, provision is further made by the rule for either adjustment payments by the sending board or reimbursement payments by the receiving board in instances of underpayment or excess charges. N.J.A.C. 6:20-3.1(e) 3, 4.

A review of the rule making history of N.J.A.C. 6:20-3.1 et seq. indicates that the purpose of the actual cost per pupil formula is to provide a uniform process for administering tuition contracts. 17 N.J.R. 145. The social impact statement accompanying the proposed re adoption of the rules emphasizes this need:

The social impact of this subchapter will be intense if these rules are not readopted. The entire tuition system for public schools would become inconsistent and chaos would result, since the district boards of education would have a definition of the "actual cost per pupil" for tuition purposes and there would be no uniform process for administering tuition contracts ... there is an even greater need to regulate this system to insure fiscal equity for all district boards of education. Id.

N.J.S.A. 18A:54-1 et seq. governs district, regional and county vocational schools. N.J.S.A. 18A:54-23, which governs receiving pupils from other districts by county vocational school districts, mandates that boards of education in counties within certain population limits receive pupils from without the county at tuition rate not to exceed the cost of such education:

The boards of education of schools established under the provisions of section 18A:42-12 in any county of the third class with a population not less than 65,000 nor more than 85,000 according to the latest federal decennial census, and the boards of education of schools established under the provisions of section 18A:54-13, shall receive pupils from districts without the county so far as their facilities will permit, provided a rate of tuition not exceeding the cost of such education as prescribed by rule of the commissioner, approved by the State Board, is paid by the sending districts. 1

It is noteworthy that while this provision does not explain further the method of calculating tuition costs, neither does it explicitly exclude the actual costs per pupil formula contained in N.J.S.A. 18A:38-19 and more fully defined in N.J.A.C. 6:20-3.1 et seq.

N.J.S.A. 18A:54-23 also prescribes the tuition rate to be paid by other school districts within the county whose pupils attend the schools of the county vocational school district:

The board of education of any county vocational school district referred to in section 18A:54-11.1 and the board of education of any other school district within the county thereof are each hereby authorized and empowered to undertake and to enter into agreements with respect to the attendance at schools of the county vocational school district, of residents or pupils of such other school districts who are students attending the schools of the county vocational school district and as to the payments to be made or the rate of tuition to be charged on account of such students. The payment or rate of tuition per student shall be 50% of the pro rata annual cost of the operation and maintenance of the county vocational school district remaining after deduction from such cost of all amounts of aid received by the county vocational school district or the county thereof on account of such district or credited thereto from the State of New Jersey or the United States of America or agencies thereof, but excluding from such cost any amounts on account of required payments of interest on or principal of bonds or notes of the county issued for the purposes of such district. The annual aggregate amount of all such payments or tuition may be anticipated by the board of education of the county vocational school district and by the governing body of the county with respect to the annual budget of the county vocational school district. The amounts of all annual payments or tuition to be paid by any such other school

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district shall be raised in each year in the annual budget of such other school district and paid to the county vocational school districts. 2

Thus, it appears that N.J.S.A. 18A:54-23 requires a deduction from the tuition rate to be charged to sending districts within the county of all state aid received by the county vocational school district or the county on account of such district.

II. Part-time and full-time provisions; calculation of tuition rates

The terms "full-time" and "part-time" are not defined in the statute or administrative code provisions, nor is there case law addressing the issue. The pertinent statutory and administrative code provisions have been set forth in the preceding discussion.

As to whether the pupils from the sending school districts are "full-time" or "part-time" pupils in the LAV programs, it is instructive to review the criteria for Millville's eligibility as LAVSD. Pursuant to N.J.A.C. 6:46-2.3 (a) in order for Millville to qualify as a LAVSD it must, among other things, comply with the following requirements:

1. Demonstrate the need for the courses/programs by citing current data sources (within the last two years) such as: employment, labor market or pupil placement statistics, the county plan, community or local program assessment or other applicable research.
2. Operate a minimum of two approved secondary vocational education programs in at least three of the following five broad occupational areas: agriculture/agribusiness education, health occupations education, home economics and consumer education, marketing education and technical education.
3. Operate a minimum of five approved secondary vocational education programs in trade and industrial education.
4. Operate business education.
5. Provide, as part of the programs required in (a) 2, 3 and 4 above, cooperative vocational education in every broad occupational area offered in (a) 2, 3 and 4 above, except technical education.
6. Provide a full-time director of vocational education.
7. Provide a full-time job placement coordinator or the equivalent.
8. Operate the appropriate vocational student organization for every broad occupational area offered in (a) 2, 3 and 4 above.
9. Provide appropriate opportunities for the enrollment of handicapped, disadvantaged and limited-English proficient pupils in addition to regularly enrolled students.
10. Operate an advisory committee for every broad occupational area offered in (a) 2, 3 and 4 above.

It is therefore clear that any pupil enrolled in the LAV program is considered to be full-time for the program in which he/she is participating. Notwithstanding that the pupil is enrolled in regular high school academic courses of study; i.e., English

American history, mathematics, physical education, among others, he/she is considered to be a full-time LAV pupil.

Pursuant to N.J.A.C. 6:46-2.1, Millville is designated as an approved LAVSD and qualifies for State categorical aid as follows:

- (a) To qualify for State categorical aid for approved local vocational education under N.J.S.A. 18A:7A-1 et. seq., a school district must have State Board of Education designation as a local area vocational school district.
- (b) Only districts that have met the conditions outlined in this chapter and are designated as local area vocational school districts may report full-time equivalent pupil enrollments on the Application for State School Aid for vocational categorical aid purposes. Business education pupils may be enrolled in a sequence of courses that total a minimum of 600 minutes per week in one academic year to be counted for vocational categorical aid.
- (c) Except as otherwise provided by law, participation in approved local area vocational school district programs shall be limited to pupils residing within the boundaries of the designated district. (Emphasis supplied.)

In accordance with the regulations, those pupils enrolled in the LAV program are full-time pupils in the designated course of study.

In summary, tuition rates for high school students are not to exceed the actual cost per pupil as determined under the method set forth in the corresponding administrative code provisions. N.J.S.A. 18A:38-19; N.J.A.C. 6:20-3.1 et seq. Tuition rates to be paid by sending school districts to the county vocational school district are set forth in N.J.S.A. 18A:54-23 (receiving pupils from other districts).

III. Access to the County Vo-Tech school by sending school pupils; calculation of tuition rates.

N.J.A.C. 6:43:3.11 (access to vocational instruction offered) mandates student access to vocational instruction programs outside their resident districts with certain limitation:

Pupils shall be permitted to enroll in programs of vocational instruction offered by district boards of education other than their resident district so long as the resident district board of education does not offer a comparable type of program and space is available for additional enrollees in the programs offered by the receiving district board of education.

The rule further provides guidelines on access to vocational instruction by

pupils residing in the state as well as by pupils residing in the district served by the district board of education offering such a program:

To the extent that space is available, each type of program of vocational instruction offered by the State Board shall be made available to all pupils residing in the State, and each program of instruction offered by a district board of education shall be made to all pupils residing in the district or community served by the district board of education offering such instruction. (*id.*)

CONCLUSIONS

As the late Administrative Law Judge Eric G. Errickson observed in the matter of Board of Education of the Borough of Somerville v. Board of Education of the Township of Branchburg 1982 S.L.D. 1240, 1247;

When a dispute arises over a matter in which there is a statutory scheme providing for the obligations of the parties, the matter must be decided in accordance with that statutory scheme. The statutory scheme in this instance must be considered to embrace the State Board's rule, N.J.A.C. 6:20-3.1 promulgated pursuant to the Statute, N.J.S.A. 18A:38-19. Both the statute and the rule speak in terms of a tuition rate which N.J.A.C. 6:20-3.1 specifies shall be based on per pupil cost of the receiving district...

In no instance does either the statute or the rule speak of the LAVSD Categorical Aid, received by the petitioner Boards, is to be paid over to Millville. The rule, N.J.A.C. 6:20-3.1 does, moreover, provide Millville, as the receiving district, with a method by which the Commissioner shall certify the "actual cost per pupil" for each tuition category offered by it to sending pupils. In addition, N.J.A.C. 6:46-2.1 provide the standards by which Millville may qualify for LAVSD State categorical aid.

Judge Errickson further observed, in Somerville v. Branchburg that:

It is well settled that when interpreting a statute or an agency rule, the words employed by the promulgating agency are to be given their ordinary and well-understood meaning. In this regard, see Safeways Trails Inc. v. Furman, 41 N.J. 467 (1964); U.S. v. Cheeseborough, 176 F. 778 (D.C. N.J. 1910); State v. Sperry & Hutchinson Co., 23 N.J. 38 (1956) Duke Power Co. v. Patten, 20 N.J. 42 (1955); Lane v. Holderman, 23 N.J. 304 (1957); Harry A. Romeo, Jr. v. Madison Bd. of Ed., 1973 S.L.D. 102. We are not free in such interpretation either to stray from the common meaning of the words employed or to interpret in such fashion as to render superfluous the common meaning of the words employed. *id.* at 1248

I CONCLUDE, therefore, that the Millville Board's proper calculation of the tuition rate for sending pupils enrolled in its regular high school program and its LAVSD program is set forth in N.J.A.C. 6:20-3.1, pursuant to N.J.S.A. 18A:38-19. I

further **CONCLUDE** that any deviation from these rules in the calculation of tuition rates to be improper.

I **CONCLUDE** that, to the extent Millville qualifies for State categorical aid for its LAVSD program under N.J.S.A. 18A:7A-1 et. seq. it shall be in accordance with the standards pursuant to N.J.A.C. 6:46-2.1.

I **FIND** that N.J.A.C. 6:43-3.11 mandates that vocational education programs offered by a district board of education be made available to pupils residing within the district served by the local district board of education as well as pupils residing without the district.

Accordingly, I **CONCLUDE** that Millville's practice of barring sending pupils from attending Cumberland County Vo-Tech School provide such programs to its sending pupils, within the meaning and intent of the rule. N.J.A.C. 6:43-3.11.

ORDER

Accordingly, it is hereby **ORDERED** that the Board of Education of the City of Millville comply with the existing statutes and State Board of Education rules in calculating the tuition rates for the pupils from the sending districts enrolled in its regular high school programs and its LAV programs. It is further **ORDERED** that the Millville Board of Education make available to the sending pupils, educational opportunities at the Cumberland County Vo-Tech School which are not presently provided by the Millville LAV program, in accordance with N.J.A.C. 6:43-11.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN**

500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

ENDNOTES

1. **N.J.S.A. 18A:54-12** provides a procedure for establishment of vocational schools by the board of chosen freeholders on recommendation of the state board. **N.J.S.A. 18A:54-13** provides a procedure for establishment of such schools by election on request of voters in any county having a population not exceeding 100,000 inhabitants.
2. **N.J.S.A. 18A:54-11** provides the procedure by which a county vocational school district, having a population of not less than 375,000 nor more than 425,000, is to include certain cities within the school district boundaries

16 January 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

Jan. 18, 1991
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 28 1991
Date

Jayne L. Vaccaro
OFFICE OF ADMINISTRATIVE LAW

lmh

DOCUMENTS IN EVIDENCE

PETITIONERS

- P-1 State of New Jersey, Department of Education 1987-88 Per Pupil Costs
- P-2 Memorandum To: All Sending Districts; From: William Puzak; Re: LAVS Credits
- P-3 Letter, January 18, 1990 Re: Enrollments, Sending Districts
- P-4 Letter, February 21, 1990, to Barry Ballard from Stephen A. Kalapos
- P-5 Contract Information 1983-84 - 1989-90
- P-6 Tuition Contract Agreement
- P-7 Tuition Contract Agreement
- P-8 Letter, December 21, 1989
- P-9 Maurice River Township 1987-88 School Year (with attachments)
- P-10 Maurice River Township 1986-87 School Year (with attachments)
- P-11 Commercial Township 1987-88 School Year
- P-12 Letter, February 26, 1990
- P-13 Commercial Township 1986-87 School Year
- P-14 Tuition Contract Agreement
- P-15 Tuition Contract Agreement
- P-16 Tuition Contract Agreement
- P-17 Letter, August 21, 1989 (with attachments)
- P-18 Woodbine Board of Education 1987-88 School Year (with attachments)
- P-19 Tuition Contract Agreement
- P-20 Tuition Contract Agreement
- P-21 Tuition Contract Agreement
- P-22 Letter, February 21, 1990
- P-23 1986-87 Costs Per Pupil
- P-24 Letter, December 21, 1989 (with attachments)
- P-25 Tuition from Sending Districts 1990-91

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- P-26 Costs per pupil - Regular Grade Plans For the Year ending June 30, 1987
- P-27 Tuition Calculations as per MRT'S Formula (with attachments)
- P-28 1985-86 School Year - Commerical (with attachments)
- P-29 Woodbine Board of Education 85/86 (with attachments)
- P-30 Letter, December 5, 1989
- P-31 Millville High School Course Description Booklet 1990-91

RESPONDENT

- R-1 Data on Millville High School
- R-2 Respondent's counter petition
- R-3 Opinion of attorney general on LAV categorical aid
- R-4 N.J.S.A. 18A:38-13 (change of designation of receiving districts)
- R-5 Portion of NJSBA monograph on state school aid system
- R-6 N.J.S.A. 18A:7A-20 (additional cost factors and payment of categorical aid)
- R-7 N.J.S.A. 18A:38-19 (receiving district determines ACPP)
- R-8 N.J.A.C. 6:20-3.1 (method of determining tuition rates)
- R-9 N.J.A.C. 6:24-1.18 (awarding of interest)
- R10 Calculation of ACPP for 1986-87
- R11 Calculation of ACPP for 1987-88

WITNESSES

FOR PETITIONER:

Albert Monillas
Ann Timmons
Theresa Mold
William Puzak

FOR RESPONDENT:

G. Larry Miller
Kenneth Yeutter

OAL DKT. NO. EDU 3239-90

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF COMMERCIAL, CUMBERLAND COUNTY, BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBINE, CAPE MAY COUNTY, :

PETITIONERS, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF MILLVILLE, CUMBERLAND COUNTY, : DECISION

RESPONDENT. :

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

Petitioners except to the ALJ's decision as to Issue No. 1, "What is the proper formula for calculating the tuition rate for sending pupils enrolled in receiving school districts regular high school program? its LAVSD program?" Petitioners do not object to the ALJ's conclusion that deviation from N.J.A.C. 6:20-3.1 pursuant to N.J.S.A. 18A:38-19 is improper but, rather, to the application the ALJ made of that finding in a telephone conference call made by both counsel to clarify the ALJ's written opinion. Petitioners aver that during said conference call:

***Judge Law indicated that a student from the sending district who attended Millville High School for one half of the day and the Cumberland County Vo-Tech for the other half of the day should be charged a tuition rate equal to that of a full-time high school student based upon the State audited figures. Additionally, Judge Law indicated that a student from the sending districts who attended Millville High School for one half of the day and attended the Millville LAVSD program for the second half of the day should be charged a tuition rate equal to a combination of the State audited figure for a full-time high school student, plus the State audited figure for local vocational. As an example, during the telephone conference call, reference was made to Respondent's Exhibit No. 10, which is the 1986-87 cost per pupil as certified by the Division of Finance, Department of Education. A copy of that Exhibit is attached to this letter. The 1986-87 actual cost per pupil as certified by the Division of Finance indicates that a four year high school student in Millville should be charged a tuition rate of \$3,286.00. The same audited figures indicate that a full-time local vocational student should be charged a tuition rate of \$2,519.00. During the conference call with Judge Law, the Judge indicated that his understanding was that the local vocational tuition figure is an "add-on" to the four year high school tuition rate. Therefore, the 1986-87 tuition for a sending district student enrolled one half the day in the Millville High School and one half the day in the local vocational program would be \$5,805.00.
(Petitioners' Exceptions, at p. 2)

Petitioners suggest that the ALJ appeared to rely on N.J.S.A. 18A:7A-20, the statute dealing with categorical program support, which indicates an approved local vocational additional cost factor of .28 (formerly .53). However, in petitioners' view, the categorical aid provision has no bearing on the instant tuition calculations.

Petitioners further argue that testimony at hearing supported the fact that sending district students attending the

County Vo-Tech attend that program for one-half day while attending Millville High School for one-half day. They further contend that previously Millville had charged the sending districts a tuition rate for those students equal to one half of the audited high school rate and that said rate was the proper formula. They further aver that permitting Millville to charge a tuition rate equal to a full-time high school student for these pupils is not directed by statute and code and provides a windfall for Millville.

Further, petitioners submit that testimony at the hearing also indicated that the LAV students attend the Millville High School for approximately one-half day while attending the Millville LAV Program for the remaining half day, and that such condition is undisputed. They argue that Judge Law's directive that such students be charged a tuition rate equal to the four-year high school rate, plus the local vocational "rate" results in a tuition rate not found in N.J.A.C. 6:20-3.1, nor in N.J.S.A. 18A:38-19. To permit such a directive to stand would result in the sending districts paying double tuition for the LAV students, which is both improper and without basis in law, petitioners submit.

Petitioners further suggest that the rates charged for LAV students for the 1985-86 school year reflected the proper formula for such students, which was tuition equal to one half of the state audited high school rate, plus one half of the State audited local vocational rate. Petitioners further suggest that the Board auditor indicated that Millville charges one half of the audited elementary rate for Kindergarten students who attend school on a half-day basis. Carrying the same tuition calculation further, it makes

sense, in petitioners' view, that students attending the high school or the LAV program for one half of the day should be charged at one half of the State audited rate and not a combination thereof. Petitioners seek the relief specified as noted in their exceptions.

Like petitioners' counsel, Millville's counsel also notes in exceptions the clarification of the initial decision made by way of conference call on January 31, 1991. Millville's version of ALJ Law's clarification comports with petitioners. Millville summarized the discussion as follows:

After they received the judge's decision, the solicitor for Millville and the solicitor for the sending districts disagreed on its meaning. On January 31, they had a conference call with Judge Law, who indicated as follows:

(a) As to pupils from the sending districts who go part time to the VoTech ("half time LAV's"), Millville is to charge the full four year high school rate certified by the commissioner. (For 86-87 that number is \$3,286; R10, second page.)

(b) As to pupils from the sending districts who are enrolled in Millville's LAV program ("full time LAV's"), Millville is to charge the full four year high school rate certified by the commissioner plus the local vocational "add-on" (using Judge Law's words) certified by the commissioner. (For 86-87 those numbers are \$3,286 plus \$2,519 (total \$5,805); *ibid.*)
(Millville's Exceptions, at pp. 3-4)

Millville concurs with the ALJ's recitation of the laws and regulations pertinent to tuition charges. Citing N.J.S.A. 18A:38-19 as providing the formula for determining tuition rates based on "...actual cost per pupil as determined under rules prescribed by the commissioner..." (*id.*, at p. 4 citing N.J.S.A. 18A:38-19), Millville suggests that "'Cost' obviously implies cost accounting" and that "there are a myriad of acceptable ways to determine

'cost'." (Id.) Its exceptions then launch into a discussions of the variables that affect cost. In conducting such recitation, Millville avers that:

If each receiving district and each sending district were left to come up with a formula for determining "actual cost per pupil," considering the variables in their particular relationship, then "the entire tuition system for public schools would become inconsistent and chaos would result..." (Id., at p. 6)

Millville agrees with Judge Law that the purpose of N.J.A.C. 6:20-3.1 "is to provide a uniform process for administering tuition contracts." (Id.) Millville further concurs with the ALJ that certified costs should be used in making the adjustments required by the code in assessing pupil tuition costs.

Millville disagrees, however, with petitioners' contention concerning "half time LAV" students and, instead, agrees with the ALJ's conclusion that the "statutory scheme" (id., at p. 7) requires that full high school tuition be paid for those sending district pupils who go part time to the VoTech. Millville avers there is nothing in the statutory scheme that provides that only half tuition should be paid by the sending districts for such half-time LAV's, as petitioners would have it. The Board submits that the cost to the receiving district for such a pupil is the same or nearly the same as for one who is in Millville all day. It claims when a pupil goes to the VoTech, this causes Millville to have additional administrative costs as well. Moreover, the most that could be saved by having a pupil away a half day would be one-half teacher cost, which was neither alleged nor proved by petitioners, and furthermore, massive numbers of pupils would have to be going to the

VoTech before any such savings could be realized in Millville's view. Last, Millville claims that even if a separate category were carved out for half-time pupils, it would avail the sending districts nothing. To the extent they paid less for half-time pupils, they would have to pay more for regular pupils, Millville submits.

As to full-time LAV's, Millville first remarks that there is no question that LAV pupils are more expensive to educate than regular pupils and that the statutory scheme provides for this, citing N.J.S.A. 18A:7A-20.

Millville seeks to rebut petitioners' argument that the correct tuition rate is one half LAV rate plus one half regular academic rate by again stating there is nothing in the statutory scheme providing for such a formula. It adds that such a formula would result in petitioners paying less for full-time LAV's than for regular high school pupils coupled with the additional categorical aid they would be entitled to receive for their LAV pupils.

Moreover, Millville maintains that it has a right to require sending district pupils to attend Millville's high school full time, and it relies on N.J.S.A. 18A:38-13 for this assertion. Said statute provides that "no allocation ... of pupils ... shall be changed ... except upon application made to and approved by the commissioner." (Id., at p. 9) It claims a feasibility study considering the financial implications for the receiving district must first be completed, according to said statute. It bolsters its contention in this regard by citing Frigiola v. State Bd. of Ed., 25 N.J. Super. 75, 81 (App. div. 1953) for the proposition that a

process provided for by statute cannot be changed by an administrative regulation. Thus, Millville submits, N.J.A.C. 6:43-3.11 should not be interpreted to mean that sending districts may send their pupils to the VoTech before complying with N.J.S.A. 18A:38-13.

Millville summarizes its exceptions by stating that it was very concerned about sending district pupils going to the VoTech when it was erroneously charging half tuition for those pupils. It claims that such action was financially ruinous to Millville. It states that if the ALJ's decision is upheld and full tuition is charged for these pupils, it is anticipated that Millville will voluntarily agree that the sending districts may send as many pupils to the VoTech as they wish.

Upon his careful and independent review of the record of this matter, the Commissioner accepts in part and rejects in part the determination of the Office of Administrative Law in this matter. Initially, however, the Commissioner reluctantly accepts the parties' assertions as to the ALJ's telephonic findings of January 31, 1991 as addenda to the initial decision. In so doing, he notes that while the incompleteness of the initial decision might in other circumstances require a remand, the record before the Commissioner made in reliance upon the apparent accord of the parties as to the ALJ's additional findings of January 31, 1991 provides sufficient information for disposition to be made without a remand. Because Millville's counsel tersely summarized the discussion among counsel and the ALJ over the telephone on January 31, 1991 the Commissioner officially notes without approval

at this point Millville's version of the ALJ's conclusions concerning how tuition should have been assessed in this case, as recited ante.

Although the Commissioner agrees with the ALJ that the law governing tuition charges is embodied at N.J.S.A. 18A:38-19 and N.J.A.C. 6:20-3.1 and, further, agrees with the ALJ's directive that Millville "***comply with the existing statutes and State Board of Education rules in calculating the tuition rates for the pupils from the sending districts enrolled in its regular high school program and its LAV programs***" (initial decision, at p. 10), he does not agree that the mere recitation of the statutes and regulations is adequate to assist the parties in applying the appropriate formulas for arriving at tuition rate for the three types of students herein. Nor does he agree with the ALJ's application of said statutes and regulations in assessing said rates, as elaborated upon in his conference call of January 31, 1991 and incorporated herein as part of this record.

According to the terms of the sending-receiving relationship established among petitioners and Millville, three types of students attend Millville High School from petitioners' districts: 1) full-time academic students; 2) pupils who attend Millville High School for academics for some number of periods less than full time while attending Millville's LAVSD for the remaining number of periods to fill full schedule of classes (whom Millville dubs "full time LAV's"); and 3) those pupils who attend Millville High School for academic studies for less than a full-time load while attending the County Vocational-Technical High School for the

remainder of a full schedule of classes (whom Millville erroneously dubs "half time LAV's"). The Commissioner notes that such students are in fact part-time academic students at Millville High School and part-time attendees at the County VoTech School. It is with the latter two categories of students that the Commissioner's conclusions about the assessment of tuition differ from the ALJ's.

Pursuant to the directives of N.J.S.A. 18A:38-19, "Tuition of pupils attending schools in another district," the State Board of Education promulgated regulations for attendance and pupil accounting at N.J.A.C. 6:20-1.1 et seq. Therein, at N.J.A.C. 6:20-1.1(a), (b) and (c) it is stated:

6:20-1.1 School register

(a) The Commissioner shall prepare and distribute a school register which shall be known as the New Jersey School Register, for recording pupil attendance in all public schools of the State operated by district boards of education, except adult high schools.

(b) Pupil attendance shall be recorded in the school register during school hours on each day the school is in session.

(c) Separate school registers shall be kept for pupils attending a.m. kindergarten, p.m. kindergarten, full-day kindergarten, grades 1 through 6, grades 7 and 8, grades 9 through 12, each pre-school handicapped class, each handicapped class, shared-time classes for regular pupils, shared-time classes for handicapped pupils, full-time bilingual education programs and vocational day programs, and summer schools operated by district boards of education. (emphasis supplied)

Thus, those sending district pupils who are in attendance at Millville High School for a full-day academic program should be recorded as full-time students for academics in the regular school register kept for purposes of computing average daily enrollment,

just as are those resident students of Millville who attend a full-day academic program at Millville High School. However, the other two types of pupils described at issue herein, should be entered into the regular register for only half-time academic programming for the purposes of computing average daily enrollment. Their names must also be recorded in the special school register for part-time vocational day programs as required by N.J.A.C. 6:20-1.1(c). Thus, under either circumstance, for purposes of calculating average daily enrollment, any such pupil attending either Millville's own LAVSD or the County Vocational-Technical High School should receive only a .5 value toward general academic attendance at Millville High School. The other .5 value is to be assessed at the rate established for such LAVSD pupils or at the rate established for a student attending the County Vocational system, depending upon in which program the pupil is enrolled. Thereupon, N.J.A.C. 6:20-1.2(f) and (g) explain how average daily enrollment is calculated as follows:

(f) The average daily enrollment in a school district for a school year shall be the sum of the days present and absent of all enrolled pupils when schools were in session during the year, divided by the number of days schools were actually in session. The average daily enrollment for the classes or schools of a district having varying lengths of terms shall be the sum of the average daily enrollments obtained for the individual classes or schools.

Because Millville High School does enjoy designation as a local area vocational school district not only for its own resident students but, also, for those sending districts herein, the tuition rate used for those students participating in the LAVSD reflects the higher costs of maintaining said program. Therefore, it is

inappropriate for Millville to pass along to the sending district by way of "add-on" to its full audited high school tuition rate the full additional costs of the LAVSD program since LAVSD pupils should be recorded as .5 regular academic students and .5 students for the purposes of calculating average daily enrollment in the LAVSD program. The Commissioner so finds notwithstanding the Board's consideration of such pupils as "full time" LAVSD pupils. See N.J.A.C. 6:20-3.1, which states in pertinent part:

6:20-3.1 Method of determining tuition rates

(a) The term "actual cost per pupil" for determining the tuition rate or rates for a given year referred to in N.J.S.A. 18A:38-19 shall mean the cost per pupil in average daily enrollment, based upon audited expenditures for that year for the purpose for which the tuition rate is being determined that is, four year high school, senior high school, junior high school, elementary school, and special education classes.

1. All expenditures for each purpose except Federal and State special project expenditures shall be included, regardless of the sources of revenue;
2. "Average daily enrollment" for the purpose of determining the "actual cost per pupil," shall be the sum of the days present and absent of all pupils enrolled in the register or registers of the program for which the rate is being determined during the year divided by the number of days school was actually in session.

(b) The Commissioner shall certify the "actual cost per pupil" for each tuition category for a given year for each receiving district board of education based upon either:

1. An optional report submitted annually by the receiving district board of education indicating the actual amounts expended for each applicable item in the program for which the tuition rate is required, according to the prescribed bookkeeping and accounting system; or

2. A report prepared annually by the Commissioner for each receiving district board of education in accordance with (d) below.
- (c) Once having determined to submit the optional report annually to the Commissioner pursuant to (b)1 above a receiving district may not have the Commissioner certify the "actual cost per pupil" pursuant to (b)2 above without the approval of the Commissioner. A receiving district requesting a change from the optional report must submit a written request to the Commissioner. The request must indicate the reason(s) for the change.

The Commissioner concurs with the ALJ's conclusions found at page 9 of the initial decision in this regard wherein he states:

As the late Administrative Law Judge Eric G. Errickson observed in the matter of Board of Education of the Borough of Somerville v. Board of Education of the Township of Branchburg 1982 S.L.D. 1240, 1247;

When a dispute arises over a matter in which there is a statutory scheme providing for the obligations of the parties, the matter must be decided in accordance with that statutory scheme. The statutory scheme in this instance must be considered to embrace the State Board's rule, N.J.A.C. 6:20-3.1 promulgated pursuant to the Statute, N.J.S.A. 18A:38-19. Both the statute and the rule speak in terms of a tuition rate which N.J.A.C. 6:20-3.1 specifies shall be based on per pupil cost of the receiving district...

In no instance does either the statute or the rule speak of the LAVSD Categorical Aid, received by the petitioner Boards, is to be paid over to Millville. The rule, N.J.A.C. 6:20-3.1 does, moreover, provide Millville, as the receiving district, with a method by which the Commissioner shall certify the "actual cost per pupil" for each tuition category offered by it to sending pupils. In addition, N.J.A.C. 6:46-2.1 provide the standards by which Millville may qualify for LAVSD State categorical aid.

The Commissioner adopts the above conclusions as his own.

As to those students who attend Millville High School for the academic aspects of their program but who wish to attend the County Vocational Technical School as well, the Commissioner first notes that the entire legislative scheme as set forth at N.J.S.A. 18A:54-20.1 (Paragraph 71 of Chapter 52) pertaining to County Vocational Schools is broadly designed to assure that any pupil applying for county vocational educational programs be considered for admission. Such statute states:

71. (New section) a. The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes.

b. The board of education of a county vocational school district shall receive pupils from districts without the county so far as their facilities may permit.

However, the Commissioner concurs with the recitation provided by the ALJ leading to the conclusion found at page 10 of the initial decision that N.J.A.C. 6:43-3.11 mandates that vocational education programs offered by a district board of education be made available to pupils residing within the district

served by the local district board of education as well as pupils residing without the district. The regulation referred to plainly states:

6:43-3.11 Access to vocational instruction offered

(a) Pupils shall be permitted to enroll in programs of vocational instruction offered by district boards of education other than their resident district so long as the resident district board of education does not offer a comparable type of program and space is available for additional enrollees in the programs offered by the receiving district board of education.

(b) To the extent that space is available, each type of program of vocational instruction offered by the State Board shall be made available to all pupils residing in the State, and each program of instruction offered by a district board of education shall be made available to all pupils residing in the district or community served by the district board of education offering such instruction.

(c) Pupils shall be admitted for enrollment in classes and provided instruction on the basis of their potential for achieving the occupational or other objective of such instruction. (emphasis supplied)

In so stating, the Commissioner rejects Millville's argument that it is justified in refusing to permit sending district pupils to attend the County Vocational-Technical High School because there has been no change in allocation of pupils in the sending-receiving relationship pursuant to N.J.S.A. 18A:38-13. While the Commissioner concurs with the Millville Board that it may require the attendance of sending district pupils where its LAVSD offers a comparable program to that of the County Vocational system, the regulation above coupled with the statutory framework of N.J.S.A. 18A:54-20.1 mandates that a sending district pupil resident in Cumberland County or any sending district pupil from Cape May County

as well shall be permitted to apply to the County Vocational-Technical School provided such program is not offered at the LAVSD at Millville High School. Where such programming differs, the Commissioner concludes that the pupil enjoys the right to opt for the Vocational-Technical School's program without interference from the Millville Board.

In so finding, the Commissioner concurs with Millville's observation made in exceptions that "[a] process provided for by statute cannot be changed by an administrative regulation." (Exceptions, at p. 9) However, the language of N.J.S.A. 18A:54-20.1 plainly provides that any district such as Millville shall send any pupil who has applied and been accepted for admission to the County Vocational School program of his or her own choosing, unless its own LAVSD provides a comparable program.

Moreover, case law has bolstered this conclusion. The Commissioner's decision in Keyport Board of Education v. Board of Education of Union Beach, Red Bank Regional High School and Matawan-Aberdeen, Monmouth County, decided by the Commissioner October 17, 1983 affirmed the ALJ's conclusion in that case that Keyport's argument that it alone, as the receiving district for three other districts, held the expertise to make a decision concerning vocational secondary educational careers for the students attending it was misplaced. It was held: "****The Commissioner finds nothing in the record to justify Keyport's assumption of the role of omniscient educational broker for each and every high school pupil from Union Beach****." (Slip Opinion, at p. 18) The Commissioner holds herein that Millville likewise may not assume

"the role of omniscient educational broker" for students who choose a vocational program at the VoTech High School not offered at Millville.

Accordingly, for the reasons expressed above, the initial decision is affirmed in part and reversed in part. The Board is hereby directed to conform its tuition procedures with the conclusions reached herein. However, in so directing, the Commissioner would add that as of the 1991-92 school year, under the Quality Education Act the issue presented in this case will be moot in that the LAVSD designation is eliminated therein. Thereafter, all students who attend Millville High School for the whole day are to be designated as regular academic pupils.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

MARCH 4, 1991

DATE OF MAILING - MARCH 5, 1991

Pending State Board



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 903-91

AGENCY DKT. NO. 15-1/91

H.A. DeHART AND SON ,
Petitioner,

v.

BOARD OF EDUCATION OF
THE KINGSWAY REGIONAL
HIGH SCHOOL DISTRICT AND
JERSEY BUS SALES, INC.,
GLOUCESTER COUNTY,
Respondent.

Thomas H. Ward, Esquire for petitioner (Albertson, Ward & McCaffery, attorneys)

Robert S. Hagerty, Esquire, for respondent Kingsway Board of Education (Capehart and Scatchard, attorneys)

Milton H. Gelzer, Esquire, for respondent Jersey Bus Sales, Inc. (Gelzer, Kelaher, Shea, Novy and Carr, attorneys)

Record Closed: January 29, 1991 Decided: January 29, 1991

BEFORE: LILLARD E. LAW, ALJ

This matter having been opened before the Commissioner of Education (Commissioner) by Thomas H. Ward, Esquire, attorney, for petitioner, on a Petition and Notice of Motion for Emergent Relief, requesting temporary restraint against the Board of Education of the Kingsway Regional High School District (Board) to prevent said Board from proceeding with the award and execution of a contract with Jersey Bus Sales, Inc., for the purchase of a 1990 54-passenger school bus.

This matter was transmitted to the Office of Administrative Law (OAL) on January 25, 1991, for accelerated proceedings, pursuant to N.J.S.A. 1:1-9.4 in accordance with N.J.S.A. 52:14B-1 et. seq. Oral argument was heard on January 29, 1991, at the Atlantic City OAL, Atlantic City Civil Courthouse, Atlantic City, New Jersey.

The arguments of counsel having been heard regarding the allegations by petitioner that the Board failed to comply with directions ordered by the Commissioner and that irreparable harm may result if Respondent Board is not restrained from proceeding with the aforementioned contract pending the final determination by the Commissioner of the merits of the Petition.

This tribunal, having considered the criteria for the exercise of discretion in the issuances of a pendente lite restraint. See: Pressler, Current N.J. Court Rules, R. 4:52 (1991); United States v. Pavernick, 197 F. Supp. 257, 259-2260 (D. N.J. 1961); Luster Enterprises, Inc. v. Jacobs, 278 F. Supp. 73 (S.D.N.Y. 1967). And, having determined that petitioner's likelihood of success on the merits to be remote, at best. And, having balanced the interests of the pupils and the community at large against the interest of petitioner; I **CONCLUDE** that no permanent irreparable harm will result by permitting the Board to enter into a contract for the purchase of the 1990 54-passenger school bus, which the Board has determined to be in the pupils and its public interest. The Board, having complied with the Commissioner's directive, pursuant to his Decision dated December 20, 1990, is therefore, entitled to a presumption of correctness. Thomas v. Board of Education of Morris Township, 89 N.J. Super. 327 (App. Div. 19965).

OALDKT NO. EDU 903-91

Therefore, it is **ORDERED** that petitioner's request for emergent relief be and is hereby **DENIED**.

It is **FURTHERED ORDERED** that the herein Petition of Appeal be **DISMISSED**.

29 January 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

lmh

H.A. DE HART AND SON, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
KINGSWAY REGIONAL HIGH SCHOOL :
DISTRICT, GLOUCESTER COUNTY, AND :
JERSEY BUS SALES, INC., :
RESPONDENTS. :
:

The record of this matter, including tape-recorded proceedings before the ALJ and the resultant order, wherein petitioner's request for emergent relief was denied and the Petition of Appeal dismissed, have been reviewed. Exceptions by petitioner and replies thereto by respondents were timely filed pursuant to N.J.A.C. 1:1-18.4.

In its exceptions, petitioner first contends that the ALJ ignored the Commissioner's two prior decisions in this matter, H.A. DeHart and Son v. Board of Education of the Kingsway Regional High School District, Gloucester County, and Jersey Bus Sales, Inc., decided August 31, 1989, affirmed State Board May 4, 1990 (hereinafter DeHart I), and H.A. DeHart and Son v. Board of Education of the Kingsway Regional High School District, Gloucester County, and Jersey Bus Sales, Inc., decided December 21, 1990 (hereinafter DeHart II). Those decisions, petitioner argues, place upon the Board of Education in this proceeding an extraordinary and

case-specific burden of proof, namely to establish by objective and independent evidence that low bidders' offerings were not equivalent to published specifications. The ALJ, petitioner argues, relied instead on cases (principally Byram Bus Sales, Inc. v. Board of Education of the Township of Piscataway, Middlesex County, decided by the Commissioner December 15, 1981) establishing that boards need not accept low bids which do not meet specifications, ignoring the fact that those cases did not, like the present matter, involve specifications already found to have been proprietary unless equivalent offerings were entertained. Further, the ALJ erroneously relied on the presumption of correctness normally accorded school district actions in placing the burden of proof in this matter on petitioner rather than on the Board as directed by the Commissioner.

Petitioner next argues that, contrary to the ALJ's holding in denying emergent relief, it had a substantial likelihood of success on the merits. This is so because at the Board's purported "hearing" on the contested bid, no expert testimony or studies were presented, only the preferential comments of three bus drivers. This is plainly insufficient to prove non-equivalency to the degree required by the Commissioner's directive that "the Board may not meet its burden by simply noting that unsuccessful bidders did not comply with *** specifications *** or by relying on general expressions of preference by staff.***" (Exceptions at p. 8, citing DeHart II, supra, Slip Opinion, at p. 19 with emphasis supplied)

Petitioner finally contends that it will suffer irreparable harm if emergent relief is not granted, as it is settled law that money damages are not available to a party victim as the result of

an erroneous bid award. M.A. Stephen Const. Co. v. Borough of Rumson/Cardell, Inc. v. Township of Madison, 125 N.J. Super. 67 (App. Div. 1973) (hereinafter Cardell) Petitioner has consistently been victimized by the Board's disregard of competitive bidding requirements; the Board, on the other hand, must blame only its own failure to act according to law and the Commissioner's directives for any delays resulting from petitioner's challenges. Nor was any evidence adduced that a delay in the purchase of one bus would negatively impact on transportation of students. Thus, the equities in this matter clearly lie with petitioner.

In reply, the Board of Education argues that it was not compelled to accept a bid that did not meet specifications, discussing three cases establishing that even one material deviation can be sufficient to reject an otherwise low bidder: Byram, supra; W.W. Lowensten, Inc. v. Board of Education of the City of Newark, Essex County, decided March 18, 1985; and Wolfington Body Co., Inc. v. Board of Education of the Township of Barnegat, Ocean County et al., decided October 13, 1981. In addition, the Board notes the following: At the Board hearing of January 15, 1991, the bus drivers referred to by petitioner were not the sole testifiers. To the contrary, petitioner's own witnesses testified that in the past, when petitioner offered four-piece windshields, it claimed they afforded greater visibility (and hence safety) than two-piece windshields, and that fourteen gauge steel is stronger than sixteen. Moreover, petitioner could not demonstrate that the information it originally submitted contained sufficient detail to show compliance with bid specifications, nor was there any testimony

indicating that the petitioner could not, if it wished, construct a bus with a four-piece windshield and fourteen gauge steel, thereby meeting specifications. Finally, the Board contends, the ALJ was correct in concluding that once the Board had satisfactorily demonstrated compliance with the Commissioner's procedural requirements, the local board's ordinary presumption of correctness again controls; otherwise, a fact-specific Commissioner's decision would effectively be able to defeat the overriding law of the state. For these reasons, petitioner was not likely to succeed on the merits. With respect to irreparable harm, the Board argues that it would suffer greater harm than petitioner if it were enjoined from obtaining the specified bus while this matter proceeds to hearing and final determination. Because of the time ordinarily required for such determinations, the Board, and therefore the public, would likely lose a year's use of a 1990 bus required by regulation (N.J.A.C. 6:21-14) to be retired after the twelfth year from its date of manufacture. Petitioner, on the other hand, stands to lose nothing more than its profit on the sale of one bus.

In a separate reply in which it first takes general exception to what it perceives as the presumptuous character of petitioner's argumentation, Respondent Jersey Bus Sales, Inc. contends that the ALJ was correct in determining that petitioner's application did not meet established standards for granting of emergent relief. On the question of irreparable harm, Jersey Bus asserts, petitioner has not demonstrated that legal remedies for collection of money damages are unavailable to it if the disputed bus sale is completed, instead merely presuming that it would have

no damage claim. On the question of underlying legal rights, petitioner's claim is unsettled at best, since, once the Board complied with the Commissioner's demand for a hearing on the disputed bid, the Board's inherent right to make its own findings and manage the district as it sees fit prevails notwithstanding petitioner's protestations. On the question of success on the merits, petitioner is not likely to prevail despite its bald assertions to the contrary, since the Board did precisely what the Commissioner directed it to do: hold a hearing, make a determination vis-a-vis equivalency and place that determination on record. Finally, on the question of relative hardship to the parties, it is self-evident that if a school bus was requested and bid on by the Board, it was necessary for effective operation of the district. Further delaying the purchase of a needed bus while petitioner's claims are being resolved cannot help but impact on the district and its students, as well as possibly impacting on the Board's potential liability to Jersey Bus.

Upon careful consideration of the papers submitted in this matter, the tape recording of proceedings before the ALJ on petitioner's motion for emergent relief and the ALJ's order denying such relief and dismissing the Petition of Appeal, the Commissioner determines to affirm the recommendations of the ALJ for the reasons stated below.

Initially, the Commissioner has reviewed the criteria for granting of pendente lite restraints and concurs with the ALJ that petitioner has failed to sufficiently meet them. With respect to the threshold criterion of irreparable harm, petitioner has claimed

that because no money damage upon challenging an improper award to Jersey Bus must be stayed within the jurisdiction of the Commissioner of a party's particular error, it is here noted that the ALJ (before him) appears to conclude in favor of Respondent Jersey Bus (inarguable). However, even if petitioner's assessment is correct, the business must be weighed against the likelihood of success on the merits and equities.

In turning to this question of relief and disposition of the matter, I first review the salient facts of the present dispute. In DeHar, the award to Jersey Bus set aside was based on proprietary and confidential information argued that petitioner could not have had bid on them and for the reasons demonstrating that petitioner's specifications and was the basis for the Commissioner, however, set aside altogether different grounds for discussions previously held. The relative merits of the bus

underlying legal rights,
since, once the Board
for a hearing on the
to make its own findings
prevails notwithstanding
question of success on the
prevail despite its bald
did precisely what the
a hearing, make a
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cool bus was requested and
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Appeal, the Commissioner
of the ALJ for the reasons

viewed the criteria for
concur with the ALJ that
them. With respect to
a, petitioner has claimed

that because no money damages are available to bidders who prevail upon challenging an improper bid, Cardell, supra, the Board's award to Jersey Bus must be stayed. While it is beyond the expertise and jurisdiction of the Commissioner to definitively address the issue of a party's particular entitlement to damages in a civil suit, it is here noted that the ALJ (in the tape recording of proceedings before him) appears to concur with petitioner's assessment, while Respondent Jersey Bus (in its reply exceptions) deems the point arguable. However, even if the Commissioner grants that petitioner's assessment is correct, petitioner's potential loss of business must be weighed against the equally significant criteria of likelihood of success on the merits and balance of interests and equities.

In turning to this weighing, both for purposes of emergent relief and disposition of the Petition of Appeal, it is useful to first review the salient features of the predecessor cases to the present dispute. In DeHart I, petitioner sought to have the Board's award to Jersey Bus set aside on the grounds that it was improperly based on proprietary and other illegal specifications; the Board argued that petitioner could not challenge specifications after having bid on them and focused its argumentation before the ALJ on demonstrating that petitioner did not meet bus construction specifications and was therefore not entitled to the bid award. The Commissioner, however, set aside the Board's award to Jersey Bus on altogether different grounds: Notwithstanding any opinions or discussions previously held by district administrators on the relative merits of the buses offered, in rejecting DeHart's bid, the

Board had acted solely on the basis of a summary sheet indicating DeHart's exception to a penalty clause as the reason for its bid not being acceptable, and no discussion of any kind relating to actual bus specifications was held by the Board. Because penalty clauses are proscribed by New Jersey contract law, the Commissioner, and through affirmance, the State Board, could not permit the Board to reject a bid on this basis alone and ordered the contract to be rebid. In ordering such rebid, the Commissioner noted that proceedings before the ALJ had shown some of the Board's bus specifications to be proprietary in the absence of good faith consideration of equivalent offerings, and the Board was cautioned that, should it again be challenged on use of those specifications, it would bear the burden of demonstrating that it had reasonably considered alternative offerings and found them to be not equivalent to specifications. He further observed that he was ordering a rebid rather than awarding the contract to DeHart outright because the Board was entitled, subject to applicable law, to make its own determination as to the responsiveness of bidders to its specifications.

In DeHart II, petitioner challenged the Board's rebid proceedings as not having met the Commissioner's standard in DeHart I. Upon review, given that the Board was rejecting DeHart's bid on the grounds that it did not comply with precisely those specifications previously identified as proprietary to Blue Bird bus bodies, the Commissioner concurred that the perfunctory treatment accorded DeHart's low bid (a brief presentation by the Board Secretary/Assistant Superintendent for Business) did not constitute

a sufficient response to his directive that the Board fairly consider the equivalency of alternative offerings. The Board was therefore ordered to reconsider its award, demonstrating meaningful review and specifying reasons, orally or in writing, for any determination of nonequivalency. It is the Board's reconsideration pursuant to this directive that DeHart now challenges as still not having met the Commissioner's requirements.

In the Commissioner's view, the basis for this belief is a misunderstanding of what the Commissioner intended in his prior two decisions on this matter. Petitioner argues that the Board did not produce expert testimony or independent safety studies on windshield visibility and rollover capacity, that it called as witnesses only three bus drivers in direct contravention of the Commissioner's directive not to rely on general expressions of preference by staff, and that it generally failed to "prove" nonequivalency. However, the Commissioner never intended, nor do the previous cases require, that a board of education conduct special proceedings with expert witnesses in addition to district staff and bidders, independent technical studies, testimony and cross examination and the like; nor is there any indication that the purpose of a board's deliberations should be to "prove" its opinions in a legal sense. Neither was the Commissioner's comment about general expressions of preference by staff (a reference to the perfunctory presentation of the Board Secretary in DeHart II) intended to be taken out of context and relied upon as an indication that the Board shirked its burden by not producing witnesses beyond the bus drivers who testified regarding windshield construction. What was required was evidence

that the Board had been made sufficiently aware of alternative offerings, that it deliberated upon them or entertained substantive comments about them by persons who could reasonably be expected to have some direct knowledge of pertinent factors, and that it made an articulated judgment as to their sufficiency. This is the extent of the burden placed upon the Board, and once met, as the ALJ properly found, the Board's actions again take on their ordinary presumption of correctness.

In the present instance, it is clear from facts discernible in petitioner's own filings that, unlike the situation in DeHart II, Board members considered the disputed bid at two meetings of some length, heard substantial comment from representatives of petitioner and the public as well as from its own staff, and articulated the bases for their votes. Certification of Counsel, paragraphs 1, 3, 4 and 6; Affidavit of Philip Clifford, paragraphs 2, 3 and 6; Brief in Support of Emergent Relief, at pp. 4-5; Arguments before ALJ, tape recording (description of DeHart representative's comments before Board); Exceptions, at pp. 2-3 and 9.*

This being so, and given that the basis for petitioner's challenge is an erroneous and exaggerated perception of the Board's burden in this matter, petitioner not only is unlikely to succeed on the merits of its appeal; it actually has no cause of action for which the Commissioner may grant relief. Moreover, with regard to

* Further elaboration and substantiation are provided by respondents' filings, but for purposes of summary dismissal only petitioner's facts are cited.

questions of equity and public interest, the Commissioner notes that, notwithstanding petitioner's claim of having been victimized by the Board's actions, the very case relied upon by petitioner to establish entitlement to emergent relief stands for the proposition that the purpose of the public bidding laws is to protect the public, not to create rights in bidders:

[T]hat the public officialmay by statute be directed to make his award to the lowest responsible bidder or to the responsible bidder whose bid is most advantageous to the public authority, in no way changes the basic rule or the nature or extent of the correlative rights and duties as between a bidder and the solicitor of the bid. For, that obligation is imposed for the public good, not for the benefit of the bidder.***

In sum, and whatever may be the specifics of the duty owing by a public official in a given case to the members of the public to accept the bid proposal which best serves the public interest, that duty by its very nature runs to the members of the public, and to them alone. It does not run to the bidders, and does not create any right or rights in the bidders. As stated in Hillside Tp. v. Sternin, supra:

For many years our statutory law has required contracts for the performance of public work...to be let upon competitive bidding solicited through public advertisement.***The purpose is to secure competition and to guard against favoritism, improvidence, extravagance and corruption. Statutes directed toward these ends are for the benefit of the taxpayers and not the bidders; they should be construed with sole reference to the public good.***[25 N.J. at 322] (Cardell, supra, at 73-74) (citations omitted)

In the present case, the Commissioner believes that the public interest would be best served by effecting an expeditious end to litigation on this matter and permitting the Board to proceed with the purchase of its needed bus and the general operation and

management of its district. In so holding, the Commissioner is mindful of petitioner's arguments about proprietary bidding on the part of the Board, but here finds that, taking the parties' several proceedings before the Commissioner as a totality, the Board appears to be acting in what it genuinely perceives to be the public interest in insisting on certain features in the construction of its buses, so that its actions are not susceptible to the charges of favoritism, extravagance or corruption which would render it contrary to the public advantage and therefore voidable under public bidding laws.

Finally, to the extent that the ALJ in the taped proceedings before him demonstrates what petitioner perceives as a cavalier attitude toward prior decisions of the Commissioner in this matter, that attitude appears to be rooted in the perception, fostered by petitioner's characterization of the burden imposed upon the Board by the Commissioner, that those decisions are contrary to the long line of cases establishing the local board's right to reject any bid not conforming to specifications and according to Board actions a presumption of correctness. The Commissioner notes for the record, however, that all but one of those cases dealt with specifications which were not alleged to be proprietary, and the one exception (Wolfington, supra) differed from the present matter in that the specifications at issue were found to have been promulgated by the Board without the knowledge that only one vendor could satisfy them at the time of their advertisement. There are, therefore, important distinctions between these matters and the bid controverted herein, where the exclusiveness of certain features to

one bus body, purportedly distributed at present by only one South Jersey vendor, has been known to the Board at least since the commencement of proceedings in DeHart I and was clearly a factor in subsequent rebids. Moreover, it is precisely because the Commissioner viewed lawful selection of the successful bid as a Board prerogative that he consistently declined to award the bid to DeHart and, instead, gave the Board opportunities to make its contract award in a way that would render it acceptable within the confines of the school bidding laws.

Accordingly, for the reasons stated herein, petitioner's motion for emergent relief is denied and the Petition of Appeal dismissed with prejudice.

IT IS SO ORDERED.

MARCH 8, 1991

DATE OF MAILING - MARCH 8, 1991



COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE :
HEARING OF ROSEMARY HURTADO, :
STATE-OPERATED SCHOOL DISTRICT : COMMISSIONER OF EDUCATION
OF THE CITY OF JERSEY CITY, : DECISION
HUDSON COUNTY. :
_____ :

For the Board, Karen A. Murray, Esq. (Murray, Murray & Corrigan)

This matter having been opened before the Commissioner of Education on October 19, 1990 through certification of tenure charges of incapacity and other just cause against respondent, a tenured teacher in the State-operated School District of the City of Jersey City; and

The Commissioner having directed respondent and, later, her attorney by numerous notices and by letter sent via both regular and certified mail on January 17, 1991 to file an Answer to the charges against her; and

Attorney for the Board having filed a request for summary judgment on February 8, 1991, wherein it is noted that respondent's workers' compensation attorney, for reasons of alleged extenuating circumstances, had verbally sought to have the instant tenure matter held in abeyance pending respondent's workers' compensation determination, and that the Board would not voluntarily consent to such disposition; and

As of this date, neither respondent nor any attorney on her behalf has filed an Answer to the tenure charges against her or a reply to the Board's request for summary judgment, so that there is no basis on which the Commissioner might determine to hold this matter in abeyance, and each count of the charges against respondent is deemed to be admitted; now therefore

IT IS ORDERED this 6th day of March 1991 that summary judgment shall be granted to the Board and that respondent shall be dismissed from her tenured position as a teacher in the district's employ as of the date of this decision.

IT IS FURTHER ORDERED that, pursuant to N.J.A.C. 6:11-3.6, this matter shall be forthwith referred to the State Board of Examiners for review and action as it deems appropriate.


COMMISSIONER OF EDUCATION

MARCH 6, 1991

DATE OF MAILING - MARCH 7, 1991



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9439-89

AGENCY DKT. NO. 323-10/89

**BOARD OF EDUCATION OF
THE CITY OF NEWARK,**

Petitioner,

v.

**NEW JERSEY STATE
DEPARTMENT OF EDUCATION,**

Respondent.

Robin T. McMahon, Associate Counsel, for petitioner
(Hilda Burnett, General Counsel, attorney)

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

Record Closed: October 26, 1990

Decided: January 24, 1991

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This case involves whether a local school district is eligible for federal funds to subsidize a summer enrichment program for educationally handicapped children. It

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presents a novel question of how to interpret the nonsupplanting requirement attached to the use of federal funds. Newark Board of Education ("Newark") applied for federal funds available under Part B of the Education for All Handicapped Children Act ("Act"), 20 U.S.C.A. §1400 et seq.¹ The New Jersey Department of Education ("Department"), which administers and dispenses Part B funds, denied Newark's application on the ground that local districts are prohibited from using federal money to pay for services previously funded with state or local money. Newark contends that its summer program qualifies for federal funding because it enhances and expands the program offered during the regular school year. Further, Newark urges the program qualifies because its historical use of state or local funds for this purpose is no longer permissible.

Procedural History

On October 19, 1989, petitioner Newark filed a verified petition with the Commissioner of Education ("Commissioner"). Respondent Department filed its answer on December 11, 1989. Subsequently, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case. The OAL held a hearing on September 24, 1990. Witnesses and exhibits are listed in the appendix. Both parties submitted post-hearing briefs by October 26, 1990. Time for preparation of the initial decision has been extended to January 24, 1991.

¹Recently, the New Jersey Supreme Court described the dual federal and state role in this area: "Although education is primarily a concern of state and local governments, the education of handicapped children is regulated by a complex scheme of federal and state statutes and administrative regulations. Through the [Act], Congress has provided for cooperating states to receive federal funds to educate handicapped children. Receipt of the funds is conditioned on the State's compliance with [the Act's] goals and requirements. Thus, the education of handicapped children is an exercise in cooperative federalism." *Lascari v. Ramapo Indian Hills Reg. High Sch. Dist. Bd. of Ed.*, 116 N.J. 30, 33 (1989). Participating states and local school districts risk loss of federal funding if they fail to satisfy the requirements of the Act. 20 U.S.C.A. §§ 1414(b)(2)(A), -1416. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 183 (1982).

Findings of Fact

All of the relevant facts are undisputed. I FIND the following facts:

In July and August of 1988 and 1989, Newark operated a summer enrichment program geared for children with "moderate to severe" learning disabilities. Importantly, the Department never questioned the efficacy of the summer program or suggested that the money was poorly spent. About 80 children with serious educational deficiencies were enrolled in ten classes supervised by a teacher together with an aide. Essentially the program, which incorporated outdoor and recreational activities such as swimming, gardening, art and music, was designed to promote "consistency, repetition and active student participation." It aimed to develop self-help skills and to reinforce learning that had taken place during the regular school year. Although the program was "elective," these children faced a high risk of regression over the summer. Many lacked adequate socialization skills, and otherwise they merely "sat at home and vegetated." A few of the more severely disabled were "one step away from institutionalization."

Two different sites were utilized, only one of which is still directly involved in this litigation. At the New Jersey Regional Day School, Newark provided a summer program primarily for autistic children classified as "emotionally disturbed" or multipli-handicapped. The Regional Day School is a state-owned facility operated under contract by Newark as the Department's agent. Enrollment is open to children from other school districts, although the vast majority of students come from Newark. However, the summer program is exclusively for Newark residents. The school itself is particularly well-suited for a summer program because it is located on a spacious "campus-like" setting and is one of the few Newark facilities which is air-conditioned. Consequently, Newark could not easily move the program to another site.

Additionally, Newark provided another summer program for mentally retarded or mutipli-handicapped children at the district-owned John F. Kennedy School. Initially, in July 1988, the Department had disallowed federal Part B funds for both summer programs. After meeting with local officials in September 1988, however, the Department authorized funding for the JFK School because it had previously been operated as a substantially different summer program and had not been not dependent on state or local funds. Prior to 1988, the summer program at

OAL DKT. NO. EDU 9439-89

JFK School had centered on remediation of basic skills and had been federally funded under Title I or Chapter I.²

Historically, the source of funding for the Regional Day School summer program was distinctly different. Until 1988, Newark had used surplus balance from its annual operating budget to defray the cost of the summer program. Other school districts which send students to the Regional Day School pay tuition charges based on actual costs. At the beginning of each school year, Newark calculates an estimated tuition charge before actual costs are yet known. If tuition payments exceeded the actual costs incurred, Newark was able to use the generated surplus for the summer program. This amount represents "a mixture of state and local funds." State education authorities knew about and approved of the practice. Since the Regional Day School was a state facility, the Department had to approve its budget and tuition rate. Indeed, the Commissioner of Education gave express written approval for Newark to apply a surplus of \$37,500 from the 1985 fiscal year toward the 1986 summer program.

Sometime around 1987, however, the Department revised its policy and prohibited Newark from using surplus balance to pay for the Regional Day School summer program. Apparently, the Department became aware that the summer program was not a mandated expense and that other districts were unwittingly contributing to services benefiting only Newark students. In any event, the Department notified Newark that future excess tuition payments must be credited against the ensuing school year's operating expenses.

In April 1988, Newark amended its federal grant application to obtain money for its summer programs. After much correspondence back and forth, the Department ultimately denied the amended application relating to the Regional

²Federal funding for basic skills improvement programs in New Jersey derives from Title I of the Elementary and Secondary Education Act of 1965 ("ESEA"), 20 U.S.C.A. §236, and Chapter I of the Education Consolidation and Improvement Act of 1981 ("ECIA"), 20 U.S.C.A. §3801 et seq. ECIA has been repealed by Pub. L. 100-297, effective July 1, 1988, and large parts were readopted as part of amendments to Title I of the ESEA, 20 U.S.C.A. §2701 et seq.

Day School, stating that such use of the funds "would result in displacement of state and local funds."³ By then Newark had already spent the anticipated federal aid for summer 1988, so the Department reduced the district's state aid entitlement to recoup federal funds totaling \$42,700. Similarly, Newark paid \$48,000 out of its own funds to cover the costs of the 1989 summer program at the Regional Day School.

Conclusions of Law

Based on the foregoing facts and the applicable law, I CONCLUDE that the nonsupplanting requirement does not bar the use of federal Part B funds for Newark's summer enrichment program.

Congress enacted the Act to provide "federal money to assist state and local agencies in educating handicapped children." *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 179 (1982). Toward that end, Congress has included safeguards to insure that money earmarked for extra benefits would not be spent merely to relieve states and local districts of their existing financial obligations. 20 U.S.C.A. §1414(a)(2)(B) requires satisfactory assurances that:

Federal funds expended by local education agencies . . .

- (i) shall be used only to pay the excess costs directly attributable to the education of handicapped children and
- (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplement such State and local funds[.]

See also, 20 U.S.C.A. §1413(a)(9), which reiterates that funds available under the Act must be "used to supplement and increase the level of Federal, State and local

³While the Department indicates that its staff members informally "consulted" with certain unidentified officials of the United States Department of Education who "have confirmed our initial position," it is unclear exactly how much information was provided to the federal authorities or whether any binding ruling was ever issued. Certainly the record is devoid of any documentation that the federal agency specifically disallowed the intended use of the funds. Newark representatives were never invited to participate in such consultations.

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funds" expended for special education and "in no case to supplant" such other revenue.

Implementing federal regulations provide guidance on how to interpret the statutory language. Generally, the amount budgeted by a local district for education of handicapped children in the current fiscal year, on either a total or a per capita basis, must be at least equal to the amount actually expended in the preceding fiscal year. 34 C.F.R. §300.230(b)(1). More pertinently, "the local educational agency must not use Part B funds to displace State or local funds for any particular cost." 34 C.F.R. §300.230(b)(2).

Comments to the regulations clarify that:

... The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Secretary looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

There follow several examples of how to apply the requirement in specific instances. Then the Comments continue:

The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

Courts consistently uphold administrative action to recover federal funds spent in violation of nonsupplanting provisions. Illustratively, in *State of Washington v. U.S. Dept. of Ed.*, 905 F.2d 272 (9th Cir. 1989), a federal appellate court declared it to be a misuse of Part B funds when a city school system spent less money on the education of handicapped children in fiscal 1981-82 than in 1980-81. Even though the city had acted in good faith, it was not excused from compliance with the conditions of the grant. Likewise, in *Bennett v. Kentucky Dept. of Education*, 470 U.S. 656 (1985), the United States Supreme Court regarded the use of federal funds for instruction which would have been delivered in regular classes supported by

state and local funds as a clear violation of the Title I law. Again, the court ruled that "the absence of bad faith" does not absolve a state from liability for misspent funds. 470 U.S. 664. New Jersey too has not hesitated from withholding or recovering federal assistance money used improperly for "the regular education program, which the district is obligated to provide anyway." *McCarroll v. Jersey City Bd. of Ed.*, 13 N.J.A.C. 1, 42-43 (1989).

These cases are readily distinguishable, in that none deals with the prior misapplication of state or local funds. Newark should never have used the excess tuition fees in the first place. Now that the State has put a stop to that questionable practice, Newark is caught in a "Catch 22" situation. Because the Department will no longer condone this improper expenditure of state and local money, these funds have become unavailable. Because of Newark's past mistake, however, the Department takes the position that Newark cannot qualify for federal funds to which it would otherwise be entitled. It would be more logical for the Department to demand repayment of previously misspent state and local funds than to cut off the flow of future federal funds for a valuable program which is working well.

Meanwhile, it is the innocent handicapped youngsters who are asked to pay the price. Absent the unusual funding history, no one would seriously deny that the summer enrichment activities are designed to complement rather than replace the regular school program. Although the Department's overly literal approach has a superficial plausibility, it would turn the nonsupplanting requirement on its head. Intended "to insure that Part B funds are used to increase State and local efforts," instead the requirement would operate "to inhibit better services for handicapped children." In short, such simplistic interpretation would defeat the underlying purpose for which the nonsupplanting requirement was adopted.

Lastly, two additional arguments may be disposed of quickly. Newark argues that the Department should be equitably estopped from withholding federal money. Generalized considerations of "fairness" and detrimental reliance are not the real issue. Rather, the sole question is whether Newark has adhered to the conditions for receipt of federal grant money. *Bennett*, 470 U.S. at 597. In its pleadings, the Department raises the affirmative defense of untimeliness under the 90-day rule, N.J.A.C. 6:24-1.2(b). That time-bar applies to appeals from local board action as opposed to state action. Moreover, it does not prevent a party from

OAL DKT. NO. EDU 9439-89

asserting a claim based on a statutory right. *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 90 N.J. 587 (1984).

Order

It is **ORDERED** that the Department restore the state aid withheld from Newark on account of the summer enrichment program of 1988.

And it is further **ORDERED** that the Department increase Newark's state aid to reflect its cost for providing the summer enrichment program in the summer of 1989.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Jan 24, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

1 25/91
Date

Sydney Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 29 1991
Date

Joyce L. Veselka
OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Dr. William Harvey, assistant executive superintendent for pupil personnel services, Newark school district
2. Dr. Jean Adilifu, assistant executive superintendent, Newark school district

List of Exhibits

No.	Description
P-1	Copy of a letter to Executive Superintendent Eugene Campbell from Commissioner Saul Cooperman, dated July 12, 1986
P-2 (a)	Copy of a letter to Dr. Stewart Barudin from Dr. William Harvey, dated April 29, 1988
(b)	Copy of an amendment application for flow through funds, dated April 29, 1988
P-3	Copy of a letter to Dr. Stewart I. Barudin from Dr. William Harvey, dated June 28, 1988
P-4	Copy of a letter to Dr. William Harvey from Dr. Stewart Barudin, dated July 7, 1988
P-5	Copy of a letter to Dr. Stewart Barudin from Dr. William Harvey, dated July 18, 1988
P-6	Copy of a letter to Dr. William Harvey from Richard Scott, dated August 8, 1988

- P-7 Copy of a letter to Richard Scott, from Dr. William Harvey, dated August 30, 1988
- P-8 Copy of a letter to Dr. William Harvey from Richard Scott, dated September 19, 1988
- P-9 (a) Copy of a memorandum to Dr. William Harvey from Dr. Edward F. Dragan, dated June 27, 1989
- (b) Copy of amendment application for flow through funds, dated June 22, 1989
- P-10 (a) Copy of a letter to Dr. William Harvey from Dr. Edward F. Dragan, dated June 27, 1990
- (b) Copy of an amendment application for flow through funds, dated June 27, 1990
- P-11 Copy of a letter to Dr. Stewart Barudin from Dr. William Harvey, dated July 10, 1990
- R-1 Copy of an agreement between the New Jersey Department of Education and the Newark Board of Education, dated December 8, 1986

OAK DKT. NO. EDU 9439-89

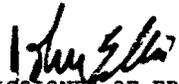
BOARD OF EDUCATION OF THE CITY	:	
OF NEWARK, ESSEX COUNTY,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
EDUCATION,	:	
	:	
RESPONDENT.	:	
	:	

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

Upon review of the record, the Commissioner agrees with and adopts as his own the findings and conclusions reached by the Administrative Law Judge.

Accordingly, respondent is directed to restore the state aid withheld from petitioner as a result of the summer enrichment program conducted in 1988 and 1989 as set forth in the initial decision.

MARCH 11, 1991
DATE OF MAILING - MARCH 12, 1991


COMMISSIONER OF EDUCATION

29-91

P.V. AND V.V., on behalf of their :
 minor child, S.V., :
 PETITIONERS, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- :
 SHIP OF HILLSBOROUGH, SOMERSET : DECISION
 COUNTY, :
 RESPONDENT. :

SYNOPSIS

Petitioning parents, on behalf of their daughter, challenged the Board's early admission policy for children, who do not meet age requirement for kindergarten, based upon administration of a standardized school-readiness test developed by the Gesell Institute and the Wechsler IQ Test.

The ALJ found no evidence that the Board abused its discretion, that there are differing opinions as to the value of standards applied by the Board. Therefore the Board was entitled to summary decision.

The Commissioner adopted as his own the findings and conclusions of the ALJ for the reasons expressed in the initial decision. Petition of Appeal was dismissed.

MARCH 15, 1991



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6855-90
AGENCY DKT. NO. 301-8/90

**P.V. AND V.V., ON BEHALF OF THEIR
MINOR CHILD, S.V.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF HILLSBOROUGH, SOMERSET COUNTY,**

Respondent.

P.V. and V.V., *pro se*

Paul Griggs, Esq., for respondent

Record Closed: January 22, 1991

Decided: January 31, 1991

BEFORE EDITH KLINGER, ALJ:

This matter was opened before the Commissioner of Education on August 24, 1990 and transmitted to the Office of Administrative Law as a contested case on August 29, 1990, pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.* The matter was brought upon an emergent basis pursuant to *N.J.A.C. 1:1-12.6*. In a verified complaint, P.V. and V.V., on behalf of their daughter, S.V., sought preliminary relief in the form of an interim order directing the Hillsborough Township School District (District) to immediately enroll S.V. in kindergarten pending the outcome of a plenary hearing on their petition. This relief was denied by the undersigned in an Order on Emergent Relief, decided September 11, 1990, when petitioners failed to establish their entitlement. That order is incorporated herein by reference.

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 6855-90

AGENCY DKT. NO. 301-8/90

**P.V. AND V.V., ON BEHALF OF THEIR
MINOR CHILD, S.V.,**

Petitioners,

v.

**BOARD OF EDUCATION OF THE TOWNSHIP
OF HILLSBOROUGH, SOMERSET COUNTY,**

Respondent.

P.V. and V.V., *pro se*

Paul Griggs, Esq., for respondent

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This matter was opened before the Commissioner of Education on August 24, 1990 and transmitted to the Office of Administrative Law as a contested case on August 29, 1990, pursuant to *N.J.S.A. 52:14B-1 et seq.* and *N.J.S.A. 52:14F-1 et seq.* The matter was brought upon an emergent basis pursuant to *N.J.A.C 1:1-12.6*. In a verified complaint, P.V. and V.V., on behalf of their daughter, S.V., sought preliminary relief in the form of an interim order directing the Hillsborough Township School District (District) to immediately enroll S.V. in kindergarten pending the outcome of a plenary hearing on their petition. This relief was denied by the undersigned in an Order on Emergent Relief, decided September 11, 1990, when petitioners failed to establish their entitlement. That order is incorporated herein by reference.

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At a telephone prehearing conference held on September 26, 1990, the matter was set down for plenary hearing on January 22, 1991. It was further determined that the following were the issues to be resolved at hearing.

- A) Was the District's refusal to admit S.V. into its kindergarten program arbitrary, capricious, and an abuse of discretion?
- B) Does the District apply reasonable standards to screen applicants for early admission into its kindergarten program?
- C) Did S.V. receive treatment different than that of other applicants to the program?
- D) To what relief, if any, are petitioners entitled?

On December 27, 1990, respondent, Board of Education (Board), moved for summary decision on the basis that all of the above issues were resolved at the preliminary hearing for emergent relief, no dispute over material fact still existed, and the Board was entitled to summary decision as a matter of law.

S.V.'s parents dispute the method of formal assessment for early admission into the District's kindergarten program mandated by the Board in a policy formally adopted on June 20, 1981. At the time of the hearing on the emergent application, S.V.'s parents challenged the Board's admission policy, which is based upon administration of a standardized school-readiness test developed by the Gesell Institute and a Wechsler IQ test for preschool and primary grade children by two qualified members of the District staff, the kindergarten teacher and the psychologist, who then confer to determine whether the results show that the candidate meets the standards for admission established by the Board. S.V.'s parents questioned the manner in which the tests were given and the reliability of the tests themselves as effective means of predicting performance. These arguments were rejected after the emergent hearing for several reasons. P.V. and V.V. conceded that they could offer no evidence as to the administration of the tests. Published studies in support of their position were not accepted into evidence since it was deemed that a challenge to the reliability of widely-accepted standardized tests was inappropriate.

in a motion for preliminary relief pending hearing and there was no competent expert testimony that these tests were improperly applied to S.V.

Petitioners responded to the motion for summary decision by submitting a brief containing the same arguments raised at the emergent hearing and attaching published articles in support of their position. In addition, they alleged for the first time that the testers did not take into account that their daughter was suffering from an eye irritation at the time the tests were administered. S.V.'s parents also produced a letter from the teacher at a private kindergarten which she is presently attending, indicating that she is doing well and is able to cope with the physical, emotional, and educational demands of kindergarten.

Although the hearing on respondent's motion was held on the day scheduled for the plenary hearing, S.V.'s parents could produce no competent expert testimony demonstrating that the Board's use of the two standardized tests to determine which candidates to admit early into the District's kindergarten program was arbitrary and capricious, nor was there any available expert opinion that the tests were improperly administered by the District's staff or unreliable as applied to S.V. I therefore FIND that there exists no genuine issue of material fact in this matter.

N.J.S.A. 18A:38-5 does not require a school district to admit a child who reaches the age of five after October 1 of the school year into its kindergarten program. Early kindergarten admission is a matter of local board discretion. See, *Tepper v. Bd. of Ed., Tp. of Hackensack, Bergen County*, 1971 S.L.D. 549 (Nov. 12, 1971), *A.H.A. v. Glen Rock Bd. of Ed.*, 88 S.L.D. 74 (April 4, 1988), and *Supuran v. Mt. Laurel Tp. Bd. of Ed.*, 88 S.L.D. 304 (Dec. 1, 1988). In an exercise of this discretion, the Board established in 1981 a written policy for early admission of children into its kindergarten program, and all applicants are screened in accord with this policy.

The Commissioner of Education has determined not to substitute his judgment for that of a local school board in its discretionary actions. *Walters v. Mendham Tp. Bd. of Ed.*, 1977 S.L.D. 854 (July 27, 1977).

If there is any fair argument in support of the agency's action or any reasonable ground for difference of opinion among intelligent and conscientious officials, "the decision is conclusively legislative, and will not be disturbed unless patently corrupt, arbitrary or illegal." *IFA, Inc.*

OAL DKT. NO. EDU 6855-90

Co. v. N.J. Dept. of Ins., 195 N.J. Super. 200, 208 (App. Div. 1984), cert. denied, 99 N.J. 218 (1984), citing *Flanagan v. Civil Service Dept.*, 29 N.J. 1, 12 (1959).

The fact that some experts disagree with the administration of standardized tests to determine whether a child is ready to attend school does not mean that the standards imposed by the Board for early attendance in the kindergarten program are arbitrary. As the articles submitted by petitioners demonstrate, there is clearly reasonable ground here for "difference of opinion among intelligent and conscientious officials," and I therefore **CONCLUDE** that the requirements set by the Board within its discretion should not be disturbed.

Under the standards set in *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 N.J. 67 (1954), it is appropriate to grant summary decision where there is no genuine issue of material fact present and the moving party is entitled to prevail as a matter of law. "[I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla," or if "other papers pertinent to the motion show palpably the absence of any issue of material fact," summary decision should not be denied. *Id.* at 75.

I **CONCLUDE** that, in this case, where petitioners have raised no defense to the motion for summary decision except that there are differing opinions as to the value of the standards applied by the Board, there is no evidence that the Board abused its discretion in setting these standards or discriminated against S.V. in the way the standards were applied. Consequently, I **CONCLUDE** that respondent is entitled to summary decision as a matter of law.

It is therefore **ORDERED** that the appeal of petitioners be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is

otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 31, 1991
DATE

2/7/91
DATE

FEB 11 1991

DATE

md/e

[Signature]
EDITH KLINGER, ALJ

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:
[Signature]
OFFICE OF ADMINISTRATIVE LAW

P.V. AND V.V., on behalf of their	:	
minor child, S.V.,	:	
	:	
PETITIONERS,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF HILLSBOROUGH, SOMERSET	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law in this matter have been reviewed. Petitioners' exceptions were timely filed pursuant to the requirements of N.J.A.C. 17:27-18.4 and are summarized below.

Petitioners' exceptions aver that the Board has accepted students who have failed the readiness test disputed herein if the parents spoke to the right "powers" in the district. However, petitioners allege that parents fear coming forward regarding this allegation lest it might prejudice their children. Petitioners also aver that the Board failed to respond to their discovery request as to whether any child had been granted early admissions despite failing the testing standard. They contend, inter alia, that there is a student who transferred into kindergarten from an out-of-state school which had a later cutoff date than the Board's and who failed the kindergarten early admissions testing. They further contend that there is a child who failed the early admissions testing for

kindergarten yet was accepted for early admission to first grade after attendance at a private full-day kindergarten.

In addition to the above, petitioners reiterate criticisms of the Gesell Readiness Test and the early admissions practices of the Board and urge that their inability to afford the testimony of an expert witness should not serve to their detriment in seeking reversal of S.V.'s denial of early admission to kindergarten in the Hillsborough School District.

Upon careful and detailed review of the record, including petitioners' exceptions and the many articles submitted by petitioners on behalf of their position, the Commissioner is in agreement with the findings and conclusions of the ALJ and adopts them as the final decision in this matter. The record amply supports the failure of petitioners to establish that the Board has acted in an arbitrary, capricious and unreasonable manner in denying S.V. early admission to kindergarten. The issue of standardized testing and the role it plays in the selection, promotion and placement of students is a controversial one which is strenuously debated and for which there exists conflicting research findings. The existence of such debate over tests such as the Gesell Readiness Test does not, however, provide proof that a board of education's use of that test constitutes arbitrary, capricious or discriminatory action by it.

Further, even if assuming arguendo that petitioners are correct in contending that there were two students granted early admission to kindergarten for the 1990-91 school year and not one as indicated on the list supplied by the Board, this would not rise to the level of proving that the disputed early admissions policy has

been applied in an unfair or discriminatory manner to S.V. Moreover, an allegation that parents fear to come forward regarding the application of the early admissions policy and standards is insufficient to demonstrate arbitrary or discriminatory action by the Board.

Accordingly, the Petition of Appeal is dismissed for the reasons set forth by the ALJ in the initial decision.


COMMISSIONER OF EDUCATION

MARCH 15, 1991

DATE OF MAILING - MARCH 15, 1991



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2899-90

AGENCY DKT. NO. 55-3/90

**IN THE MATTER OF THE TENURE
HEARING OF KENNETH HENDEREK,
SCHOOL DISTRICT OF THE
TOWNSHIP OF EAST BRUNSWICK,
MIDDLESEX COUNTY**

Martin Pachman, Esq., appeared on behalf of the petitioner, Township of East Brunswick School District

Joel D. Rosen, Esq., (Wills, O'Neill & Melk, attorneys), appeared on behalf of respondent, Kenneth Henderek

Record Closed: November 5, 1990

Decided: January 25, 1991

Before **DAVID J. MONYEK, ALJ**:

STATEMENT OF THE CASE

Petitioner, Township of East Brunswick School District, preferred charges of conduct unbecoming a teaching staff member against Kenneth Henderek, a tenured employee in its district, wherein it seeks the teacher's removal.

PROCEDURAL HISTORY

On January 26, 1990, petitioner, School District of the Township of East Brunswick, Middlesex County, forwarded to respondent, Kenneth Henderek, by certified mail, the following notice:

New Jersey Is An Equal Opportunity Employer

Pursuant to the provisions of P.L. 1975, Chapter 304, N.J.S.A. 18A, a charge has been filed against you with the Secretary of the Board of Education. You are hereby provided with a copy of that charge and a copy of the statement of evidence in support of that charge.

You are hereby afforded an opportunity to submit a written statement of position and a written statement of evidence and position, under oath with respect thereto. This statement is to be filed with the Board of Education within fifteen (15) days from date hereof.

The Board of Education, immediately after said fifteen (15) day period unless any extension is agreed upon by the Board, shall consider the charge, statement of position and statements of evidence presented to it and will determine whether, pursuant to said statute to forward the written charge to the Commissioner of Education. If said charge is certified with the Commissioner of Education, you will be subject to all sanctions as provided by law. [Exhibit J-1]

On or about February 9, 1990, respondent, by his attorney, prepared and filed his written statement of position pursuant to N.J.A.C. 6:24-1.4.

Thereafter, on March 2, 1990, petitioner forwarded to the Commissioner of Education its certification of charges against respondent. Concomitantly, respondent was suspended from his teaching position.

On or about April 4, 1990, respondent, through his attorney, filed his answer to the charges pursuant to N.J.A.C. 6:24-1.4, which pleading was acknowledged as having been received by the Commissioner on April 6, 1990.

On April 12, 1990, the Commissioner of Education transmitted the matter to the Office of Administrative Law for hearing and disposition in accordance with and pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was conducted on May 9, 1990, and a Prehearing Order was prepared, served and filed on May 14, 1990, which provided for a plenary hearing to be conducted commencing on September 17, 1990. Pursuant thereto, an evidentiary hearing was conducted at the Office of Administrative Law, Mercerville, New Jersey, on September 17 and 18, 1990, at which place and time testimony was heard and evidence adduced by and on behalf of both parties. At the conclusion of the hearing, on motion made and granted, the attorneys for the respective parties were given the opportunity to submit post-hearing memoranda on behalf of their respective clients. The

final written submission was received on November 5, 1990, the date of the closing of the record.

FACTS

Pursuant to the Prehearing Order of May 14, 1990, petitioner, Township of East Brunswick School District, proceeded first and had the burden of proof.

Petitioner's charge of conduct unbecoming a teacher consists of three separate, unrelated incidents of alleged misconduct which occurred in 1974, 1984 and 1989, respectively.

With respect to the 1974 incident of alleged misconduct, the proofs consisted of the testimony of Ms. Brenda Witt, assistant superintendent of schools for East Brunswick School District, and the acknowledgement of respondent that he had been charged in 1974 with possession of marijuana with intent to distribute same and with growing marijuana. Neither the complaints for said charges nor the indictments, if any were returned, were offered as proofs by either party. Nevertheless, all parties agree that although tenure charges against respondent were preferred for conduct unbecoming a teacher after the alleged criminal charges had been made, the tenure charges were withdrawn when all criminal charges were dropped by virtue of respondent's entering into and successfully completing a pretrial intervention program. In short, respondent was never found guilty of any of the charges made against him, petitioner withdrew the tenure charges and further agreed that reference to respondent's alleged criminal activities would be excised from his official personnel file and placed under seal in a separate space accessible only by central administration, in the event that respondent should become involved in any similar controlled dangerous substance-related disciplinary matters (Exhibits J-1 and R-4). Furthermore, in both January and March 1986, the superintendent of schools on behalf of petitioner assured respondent that in consideration of the resolution of a grievance, in connection with which both parties were represented by attorneys, all references to the alleged criminal activities which resulted in dismissal of all criminal charges against respondent would be excised from respondent's personnel records (Exhibits R-3 and R-4).

In short, respondent was exonerated of any illegal activities in connection with the charges and petitioner acknowledged respondent's innocence in connection therewith.

The 1984 incident included within the present charge of conduct unbecoming was set forth in the charges filed herein by the statement of Brenda Witt (Exhibit J-1), consisting of the following:

During the fall of 1984, the East Brunswick School District suffered a strike. During the strike, Mr. Kenneth Henderek attended football practice wearing a placard. He was accompanied by his dog who was also wearing a placard. Mr. Henderek walked up and down the sidelines shouting obscenities and using vulgar language toward the coach and team. The Supervisor of Athletics approached Mr. Henderek and requested him to leave the field informing him that the Judge in Middlesex County ordered the East Brunswick Education Association to refrain from any pickets on school property. Mr. Henderek continued to shout obscenities. Mr. King went to take Mr. Henderek's arm to escort Mr. Henderek off the field. Mr. Henderek fell backwards. He eventually left the field. Several weeks later, Mr. Henderek sued the Supervisor of Athletics; however, the case was dismissed. After the dismissal, the Supervisor of Athletics received 15 to 20 threatening calls both at home and school. Mr. Henderek continued to attend football games. He followed the wife and daughter of the football coach, sitting next to her at a game. Mr. Henderek would continually seek out the Supervisor of Athletics and the football coach in order to harass and intimidate them.

On Election Day, 1984, the Supervisor of Athletics was having lunch in a local restaurant. Mr. Henderek was present; moved and sat next to him and began to make threatening and intimidating comments. The owner finally had to call the South River police. Mr. Henderek was told [that] the police were called, and [that] he had better leave before they arrived. Mr. Henderek left prior to the arrival of the police.

Although the said statement refers to events which took place in 1984, and no disciplinary charges or other charges ever resulted from the alleged activities contained therein, said statement was signed by Brenda Witt on January 22, 1990 (Exhibit J-1).

Both Charles M. King, supervisor of athletics for East Brunswick High School in 1984, and Marcus A. Borden, head football coach of East Brunswick High School in 1984, testified with regard to the 1984 picketing incident. The testimony revealed that a labor strike by certain teachers in the East Brunswick School System was in progress in 1984, and that respondent, as a striker, was picketing the football practice being conducted on the high school athletic field in September 1984. He was asked to leave the grounds and refused to do so unless and until the football coach read the picket sign

which respondent was carrying. An altercation ensued and respondent and the athletic director scuffled, as a result of which respondent left the playing field. Thereafter, the football coach observed respondent at one or more football games and he appeared to be sitting in the general vicinity of the coach's wife. However, no offensive words, actions or other conduct ever took place. Furthermore, no criminal charges, civil charges or school board charges of conduct unbecoming a teacher were ever preferred against respondent in connection with any of the 1984 activities set forth in the statement of Ms. Witt or the testimony of either Mr. King or Mr. Borden.

The 1989 incident culminated in the following events: On December 12, 1989, respondent was arrested and charged with having committed multiple criminal violations on that date in the Township of Millstone, involving assaults upon police officers while they were acting in the performance of their sworn duties and while in uniform, allegedly in violation of N.J.S.A. 2C:12-1b(5); preventing law enforcement officers from effecting a lawful arrest, in violation of N.J.S.A. 2C:29-2; possessing a handgun without having obtained a purchase permit and a carrying permit, in violation of N.J.S.A. 2C:39-5; possessing a handgun with the purpose of using it unlawfully against a police officer, in violation of N.J.S.A. 2C:39-4; and threatening to commit a crime of violence against a police officer by shooting him with the purpose to terrorize said police officer, in violation of N.J.S.A. 2C:12-3. Respondent was also accused of committing an act of robbery upon a police officer by inflicting bodily injury and threatening to commit serious bodily injury on said police officer in violation of N.J.S.A. 2C:15-1. Exhibit J-1.

On both December 14 and December 15, 1989, respondent was named in newspaper reports concerning the incident, and it was reported that he was charged with nine felony complaints arising out of his alleged assault of two state troopers and his alleged threat to kill a police officer with his own gun. The newspaper further reported that respondent was released on bail of approximately \$27,000. Exhibit J-1.

While the aforesaid charges were pending, some of which charges involved crimes of magnitude greater than the fourth degree, respondent retained an attorney and on April 11, 1990, respondent entered into an agreement with the prosecutor of Monmouth County to waive indictment (Exhibit P-3) and to plead guilty to a four-count accusation (Exhibit P-1). The said accusation accused respondent of three

violations of N.J.S.A. 2C:12-1b(5)(a), wherein respondent was alleged to have assaulted three different police officers while they were in uniform and acting in the performance of their sworn duties, and of a violation of N.J.S.A. 2C:29-2 by purposely preventing a law enforcement officer from effecting a lawful arrest by using or threatening to use physical force or violence against said law enforcement officer (Exhibit P-1). All of the aforesaid crimes are indictable crimes of the fourth degree.

Respondent's total exposure to incarceration, if found guilty of all charges, amounted to six years, and he had exposure to a maximum fine on all counts of \$30,000 (Exhibit P-4). Nevertheless, when asked the question: "Did you commit the offenses to which you are pleading guilty?" he responded, "Yes." Likewise, when asked the question, "Do you understand that if you plead guilty, you will have a criminal record?" he responded, "Yes" (ibid.).

Accordingly, in consideration of respondent's plea of guilty to the aforesaid charges, the prosecutor agreed to recommend dismissal of the more serious charges originally made against respondent (Exhibits J-1 and P-4).

In response to the question, "Do you understand that if you are a public office holder or employee, you can be required to forfeit your office or job by virtue of your plea of guilty?" respondent answered, "Yes" (Exhibit P-4).

In response to the question, "Have any promises other than those mentioned in this form, or any threats, been made in order to cause you to plead guilty?" respondent answered, "No" (Exhibit P-4.)

On May 25, 1990, respondent was sentenced to a term of probation for five years, a fine of \$500 and a Violent Crimes Compensation Board penalty in the sum of \$120. On May 29, 1990, a Judgment of Conviction was filed in the Superior Court, Monmouth County (Exhibit P-2).

The reasons set forth by the sentencing judge for the probation imposed were as follows:

This is a 42 year old defendant who has had prior involvement with the law in the past. The Court finds as aggravating factors that the nature and the circumstances of the offense and the role of the actor therein, there is a need to protect society from violators of

the law. The defendant committed the offense against a police officer acting in the performance of his duties while in uniform or exhibiting evidence of his authority. There is a need for deterring the defendant and others from violating the law. The Court finds as mitigating factors that the defendant did not contemplate that his conduct would cause or threaten serious harm. There were substantial grounds tending to excuse or justify the defendant's conduct. The defendant's conduct was the result of circumstances unlikely to reoccur. The imprisonment of the defendant would entail excessive hardship to himself or his dependents. The court finds that the aggravating and mitigating factors balance; however, the Court feels that this defendant is particularly likely to respond affirmatively to probation. [Exhibit P-2]

Approximately 12 days after the commission of the aforesaid offenses, respondent was admitted to the Carrier Foundation Addiction Recovery Unit. However, he was subsequently transferred from the Addiction Recovery Unit to Edward Hall because he appeared to be out of control. He was described as loud, argumentative, demanding and not responsive to verbal limit setting. He is also alleged to have threatened a staff member and had to go into a quiet area (Exhibit R-1). Respondent remained at the Carrier Foundation until February 5, 1990, and his final diagnosis consisted of the following: Bipolar disorder-manic, alcohol dependence, personality disorder with narcissistic and antisocial traits, seizure disorder, history of Lyme's disease, status post head injury, facial fracture secondary to trauma, deviated symptoms, history of rib fracture, and history of herniated lumbar disc (Exhibit R-1).

Respondent testified as to his recollection of the events of December 12, 1989, which led to the charges of indictable crimes to which he pleaded guilty. He claimed that he returned home at approximately 2 o'clock in the afternoon and went out to his car to get his boots and gloves. He further claimed that he had some words with a police officer in the vicinity of his car and decided to take a walk in the woods. Upon his return, he again was confronted by several police officers who assaulted him, kicked him in the head and body and inflicted serious injuries upon him for which he was taken to the Freehold Hospital (Exhibit R-2). Thereafter, respondent admitted himself to the Carrier Clinic.

Respondent's wife testified on his behalf, but claimed not to have been a witness to the altercation between her husband and the police officers.

Dr. William D. Reilly, a board certified psychiatrist, testified on behalf of respondent. Respondent became his patient as a referral from the Carrier Clinic. Dr.

Reilly diagnosed respondent's condition as a bipolar disorder with a seizure disorder. Respondent was seen by Dr. Reilly every two weeks and is currently taking lithium for his polar illness. Dr. Reilly also testified that respondent has a history of grand mal seizures. Dr. Reilly further testified that respondent has responded well to treatment and is an unlikely candidate to commit again the same types of crimes to which he has heretofore pled guilty.

ISSUES

1. Did respondent engage in conduct unbecoming a teaching staff member?
2. If so, what is the appropriate penalty?

APPLICABLE STATUTORY PROVISION

N.J.S.A. 18A:6-10 provides, in pertinent part, as follows:

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state...

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

ANALYSIS

It is initially observed that a tenured employee may be dismissed or reduced in compensation if he is guilty of "unbecoming conduct" which does not rise to the level of criminal conduct. It is likewise apparent that a tenured employee forfeits his position if he is convicted of an offense of the third degree or above. Furthermore, the forfeiture may take effect upon the plea of guilty to the offense. See N.J.S.A. 2C:51-2.

Accordingly, analysis must first be made as to whether any of the charges herein, individually or collectively, amount to "unbecoming conduct."

The initial charge herein consisted of an allegation that respondent was charged with possession of marijuana with intent to distribute and the growing of marijuana. These charges are alleged to have been made in 1974. Both the criminal charges and the tenure charges based upon unbecoming conduct have been heretofore withdrawn and dismissed. Respondent was found guilty of neither. The alleged criminal activities were excised from respondent's official personnel file and placed under seal and apparently respondent has not been guilty of any subsequent substance-related disciplinary matters. Accordingly, I FIND the initial charge to be so illusory and insubstantial as to amount to a nullity.

The second charge had to do with respondent's conduct during the fall of 1984 and his alleged picketing on school property in connection with a work-related strike. The alleged altercation between respondent, Mr. King and Mr. Borden and the alleged subsequent conduct arising therefrom were never the subject of either criminal, disorderly persons or civil offenses. Neither Mr. King, Mr. Borden nor the East Brunswick Board of Education ever preferred any type of charges, complaints or averments of impropriety against respondent in connection with any of the alleged conduct. In excess of six years has elapsed since the events in question. Furthermore, none of the conduct proven rises to the level of unbecoming conduct. Undoubtedly, philosophical differences have existed between the then supervisor of athletics and now principal of the East Brunswick High School, the head football coach and the respondent. Those philosophical differences, in a democratic society, do not amount to unbecoming conduct on the part of one of the participants.

With regard to respondent's conviction of the four indictable offenses herein, since the crimes were not of the third degree or above, forfeiture of position either upon plea or sentencing pursuant to N.J.S.A. 2C:51-2 is inapplicable; it must therefore be determined whether the criminal conduct committed by respondent amounts to unbecoming conduct pursuant to N.J.S.A. 18A:6-10.

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R. 3:9-2 - Pleas, provides:

A defendant may plead only guilty or not guilty to an offense. The court, in its discretion, may refuse to accept a plea of guilty and shall not accept such plea without first addressing the defendant personally and determining by inquiry of the defendant and others, in the court's discretion, that there is a factual basis for the plea and that the plea is made voluntarily, not as the result of any threats or of any promises or inducements not disclosed on the record, and with an understanding of the nature of the charge and the consequences of the plea.

Our Rules of Evidence, Rule 63 (20) - Judgments of previous conviction of crime, provides:

In a civil proceeding, except as otherwise provided by court order on acceptance of a plea, evidence is admissible of a final judgment against a party adjudging him guilty of an indictable offense in New Jersey or of an offense which would constitute an indictable offense if committed in this state, as against that party to prove any fact essential to sustain the judgment.

The comment immediately following Evid. R. 63(20) provides:

This Rule allows, in a civil proceeding, evidence of a judgment convicting a party of an indictable offense to be introduced against that party to prove any fact essential to sustain the judgment, unless otherwise provided by court order on acceptance of a guilty plea...By Official Note to the rule, Rule 63 (20) supersedes N.J.S. 2A:81-12 to the extent that that statute was inconsistent with the rule. See N.J.S. 2A:84A-40. Under N.J.S. 2A:81-12 no conviction of an offender could be received in evidence against that offender to prove the truth of the facts upon which a conviction was based.

Now convictions may be admissible as proof of the facts underlying convictions, but only in civil proceedings.

See, Matter of Tanelli, 194 N.J. Super. 492, 497 (App. Div. 1984), wherein in reference to Evid. R. 63 (20), the Court stated: "The Rule permits use of a judgment of conviction for only an indictable offense to prove facts at issue in civil proceedings."

The Tanelli Court also held:

The doctrine of collateral estoppel may be applied in a removal proceeding to establish misconduct previously established in a

court proceeding. In re Coruzzi, 95 N.J. 557 (1984). The conviction there of an indictable offense was deemed sufficient ground for removing a state court judge. Collateral estoppel has been similarly applied in attorney disbarment proceedings. [at 496-497; citations omitted]

Here, the Board introduced into evidence the Accusation (Exhibit P-1), the Judgment of Conviction, certified by a deputy clerk of the Superior Court (Exhibit P-2), respondent's executed waiver of indictment (Exhibit P-3) and respondent's handwritten executed statement pursuant to R. 3:9-2 (Exhibit P-4).

Accordingly, the conduct of the respondent as set forth in the Accusation (Exhibit P-1) is that which must be evaluated as constituting or not constituting "unbecoming conduct" as set forth in N.J.S.A. 18A:6-10. I FIND that respondent's attempt to cause bodily injury to three New Jersey state troopers while each was acting in the performance of his sworn duties and while in uniform constitutes "unbecoming conduct," as does purposely preventing law enforcement officers from effecting a lawful arrest by using or threatening to use physical force or violence.

Although respondent attempted to dispute his guilt by denying the facts which constituted the basis of his convictions of indictable offenses, his position, as a matter of law, must be rejected. Furthermore, his testimony, as well as that of his wife and that of Dr. Reilly, regarding respondent's alcohol addiction, bipolar disorder and seizures, whether offered by way of denial of the acts constituting the conviction or by way of mitigation, was not persuasive with regard to either the denial of the conduct or the appropriate penalty to be assessed. Although respondent's alcohol addiction, seizure disorder and the unlikelihood of his committing like crimes in the future were considered by the sentencing judge, and rightly so, in determining whether incarceration was appropriate (Exhibit P-2), the issues here are quite different. Once having determined that respondent's conduct constituted "unbecoming conduct" the question is what is the appropriate penalty, not the likelihood of a repeat occurrence. Additionally, the very factors which were apparently pertinent to the sentencing judge's determination not to sentence respondent to a term of incarceration bring into focus whether respondent has sufficient mental and physical capacity to assume the duties and functions of the responsible position of a school-teacher.

With regard to the appropriate penalty to be imposed for respondent's unbecoming conduct, the Commissioner has heretofore held:

The teaching profession is chosen by individuals who must comport themselves as models for young minds to emulate. This heavy responsibility does not begin at 8:00 a.m. and conclude at 4:00 p.m., Monday through Friday, only when school is in session. Being a teacher requires, *inter alia*, a consistently intense dedication to civility and respect for people as human beings. [In the Matter of the Tenure Hearing of Robert H. Beam, School District of the Borough of Sayreville, 1973 S.L.D. 157, 163]

Petitioner's counsel, in his brief at page 7, eloquently set forth the rationale for dismissal of respondent under the circumstances herein, as follows:

In sum, it is the position of the Board of Education of the Township of East Brunswick that a teacher must serve as a role model for students and in addition must have the ability to stand before students with the appropriate degree of respect and attention to what is being taught rather than to external attributes of the individual. In this case, it is respectfully submitted that the incidents of December 12, 1989, the fact of Mr. Henderek's guilty plea to those crimes, and the fact that he is on probation, would in and of themselves be sufficient to warrant his dismissal. Perhaps what is most egregious [sic] in this circumstance is that unlike any other circumstance which diligent research has been able to uncover, the assaults committed by Mr. Henderek were not merely upon citizens, but were rather assaults upon police officers. Clearly, the Board admits that the seriousness of an alleged assault by a teacher upon a neighbor or by a teacher upon some other citizen could perhaps be looked upon as an offense not requiring discharge. It is submitted, however, that in the instant circumstance, those assaults were committed against police officers in the course of resisting arrest. Thus, the offenses of which Mr. Henderek stands convicted are not merely abstract violations of law, but rather demonstrate a total disdain for that element of our society charged with enforcing that law. How can a school district educate students to live appropriate lives within our legal system when a member of its teaching staff not only resisted arrest but assaulted the representatives of law and order in our society? We submit the answer is self-evident. It can not do so.

I concur that dismissal is the appropriate penalty herein.

RECOMMENDED DISPOSITION

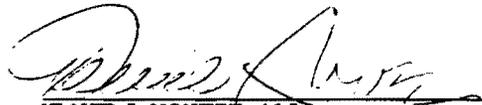
For the reasons set forth herein, it is hereby **ORDERED** that respondent be and is hereby **DISMISSED** for unbecoming conduct in accordance with and pursuant to N.J.S.A. 18A:6-10.

I hereby FILE this initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

1/25/91
DATE


DAVID J. MONYK, ALJ

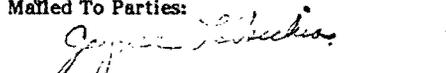
Receipt Acknowledged:

1/28/91
DATE


DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 06 1991
DATE


OFFICE OF ADMINISTRATIVE LAW

am

OAL DKT. NO. EDU 2899-90

DOCUMENTS IN EVIDENCE

- J-1 Notice of petitioner to respondent, dated January 26, 1990, with attachments consisting of charge of conduct unbecoming a teaching staff member, photostats of five criminal complaints, letter of petitioner to respondent, dated December 18, 1989, photostats of newspaper articles appearing in Asbury Park Press December 14 and 15, 1989, statement of Brenda Witt, dated 1-22-90, photostat of charges notarized November 2, 1978, letter of respondent's attorney to Brenda Witt, dated February 9, 1990, and written statement of position of attorneys for respondent, dated February 9, 1990.
- J-2 Copy of petitioner's minutes of regular board meeting, dated March 1/8, 1990
- J-3 Attachment to minutes of board meeting
- J-4 Answer of respondent's attorneys, dated April 4, 1990
- P-1 Accusation in the matter of the State of New Jersey v. Kenneth F. Henderek, dated April 11, 1990
- P-2 Certified copy of Judgment of Conviction in the matter of State of New Jersey v. Kenneth F. Henderek
- P-3 Copy of Waiver of Indictment, executed by respondent on April 11, 1990
- P-4 Respondent's written statement pursuant to R. 3:9-2, dated April 11, 1990
- R-1 Copy of Summary of Treatment received by respondent at the Carrier Foundation between 12/24/89 and 2/5/90
- R-2 6 photographs of respondent taken on 12/18/89
- R-3 Confidential memorandum to respondent from Dr. Joseph Sweeney, superintendent, dated March 12, 1986
- R-4 Confidential memorandum to respondent from Dr. Joseph Sweeney, superintendent, dated January 29, 1986

WITNESSES

On behalf of petitioner: Kenneth F. Henderek
Charles M. King
Marcus A. Borden
Brenda A. Witt

On behalf of respondent: Kenneth F. Henderek
Dr. William D. Reilly
Pamela A. Henderek

IN THE MATTER OF THE TENURE :
 HEARING OF KENNETH HENDEREK, :
 SCHOOL DISTRICT OF THE TOWN- : COMMISSIONER OF EDUCATION
 SHIP OF EAST BRUNSWICK, : DECISION
 MIDDLESEX COUNTY. :
 _____ :

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4, which incorporated all arguments embodied in his post-hearing brief. The Board filed timely reply exceptions thereto, as well as primary exceptions. Respondent filed timely reply exceptions to the Board's primary exceptions.

Respondent excepts both to the ALJ's conclusion that "****the conduct of respondent as set forth in the Accusation (Exhibit P-1) is that which must be evaluated as constituting or not constituting 'unbecoming conduct' as set forth in N.J.S.A. 18A:6-10" (Exceptions, at p. 1, quoting the initial decision, at p. 11) and also to the ALJ's penalty of dismissal.

It is respondent's position that the ALJ's reliance on the Accusation for a determination as to whether such averments constituted conduct unbecoming a teaching staff member was misplaced. He claims that

You are viewing an archived copy from the New Jersey State Library.
The Initial Decision fails to acknowledge that the tribunal must inquire into the primary conduct of the teacher whose tenure of office is under challenge, and may not merely look at the conclusory legal language of the Accusation to which the Respondent admitted guilt as 'proof' of the nature and quality of acts which are unspecified therein. (emphasis in text)
(Exceptions, at p. 2)

Mr. Henderik submits that In the Matter of Tanelli, 194 N.J. Super. 492, 497 (App. Div. 1984) indicates that such documents are probative of underlying facts, but that proof is still necessary. He claims he was advised that a conviction for any third degree charge would lead to automatic forfeiture of his position for a teacher and, thus, he entered into a plea agreement pleading guilty to four fourth degree charges. Citing Garden State Fire and Gas Co. v. Keefe, 172 N.J. Super. 53, 60-61 (App. Div.), certif. den. 84 N.J. 389 (1980) for the proposition that a plea bargain does not constitute a full and fair litigation of the issues, but rather represents a defendant's option to forego such litigation for reasons unrelated to the issue at question, respondent submits that the ALJ's overbroad application of Tanelli, supra, has resulted in the exclusion of virtually all evidence proffered by him, and also resulted in an unwarranted conclusion that the Board has met its burdens of production and of persuasion without submitting any evidence relating to the underlying conduct.

Respondent further argues that the initial decision is in error with regard to the weight accorded the expert psychiatric testimony. Mr. Henderik cites mitigating factors such as his undiagnosed and untreated bipolar illness and his partially uncontrolled seizure disorder at the time of the incidents in question. He further contends the ALJ erred in regard to the

bearing of issues of rehabilitation upon the appropriate punishment, noting that since the incidents in question he has devoted his energies to the task of recovery and as the result of specialized therapies, has demonstrated remarkable success. In response to the ALJ's proposed punishment of removal from tenure by alluding to the respect students must have for teachers, respondent argues that it is "****totally appropriate for students to understand that individuals, through illness or other mitigating factors, sometimes become involved in isolated incidents not totally of their own volition which do not reflect the true traits of their character.***" (Exceptions, at p. 4) Respondent finds the ALJ's conclusion ridiculous that students would be unable to respect one who recognized his own shortcoming and disabilities and sought appropriate therapies to become cured and to redeem his character from a single aberrant incident that resulted, respondent claims, in injury only to himself.

Finally, respondent incorporates his post-hearing brief in support of his position.

The Board submitted four exceptions which are summarized, in pertinent part, below:

Point I states:

THERE WAS MORE THAN SUFFICIENT EVIDENCE FOR THE ADMINISTRATIVE LAW JUDGE TO CONCLUDE THAT KENNETH HENDEREK'S ACTIONS ON DECEMBER 12, 1989 DEMONSTRATED CONDUCT UNBECOMING A PUBLIC SCHOOL TEACHER.

The Board submits that the ALJ correctly and fully evaluated the evidence of respondent's conduct on December 12, 1989 in accordance with N.J.S.A. 18A:6-10, including a review not only of the Accusation, the Judgment of Conviction and Plea Agreement, but

also the testimony of respondent, given over great objections, which included specific details as to the events leading to his assault upon state troopers.

The Board further claims that the ALJ met his obligation of determining the credibility of witnesses by hearing respondent's denial of the facts which constituted the basis of his convictions and specifically rejected his denial. The ALJ also heard testimony concerning respondent's alcohol addiction, bipolar disorder and seizures, the Board submits, and found such testimony "whether offered by way of denial of the acts constituting the conviction or by way of mitigation, was not persuasive with regard to either the denial of the conduct or the appropriate penalty to be assessed." (Reply Exceptions, at p. 2 quoting the initial decision, at p. 11)

The Board further argues that respondent misreads and misapplies the holding of Tanelli, supra, and Prudential Property and Gas Inc., Co. v. Kollar, 243 N.J. Super. 150 (App. Div. 1990). It contends, first, that Evid. R. 63 (20) permits the admission of the indictable offenses for which respondent was convicted as evidence to prove any fact essential to sustain the judgment. The Board submits that Tanelli does not say evidence of an indictable conviction is simply probative, as respondent submits is the case. Rather, the Board submits Tanelli says it is proof and further that Kollar, supra, is not to the contrary. The Board avers Kollar focuses on conviction, and involved the criminal law concepts of conspiracy, criminal liability for conduct of another and common criminal purpose. The Board distinguishes this case because these factors are not present in the present matter since Mr. Henderik acted alone, and there are no co-defendants for whose conduct he has

been found to be criminally liable. Furthermore, the Board contends, the facts essential to sustain his convictions are the same facts which prove his conduct was unbecoming a teaching staff member. Unlike Kollar, the Board claims there are no other nonessential facts at issue with respect to this civil tenure matter.

Additionally, the Board submits that in this case the ALJ had before him the Judgment of Conviction, the Accusation, the Waiver of Indictment, and respondent's own written statement pursuant to R. 3:9-2. The Board notes that the ALJ also asked respondent questions concerning his entering his guilty plea, citing the initial decision at page 6. The Board further notes that respondent answered the judge's question in the affirmative when asked whether he committed the offenses to which he pled guilty. "Obviously, all this is far more than just evidence of a fact of conviction and is far more than the required additional need for a residuum of legally competent evidence, N.J.A.C. 1:1-15.8(b), and is clearly a thorough review of the primary conduct of Mr. Henderek. (emphasis in text) (Reply Exceptions, at p. 2.)

Mr. Henderek also misunderstands the scope and application of the criminal forfeiture statute, the Board claims. It avers that the failure of the criminal forfeiture statute to mandate job forfeiture for such fourth degree crimes as those committed by Mr. Henderek is of no relevance to a determination of whether his conduct was sufficiently unbecoming for dismissal of a public school teacher. It further claims that there is no statutory or case law requirement that a teacher's conduct be in any way criminal in order for it to be unbecoming and sufficient for dismissal. The Board

notes the ALJ made specific note of this fact and ruled that once it is determined that the criminal forfeiture statute, N.J.S.A. 2C:51-2 does not apply, then the teacher's conduct is to be reviewed to determine whether it "amounts to unbecoming conduct pursuant to N.J.S.A. 18A:6-10." (Reply Exceptions, at p. 3, quoting the initial decision at p. 9)

Point II states:

THE ADMINISTRATIVE LAW JUDGE DID RECEIVE EVIDENCE
CONCERNING AND DID ADDRESS ALL MITIGATING FACTORS
RAISED BY MR. HENDEREK.

The Board avers Mr. Henderek was granted the full opportunity to present mitigating evidence through his own testimony and the testimony of his treating psychiatrist and his wife, as well as placing in the record the treatment report of the Carrier Foundation, which he entered after the 1989 incident. All such evidence, in the Board's view, is available to support respondent's claim of mitigating circumstances.

The Board points out, however, that Mr. Henderek's purported rehabilitation by following a different course of psychotherapeutic treatment is irrelevant to the issue of whether he engaged in conduct unbecoming. The Board suggests respondent proffers no authority for the proposition that the evidence of subsequent rehabilitative treatment is relevant to the fact that he engaged in conduct that is unbecoming of a teaching staff member. The Board submits that the standard of review is unbecoming conduct not "unrehabilitatable unbecoming conduct." (Reply Exceptions, at p. 4) It adds that while a full diagnosis may not have been completed by the time of the December 12, 1989 incident, it is clear that he was under treatment for a seizure disorder, and that his own

doctor testified that he may have had a psychomotor episode on December 12, 1989 as a manifestation of the seizure disorder.

The Board would rebut respondent's assertion made in exceptions that he has recognized his shortcoming and was following the treatment prescribed by his doctor by noting that respondent's own testimony was that he had drunk one or more bottles of beer before assaulting the state troopers, citing respondent's brief at page 12. Further, the Board argues that Dr. Reilly's psychiatric report can only have relevance if it relates to the defense of mitigating circumstances, and that there is nothing in the report which indicates that respondent was not cognitive of his violent tendencies and alcoholic propensities at the time of his assault on the troopers. Although averring that it is not relevant to this matter, the Board notes that a question raised by respondent's voluntary alcohol consumption is whether he "will continue the current treatment proscriptions with the same disregard as he did the past proscriptions." (Reply Exceptions, at p. 4)

Citing page 11 of the initial decision as dispositive of this matter, the Board submits that the ALJ considered evidence of mitigating circumstances and gave it the appropriate weight in reliance on his determination of credibility and the requirements of law.

Point III states:

THE EVIDENCE IS SUFFICIENT TO SUPPORT ALL SPECIFICATIONS OF THE TENURE CHARGES, BUT REGARDLESS OF WHETHER ANY INCIDENT OF PAST CONDUCT IN AND OF ITSELF RISES TO THE LEVEL OF 'UNBECOMING CONDUCT,' IT IS RELEVANT TO APPROPRIATE PENALTY.

The Board again proffers in reply exceptions its arguments that the 1978 charges against respondent as well as his harassment of co-workers in 1986 are each sufficient to sustain respondent's dismissal. Repeating its version of the facts of those two matters, the Board posits that such charges filed against respondent demonstrate a series of incidents over a lengthy period of time which both meet the requirements of conduct unbecoming a teaching staff member and, therefore, warrant dismissal.

In response to respondent's argument that the 1989 assault on the state troopers was "a single aberrant incident" (Reply Exceptions, at p. 6, quoting respondent's exceptions at p. 6), the Board submits that respondent at the same time declares that the prior acts of unbecoming conduct were included "only for rhetorical effect" and "obviously intended as 'make weight' issues" (Id., quoting respondent's post-hearing brief, at p. 5). The Board suggests that by acknowledging the existence of the prior behavior and urging that the ALJ not consider it, Mr. Henderek cannot then claim that the December 12, 1989 episode was an aberration. In the alternative, the Board submits that even if the prior incidents do not amount to sufficient cause for dismissal, they are relevant to consideration of the appropriate penalty and submits in reliance upon In re Brody, Elmwood Park, 1984 S.L.D. 1216, aff'd State Board 1247, that the cumulative effect of separate incidents, although years apart, demonstrates that the conduct of respondent was inappropriate for continued employment in the public schools.

Point IV states:

ASSAULTS ON STATE TROOPERS IS SUFFICIENT TO
SUSTAIN AN 'UNBECOMING CONDUCT' CHARGE WARRANTING
DISMISSAL.

In response to respondent's argument that he should not be dismissed because students need to learn to respect individuals who are undertaking appropriate therapies to become cured when there is an isolated incident not totally due to their own volition, the Board states there are several points of rebuttal. First, the Board submits that respondent's consumption of beer just prior to the 1989 assault was totally voluntary. It submits that students need to learn to take ownership and responsibility for their own conduct. Second, the 1989 incident was not isolated nor spontaneous. It claims that in addition to the prior inappropriate behavior noted above, the assault incident was protracted, intentional and repetitive and involved actions not becoming a public school teacher. The Board submits that students need to learn that second chances do not go on indefinitely, and that a penalty will be meted out when the conduct is egregious.

The Board urges the Commissioner to affirm the ALJ's initial decision and penalty in this matter.

By way of reply to the Board's primary exceptions to the points contained in his post-hearing brief, respondent urges that contrary to the Board's suggestion in exceptions, the only testimony offered on whether he has a problem with alcohol consumption was to the effect that he did not suffer from alcohol addiction. Respondent claims that "[t]he invidious aim of the East Brunswick Board's ***Exceptions is to call attention away from the fact that Mr. Henderek is being prosecuted as a status offender in this tenure matter, contrary to the mandate of the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. because of his medical disabilities." (Respondent's Reply Exceptions, at p. 2) He

reiterates his contention that "[h]e was brutally beaten by the state police****" (Reply Exceptions, at p. 3) as a result of his then-untreated neurological disorder, and should not be punished because of that fact.

Moreover, respondent claims that the Commissioner should not consider the further attempts of the Board to "****smear Mr. Henderik with a variety of ill-conceived accusations to add weight to the state trooper incident." (Id.) He agrees that the ALJ rightly rejected the two prior events made a part of the tenure charges herein.

Respondent summarizes by saying "[i]n the context of this tenure charge he should not be treated as a witch or demon. Rather, the Commissioner should heed the humane values embodied in the Law Against Discrimination and refuse to deprive Mr. Henderik of his teaching position." (Id.)

Upon a careful and independent review of the record of this matter, which it is noted, does not include a transcript of the hearing below, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that respondent herein is guilty of conduct unbecoming a teaching staff member warranting dismissal from his tenured position with the East Brunswick Board of Education.

In so finding, the Commissioner is cognizant of the standard of review in deciding a tenure matter in this, a quasi-judicial forum:

***the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented. In the process of reaching that finding, the Commissioner should give due regard to the opportunity of the hearer below to

observe the witnesses and to evaluate their credibility.***

Appellate Division decision November 15, 1988, In the Matter of the Tenure Hearing of Patrick Caporaso, School District of the Township of Belleville, Essex County, citing In re Masiello, 25 N.J. 590, 606 (1958))(Slip Opinion, at pp. 2-3)

The findings derived from such a hearing must be based upon substantial credible evidence set forth in the record. Dore v. Bedminster Tp. Bd. of Ed., 185 N.J. Super. 447, 453 (App. Div. 1982) By procedural rules established pursuant to N.J.S.A. 52:14F-5, N.J.A.C. 1:1-15.5 speaks to hearsay evidence. Therein it is established that in this administrative forum hearsay evidence is admissible to the following extent:

1:1-15.5 Hearsay evidence; residuum rule

(a) subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. (emphasis supplied)

The residuum rule was elaborated upon by the courts in the case captioned Michael S. Colavita v. Board of Education of the Hillsborough Township School District, 1985 S.L.D. 1882. Therein, the Appellate Division reversed the State Board's decision which affirmed the Commissioner's decision in that increment withholding action. It stated:

All parties have conceded throughout this case that there has only been hearsay evidence offered to sustain the underlying facts supporting the withholding of the salary increment and that there has been no 'legally competent evidence' presented to support the 'ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.' [citation omitted] The proofs fail under the test of the residuum rule. (Colavita, at 1884)

The Court went on to discuss the administrative forum's residuum rule standard in commenting:

We are aware that the residuum rule has been under heavy attack from the academic community as being both logically unsound and administratively impractical. See, e.g., 3 K.C. Davis, Administrative Law Treatise, sec. 16:6 at 239-46 (2d ed. 1980); 1 J.H. Wigmore, Evidence (Tillers rev. 1983) sec 4b at 119-25; E.W. Cleary, McCormick, On Evidence, sec. 354 at 1017; K.C. Davis "Hearsay in Nonjury Cases," 83 Harv. L. Rev. 1362 (1970). However, so long as the residuum rule remains part of the New Jersey Administrative Code we are loathe to uphold so obvious a circumvention of the rule in a particular case. See Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 29 (1981); Weston, 60 N.J. at 50-52. (Id., at 1885)

Thus, in the instant matter the ALJ was obliged to comply with the residuum rule in evaluating the admissibility of documents which would, under the court rules, constitute hearsay evidence such as a judgment of conviction for Indictable Offenses, an Accusation, a Waiver of Indictment, and a written statement scribed by respondent pursuant to R. 3:9-2. In considering such documents for the purpose of assessing whether the conduct for which respondent was convicted constituted conduct unbecoming a teaching staff member, Tanelli, supra, and Kollar, supra are instructive.

Tanelli holds that a single judgment of conviction may be presented to estop collaterally the party convicted from retrying the factual issues essential to sustain that judgment, but is

inadequate, by itself, to sustain a finding of conduct unbecoming a teaching staff member absent a residuum of legally competent evidence. Kollar adds that "a party's judgment of conviction on an indictable offense is admissible against him to prove any fact essential to sustain conviction. The rule, however, does not make the conviction conclusive proof of the underlying facts." (Kollar, at p. 153-4) In the case at bar, the Commissioner is convinced that the ALJ's review of the documentary evidence as well as the testimonial evidence was entirely appropriate and adequate to satisfy the standards extant in this tenure matter and to sustain his conclusions of law.

It is uncontested that respondent herein entered into a plea bargain, which downgraded the charges against him to three counts of aggravated assault on a police officer and one count of resisting arrest. Had said single judgment of conviction been the only submission proffered as sufficient legally competent evidence that the facts underlying such convictions did constitute conduct unbecoming a teaching staff member, there might indeed be cause for concern that respondent was denied, in this forum, the opportunity to establish that the nature of his actions, for whatever reasons, did not rise to the level of conduct unbecoming a teaching staff member. Such was emphatically not the case in this hearing. Not only did the Judgment of Conviction enter the record (P-2), but the Accusation (P-1), the Waiver of Indictment (P-3), and Mr. Henderek's own written statement (P-3) submitted pursuant to R. 3:9-2 were also admitted by the Board as evidence. The Commissioner finds and determines that said exhibits, combined, amount to more than the requisite residuum of sufficient legally competent evidence on the

question of the primary conduct which led to the filing of tenure charges against respondent herein.

Moreover, the ALJ determined to look at more than the above-stated exhibits by receiving into the record respondent's own testimony reciting his version of the facts which led to his convictions, which testimony further addressed the facts underlying the tenure charges herein. Beyond that, the ALJ also permitted testimony from respondent's wife and his current psychiatrist on the issue of mitigation. What is more, the initial decision reflects the ALJ's consideration of such testimony in his finding of fact and conclusions of law. In this regard, the Commissioner finds the ALJ's actions were entirely appropriate and more than adequate to meet the requirements of law in deciding this matter. (Caporaso, supra; In re Masiello, supra; Dore, supra)

The Commissioner thus concludes that in a tenure matter where a respondent has been convicted of an indictable offense(s), which forms the basis for the certification of tenure charges, no obligation exists to retry such individual's guilt. The doctrines of res judicata and collateral estoppel bar relitigation of such conviction. However, a review of the legal documents related to such conviction and the taking of testimony in consideration of mitigating circumstances surrounding the facts underlying any such conviction is acceptable and consistent with law. (R. 36(20); N.J.A.C. 1:1-15.5; Tanelli, supra; and Kollar, supra)

In consideration of the above as well as the record developed below, the Commissioner concurs fully with the ALJ that the events of December 12, 1989, which formed, in part, the basis of the instant tenure charges constitute conduct unbecoming a teaching

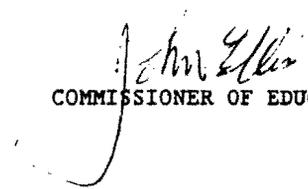
staff member. The Commissioner further concludes, based on a careful review of the record before him, that the penalty of dismissal recommended by the ALJ is the appropriate one, for the reasons expressed in the initial decision. In so finding, the Commissioner also adopts as his own the conclusion of the ALJ dismissing the events alleged to have taken place in 1974 and those alleged to have occurred in the fall of 1984 in arriving at the penalty in this matter for the reasons expressed in the initial decision at page 9.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law that respondent be dismissed from his tenured employment with the Board for conduct unbecoming a teaching staff member pursuant to N.J.S.A. 18A:6-10 et seq. and adopts it as the final decision in this matter for the reasons expressed in the initial decision as amplified herein. He further directs that this matter be forwarded to the State Board of Examiners for any action it deems appropriate pursuant to N.J.A.C. 6:11-3.6.

MARCH 14, 1991

DATE OF MAILING - MARCH 15, 1991

Pending State Board


COMMISSIONER OF EDUCATION

PINELAND LEARNING CENTER, INC., :
FRED ECCLESTON AND MARY :
ECCLESTON, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
NEW JERSEY STATE BOARD OF : DECISION
EDUCATION AND NEW JERSEY STATE :
DEPARTMENT OF EDUCATION, :
RESPONDENTS. :
_____ :

For petitioner, Peter R. Sarasohn, Esq. (Ravin, Sarasohn,
Cook, Baumgarten, Fisch & Baime)

For respondent, Arlene G. Lutz, DAG (Robert J. Del Tufo,
Attorney General)

This matter was opened before the Commissioner by way of a petition for injunctive relief and declaratory judgment filed by petitioners on December 14, 1990. In essence, the petition sought a declaration that a full scope tuition audit conducted by the Department of Education during March through May, 1990, together with concomitant requests for certain records and the disallowances resulting from petitioners' refusal to provide them, was unauthorized by statute and regulation then in effect and in violation of constitutional rights of equal protection and freedom from unwarranted governmental intrusion. The injunctive relief sought was restraint of a previously scheduled December 19, 1990 audit appeal meeting with the Chief of the Department's Bureau of

Auditing, on the grounds that production of the documents requested for this meeting would moot petitioners' appeal.

The need for determination on the most immediately pressing aspect of this matter was averted by the Bureau of Auditing's agreement to postpone the December 19, 1990 appeal meeting at petitioners' request, and the parties were instructed to proceed accordingly.

Subsequently, in response to petitioners' initial filing, the State moved to dismiss the petition for failure to exhaust administrative remedies: specifically, for failure to use the full internal appeal process established by the Division of Compliance, which provides for initial appeal to the Chief of the Bureau of Auditing and subsequent appeal to the Director of the Division of Compliance prior to appealing to the Commissioner pursuant to N.J.A.C. 6:24-1.2(a).

In reply, petitioners (hereinafter Pineland) argued that it was not required to exhaust administrative remedies where a fundamental question of law rather than fact-sensitive interpretation was at issue, and where such remedies would prove futile given the Department's established position on the extent of its authority as specifically expressed in writing by both persons to whom Pineland could appeal prior to appearing before the Commissioner. In the view of both potential adjudicators, Pineland argued, it would be required to produce the disputed documentation in order to significantly alter the outcome of its audit; Pineland's entire contention, however, is that demands for such production are ultra vires, so that a fundamental question of law must be resolved prior to any attempt on Pineland's part to appeal the actual audit

results. For this very reason, Pineland argued, its request for injunctive relief also remains viable notwithstanding postponement of the December 19, 1990 audit appeal meeting.

Upon careful review of the papers in this matter, the Commissioner rejects the State's contention that Pineland's appeal should be dismissed for failure to exhaust administrative remedies, since the Department's internal appeal procedure is not embodied in regulation and cannot be imposed upon the parties within this context as if it had the force of law. Nonetheless, for the reasons set forth below, the Commissioner determines both to deny Pineland's request for emergent relief and to dismiss its underlying petition.

Pineland's claims, set forth in six counts, essentially fall into two categories: first, that certain actions on the part of the Department were ultra vires because not specifically authorized by statute or regulation, and second, that these same actions were also violations of constitutional rights of equal protection and freedom from unwarranted governmental intrusion. The Commissioner rejects both these contentions.

Initially, the Commissioner notes that statute bestows broad powers upon both him and the State Board of Education in conjunction with the State's responsibility for the general supervision of New Jersey's public education system, of which private schools for the handicapped accepting public school pupils are an integral part. Specific powers include the ability to command appearances, produce documentation, take testimony and administer oaths, as well as, in the case of the State Board, all powers requisite to performance of its duties, and in the case of the Commissioner, power to enforce the rules of the State Board.

N.J.S.A. 18A:4-16, 18A:4-17, 18A:4-18, 18A:4-19, 18A:4-23 and 18A:4-31.

Moreover, it is well established that the State has an overriding interest in, and bears an overriding responsibility for, assuring the fiscal and operational integrity of private schools supported in whole or part by public monies. Council of Private Schools v. Cooperman, 205 N.J. Super. 544 (App. Div 1985); Penta Associates II and Coastal Learning Center v. New Jersey State Department of Education and Commissioner of Education, decided by the Commissioner May 22, 1989, affirmed with modification by State Board, February 7, 1990; Deron School of New Jersey, Inc. et al v. New Jersey State Department of Education and Commissioner of Education, decided by the Commissioner October 20, 1989, affirmed by State Board April 4, 1990. In terms of specific regulation, N.J.A.C. 6:28-9.1 clearly and unequivocally authorizes the Department to:

***monitor all programs and services required by this chapter for compliance with the New Jersey Statutes Annotated, New Jersey Administrative Code and the approved special education plan.

(b) The monitoring process may include, but is not limited to:

- (1) Review of data and reports;
- (2) On-site visits;***and
- (3) Audit of Federal and State funds.

This charge plainly confers upon the Department broad discretion to command any records, papers, etc., and to undertake any inquiry, which it deems legitimately necessary to ascertain a private school's compliance with law and, as in the case presented herein, the validity of its tuition charges as regulated by N.J.A.C. 6:20-4.1 et seq. Further, N.J.A.C. 6:20-4.8(d) [now (g)] makes

plain reference to a "tuition audit" as something separate and distinct from the annual certified audit required pursuant to N.J.A.C. 6:20-4.8(a), so that the latter cannot be construed as the State's sole method of satisfying the requirements of either N.J.A.C. 6:28-9.1 or 6:20-4.1 et seq.

Pineland's fundamental contention with respect to N.J.A.C. 6:20-4.1 et seq. as it existed prior to amendment in November 1990 is that any document not specifically enumerated therein is ipso facto immune from Department scrutiny and beyond the State's authority to command; it further avers that the Department effectively admitted as much by proposing amendments to N.J.A.C. 6:20-4.3 and 4.4 and adding a new section (6:20-4.11) that explicitly authorizes agency access to certain records. These contentions, however, are patently erroneous.

At the time of adoption of the original tuition regulations, the State had no basis in practical experience on which it might have predicted a need to codify its obvious right of access to the documentation underlying the tuition allowability determinations it was charged with making. By the time the regulations were revised, however, experience had taught Department staff both what types of documentation it was likely to need and that some private schools would resist production of this documentation unless State agents could "point to" a specific citation requiring it. Hence, the changes made to those portions of the regulations relevant to this case conferred no new authority on the agency; they merely codified existing authority and experience in order to clarify agency expectations and procedures and foreclose

unwarranted disputes. See Rule Proposal Statement, 22 N.J.R. 2633 et seq.*

The hollowness of Pineland's position becomes even more apparent when reviewing the types of documentation it claims to be outside proper Department purview absent specific regulatory itemization: Depreciation schedules, insurance policies, payroll records, cash disbursement journals and related vendor invoices, cash receipts, statements of annual interest, tax bills, lease agreements, employment contracts, auditor's workpapers and mileage logs for buses used in contracted service with a related party. In effect, Pineland maintains that ordinary and essential business records are the privileged property of private school owners regardless of the quasi-public nature of these schools, and that the Department could make accurate determinations regarding the stringent and highly specific bookkeeping/accounting practices and cost allowances set forth in N.J.A.C. 6:20-4.3 and 6:20-4.4 without the concomitant right of access to underlying records which can only be characterized as crucial.

Pineland's constitutional claims are likewise without merit. In its equal protection claim, Pineland argues that, of New Jersey's 120 private schools for the handicapped, four of the five schools selected for full scope audit as of the date of its

* The Commissioner notes the proposal statement's reference to Metromedia, Inc. v. Director Division of Taxation, 97 N.J. 313 (1984), namely that certain agency standards, though implied and intended, were not expressly included in the agency's prior rules as required by Metromedia. The directives of that case however, pertain to adjudicative standards, of which several are included elsewhere in the rule adoption. These have no application for the present matter, which centers on the Department's authority to view documentation directly related to existing adjudicative standards.

petition were for-profit schools. As Pineland's letter from then-Director of Compliance Richard Kaplan (Exhibit B) explicitly states, however, it is the goal of the Department of eventually conduct such audits of all 120 private schools, and those selected for initial audit were chosen on the basis of their first-level monitoring reports and annual audit results. Thus, to the extent that for-profit schools represented a disproportionate number of the first full scope audits conducted by the Department, their choice was directly related to the legitimate public need of ensuring that public monies paid to private schools would be related to ordinary and necessary program costs. Moreover, this purpose has historically been more important for for-profit schools because of previously identified problems in their operation and tuition rate setting. Deron, supra.

In its search and seizure claim, Pineland construes the Department's demands for "unauthorized" documentation as unwarranted governmental intrusion. Again, however, and as the Department's audit report (Exhibit K) makes abundantly clear, each demand was made for a specific purpose explicitly related to regulatory criteria for accounting and tuition rates. Within the framework of the State's obligation to oversee private school use of public funds, such scrutiny cannot be characterized as unwarranted; to the contrary, it is both demanded by the common weal and sanctioned by the court. Cooperman, supra.

Accordingly, the Commissioner finds that the full scope audit of Pineland conducted by the Department in 1990 was fully authorized, as was the agency's demand for specific documentation related to its ascertaining of Pineland's compliance with law. He

further finds that the Department's actions are not susceptible on constitutional grounds as alleged by Pineland and that the revised tuition rules as adopted in November 1990, at least in so far as they pertain to this case, are not vague and overbroad so as to render them void on that basis. Pineland's petition for declaratory judgment is therefore dismissed, together with its request for restraint of further internal audit appeal proceedings.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

MARCH 18, 1991

DATE OF MAILING - MARCH 18, 1991
Pending State Board

PINELAND LEARNING CENTER, INC., :
FRED ECCLESTON AND MARY :
ECCLESTON, :
PETITIONERS--APPELLANTS, :
V. : STATE BOARD OF EDUCATION
NEW JERSEY STATE BOARD OF : DECISION ON MOTION
EDUCATION AND NEW JERSEY STATE :
DEPARTMENT OF EDUCATION, :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, March 18, 1991

For the Petitioners-Appellants, Ravin, Sarasohn, Cook,
Baumgarten, Fisch & Baime (Peter R. Sarasohn, Esq., of
Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Robert J. Del Tufo, Attorney General)

On December 14, 1990, Petitioners, a for-profit private school for the handicapped and its shareholders, filed a petition with the Commissioner of Education seeking declaratory judgment and injunctive relief. Petitioners requested a declaration that N.J.A.C. 6:20-4.1 through 6:20-4.11 was overbroad, vague and ambiguous and that the full scope tuition audit conducted by the Department of Education under the authority of those regulations was null and void.

On March 18, 1991, the Commissioner dismissed the petition, and this appeal followed. By way of the instant motion, Petitioners seek to supplement the record with their accountant's certification and various other documents.

For the reasons that follow, we deny Petitioners' motion.

To the extent that the proposed exhibits are not documents of which we can take official notice or already included in the record,¹ we conclude that they are irrelevant to the issues

¹ We note that inasmuch as the Commissioner's decision in this case (Petitioners' proposed exhibit A) is already included in the record and the excerpt from the New Jersey Register (proposed exhibit E) is a document of which the State Board can take official notice, there is no necessity for supplementing the record with such items.

presented by the petition, which asserts a facial challenge to the regulations at issue. Additionally, we find the certification of Petitioners' accountant to consist largely of a recitation of her beliefs and opinions, rather than an averment of facts relevant to the specific allegations contained in the petition. Nor can we disregard Petitioners' argument in their brief to the Commissioner in opposition to the Respondent's motion to dismiss that their petition involved issues of law which did not require an involved factual record.

We therefore deny the Petitioners' motion to supplement the record.

August 7, 1991

PINELAND LEARNING CENTER, INC., :
FRED ECCLESTON AND MARY :
ECCLESTON, :
PETITIONERS-APPELLANTS, :
V. : STATE BOARD OF EDUCATION
NEW JERSEY STATE BOARD OF : DECISION ON MOTION
EDUCATION AND NEW JERSEY STATE :
DEPARTMENT OF EDUCATION, :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, March 18, 1991

Decision on motion by the State Board of Education,
August 7, 1991

For the Petitioners-Appellants, Ravin, Sarasohn, Cook,
Baumgarten, Fisch & Baime (Peter R. Sarasohn, Esq., of
Counsel)

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Robert J. Del Tufo, Attorney General)

On May 8, 1991, Petitioners filed a brief and separate appendix with the State Board of Education in support of their appeal from a final determination of the Commissioner of Education rejecting Petitioners' challenge to certain regulations governing non-profit schools for the handicapped. The appeal brief included references to a number of documents which were not part of the record, copies of which were included in the appendix. Petitioners simultaneously filed a motion to supplement the record with such documents. The briefing schedule in this appeal was stayed pending disposition of that motion.

On August 7, 1991, the State Board denied Petitioners' motion to supplement, finding that the proposed exhibits were irrelevant to the issues presented in the petition.

In view of such determination, Respondent has filed the instant motion to suppress Petitioners' appeal brief and appendix. Respondent argues that the brief is tainted by the improper references to materials not in the record. Petitioners counter that the brief is not tainted to such a degree that it should be suppressed and that it would be unfair to burden them with the expense of preparing a new brief. Petitioners also request the State Board to reconsider its earlier decision not to permit supplementation of the record.¹

After a review of the record, we grant Respondent's motion to the extent that it requests suppression of Petitioners' appeal brief. We find that references in Petitioners' brief to materials outside the record are so pervasive as to imperil our fundamental responsibility to render a fair determination on the merits. Petitioners acted at their own risk in submitting a brief with references to documents not in the record, and we reject their argument that it would be inequitable to require them to bear the expense of a new brief. Under the circumstances, we find our responsibility to assure a fair determination to outweigh such expense.

We do, however, conclude that it would be unnecessarily duplicative to require Petitioners to prepare a new appendix which

¹ We note that Petitioners have not filed a formal motion or request for reconsideration.

includes all the materials in the current appendix except for those which are not part of the record. Inasmuch as we are directing Petitioners to file a revised brief which does not reference or rely upon documents outside the record, such materials can readily be disregarded in reviewing the merits of this appeal, and we find that their presence in the appendix will not impair the review process to the extent that preparation of a revised appendix would be warranted under the circumstances.

Finally, we deny Petitioners' request for reconsideration, finding nothing in their brief in opposition to the instant motion that would warrant reconsidering our decision not to permit supplementation. We also reject as without merit Petitioners' contention that Respondent's motion is untimely.

Accordingly, we direct the Petitioners to file a revised appeal brief reflecting only those materials which are properly included in the record. Such brief is required to be filed within 20 days after the filing of this decision.

October 2, 1991

Date of mailing 04 OCT 1991

IN THE MATTER OF THE TENURE :
HEARING OF IRENE DIAKIDES, STATE- : COMMISSIONER OF EDUCATION
OPERATED SCHOOL DISTRICT OF : DECISION
JERSEY CITY, HUDSON COUNTY. :
_____ :

For the Board, Murray, Murray & Corrigan
(Karen A. Murray, Esq.)

This matter was opened before the Commissioner of Education on January 4, 1991 through the certification of tenure charges of conduct unbecoming a tenured teaching staff member and other just cause for abandonment of position by the State-operated School District against Irene Diakides, a teacher at Ferris High School; and

The Commissioner directed respondent on January 9, 1991, and again on January 29, 1991 to file an Answer to the tenure charges against her; and

Respondent having failed to comply, the Commissioner directed respondent to Answer by letter sent return receipt requested on February 14, 1991, noting that "unless an Answer is received from you or your attorney within ten (10) days of receipt of this letter, each count in the petition will be deemed to be admitted, whereupon, the Commissioner of Education will grant summary judgment to the Board, pursuant to N.J.A.C. 6:24-1.4(e)" (Letter to Irene Diakides dated February 14, 1991); and

Respondent having failed to comply with said directives of the Commissioner or to submit responsive pleadings in any form; now therefore

IT IS SO ORDERED on this 19TH day of March, 1991 that all facts averred in the instant tenure charges are deemed to be true as pled; and that according, summary judgment is granted to the board.

IT IS FURTHER ORDERED on this 19TH day of March 1991 that respondent be dismissed as a tenured teaching staff member in the Board's employ and that the matter be forwarded to the State Board of Examiners for any further disposition it deems appropriate in conformity with N.J.A.C. 6:11-3.7 et seq.


ACTING COMMISSIONER OF EDUCATION

MARCH 19, 1991

DATE OF MAILING - MARCH 19, 1991

SPRINGFIELD TOWNSHIP, A MUNICIPAL CORPORATION OF THE STATE OF NEW JERSEY, ET AL.,
PETITIONERS,
V. COMMISSIONER OF EDUCATION
ARTHUR E. MERZ, BURLINGTON COUNTY SUPERINTENDENT OF SCHOOLS, ET AL.,
RESPONDENTS. DECISION

For the Petitioners, Hulse & Germano (Denis C. Germano, Esq., of Counsel)

For the Respondents:

For Northern Burlington County Regional High School, Ferg, Barron and Gillespie, (Steven Mushinski, Esq., of Counsel)

For Mansfield Township, John L. Madden, Esq.

For North Hanover Township, Schulze and Rupinski, (Carl P. Schulze, Esq., of Counsel)

For Chesterfield Township, Ferg, Barron and Gillespie (John Gillespie, Esq., of Counsel)

For Respondent Merz, Robert J. Del Tufo, Attorney General (Marlene Zuberan, Deputy Attorney General)

This matter has come to the Commissioner of Education by way of a Petition of Appeal and Request for Interim Relief and a Proposed Stay of the Reapportionment of Board member seats for the constituent districts making up the Northern Burlington Regional Board of Education, which consists of the municipalities of .

Mansfield, Chesterfield, North Hanover and Springfield. Petitioners challenge the reapportionment whereby Springfield Township will lose two seats, both of which would be gained by North Hanover, based on 1990 census data which figures, it is averred, include in Chesterfield's 1990 population of 5,152, inmates numbering 1,100 at the Albert C. Wagner Youth Correctional Facility, a State penal institution. Said petition also avers that the 1990 census figures relied upon in said reapportionment include in North Hanover's 1990 population of 9,994, 5,000 residents of McGuire Air Force Base and claims that N.J.S.A. 18A:13-8 provides that individuals as described in such communities are not to be counted when the County Superintendent of Schools apportions the member seats of the regional Board of Education.

Said petition further submits that North Hanover's census population is in error in that approximately 1,000 residents of New Hanover stationed on McGuire Air Force Base have erroneously been counted as North Hanover residents for which New Hanover has filed an appeal with the United States Census Bureau.

Petitioners request that the County Superintendent reapportion the membership of the respondent regional high school district in line with the statutory scheme and that the respondent district be restrained from conducting elections contrary to said statutory scheme. The petition further requests that the apportionment of membership on the respondent regional board remain status quo until the within controversy is adjudicated.

Said petition is accompanied by a letter memorandum in lieu of formal brief in support of petitioners' request for interim relief and a stay of the proposed reapportionment. Said letter

brief is summarized by petitioners as involving the Department of Education's policy of counting military and civilian personnel who reside on military bases for apportionment of membership on regional school boards of education, as well as over 1,100 inmates of a state prison. Petitioners couch the nature of the petition as presenting a constitutional question interpreting N.J.S.A. 18A:13-8 which they aver states in pertinent part:

In making the apportionment of the membership of a regional board of education *** there shall be subtracted from the number of inhabitants of a constituent school district *** the number of such inhabitants who ***were *** inmates of any State *** prison, or who are military personnel stationed at, or civilians residing within the limits of, any United States Army, Navy or Air Force installation***.

Petitioners suggest that this matter presents two larger issues as well; the first, how many parts of N.J.S.A. 18A:13-8 are unconstitutional and second, whether the Commissioner may pick and choose which unconstitutional provisions of the statute to implement and which to ignore.

Petitioners' letter brief notes the Chancery Division decision captioned Borough of Oceanport v. Hughes, 186 N.J. Super. 109 (Chan. Div. 1982), and summarizes it as holding that contrary to the legislative scheme, the four-district regional board at issue in that case would have ten members, some of whose votes were weighted to reflect the populations they represent. Petitioners also cite Franklin Township v. Board of Education of North Hunterdon Regional High School District, 74 N.J. 345 (1977) suggesting the New Jersey Supreme Court in that case ruled that the one-man-one-vote principle was applicable to apportionment of representation on the boards of regional school districts. Petitioners claim that in that case the

court suggested that the Legislature "devise an apportionment formula consistent with the Constitution," (Letter Brief, at p. 2, quoting Franklin Twp.) and that the 1979 amendment to the third paragraph of N.J.S.A. 18A:13-8 is the Legislature's response.

Petitioners suggest that said amendment affects one school district but that the balance of the State's regional school boards, which are governed by the first two paragraphs of the statute have their membership apportioned without regard to the one-man-one-vote principle. Petitioners elaborate by referring to "[o]ne Monmouth County regional high school district consisting of 8 constituent districts****" (Letter Brief, at p. 2) to illustrate their point. They chart population and representation figures for said unnamed district, then note that the decision of the Burlington County Superintendent of School to count military and civilian personnel is not an isolated incident. Instead they suggest that the decision to apportion seats in a manner contrary to the legislative mandate appears to be a conscious decision by the Department of Education. Petitioners acknowledge that the Commissioner has the power pursuant to N.J.S.A. 18A:6-9 to rule on the constitutionality of both the one-man-one-vote issue and the military exclusion question. They claim, however, pending a judicial determination by him, the statute at issue must be observed.

By way of consideration of the standards for the grant of interim relief, petitioners acknowledge that generally speaking, irreparable harm is considered to exist where a wrong is done which cannot be compensated by money damages. They submit that the issue here is equal protection rights of the inhabitants of the regional school. They further submit that interim relief should not be

granted when the facts underlying the request for relief are genuinely in dispute, and that in the case at bar, the facts are virtually all matters of public record. Therefore, they contend, no genuine issue of material fact exists.

On the probability of success standard, petitioners reiterate their contention that the Department of Education seeks to implement a policy in direct conflict with the plain meaning of N.J.S.A. 18A:13-8 based on the reported decision of one Superior Court judge while ignoring the implications of the New Jersey Supreme Court's decision in Franklin Township, supra. Petitioners note that the court in Franklin Township, while finding the statutory scheme unconstitutional, ordered that the status quo be preserved pending legislative action. Petitioners urge that their request that the present apportionment be preserved pending the outcome of the litigation seeks essentially the same result.

As to the relative hardship to the parties standard, petitioners concede that this case presents no hardship to any party.

Petitioners request interim relief be granted.

By way of responsive pleadings, counsel to the Township of Chesterfield would not oppose Springfield's application for a restraining order against the implementation of the County Superintendent's reapportionment order, but reserves the right to reconsider the Board's position should the restraining order be entered, but prior to any hearing on the matter. Counsel for Chesterfield notes that he may be in conflict of interest with the attorney for Northern Burlington Regional School District, if their clients have differing views on the positions they intend to assert

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in this matter, which may necessitate special counsel, insofar as they are partners in the same law firm.

Counsel for Mansfield Township, another of the defendants named in this matter, indicates that Mansfield Township has not been affected by the recent census and will not be losing members on this Board. Hence, since Mansfield Township has no adverse interest in the reapportionment, it elects not to participate formally through answer or similar response. Further, Mansfield Township indicates through its counsel that it has no objection to the resolution of the matters herein by way of summary judgment.

The Township of North Hanover, another of the constituent districts named as a respondent in this case, concurs with the Attorney General's position dated March 21, 1991, not only as to affirming the allocation of the representative members promulgated by the County Superintendent, but also to the extent that no irreparable harm is visited upon the Regional District or its constituents warranting a stay of the upcoming election. North Hanover contends the military and civilian populations of the military installation must be counted. To eliminate them would eliminate their rights to express their concerns through such representative members, it submits. Thus, North Hanover avers, the present allocation by the County Superintendent is consistent with the existing law and both the New Jersey and Federal Constitutions.

Counsel for the Board of Education of the Northern Burlington County Regional High School District responds on behalf of said respondent that it takes no formal position with respect to the Application for Interim Relief and Stay of Proposed Reapportionment at this time, but reserves the right to review the contents of

the Petition of Appeal and may determine to file a responsive pleading to the petition within the time frames permitted by the rules. He further represents on behalf of the Northern Burlington County Regional High School District that the Board will comply with the Order of the Commissioner issued in response to petitioners' application.

The Burlington County Superintendent of School, Mr. Merz, represented by Deputy Attorney General Marlene Zuberan, contends in reply that although petitioners acknowledge that a provision of N.J.S.A. 18A:13-8 was ruled unconstitutional because it mandated that the number of military or civilian inhabitants of a military installation be subtracted from the population count, citing Borough of Oceanport, supra, they "inexplicably [argue] that that decision should be ignored by the Department of Education. As there is no legal basis for the Department to do so, the [petitioners'] claim for relief on that issue cannot be granted.***" (Letter Memorandum in Opposition, dated March 21, 1991 from Marlene Zuberan, DAG, at p. 2) In a footnote, the State adds that petitioners' reliance on Franklin Tp., supra, is misplaced. The State claims that that case, "****while perhaps suggesting that the 'one man-one vote' rule was applicable to regional school boards, only invalidated the then existing apportionment formula of N.J.S.A. 18A:13-8(a) as it applied to the regional school district before the Court." (Id., at footnote 1)

In response to petitioners' claim that North Hanover has been mistakenly credited with 1,050 military residents who actually "reside" in New Hanover (Id., quoting Petitioners' Exhibit B) and their further challenge that 1,100 inmates at Wagner Youth

Correctional Facility were included in Chesterfield's 1990 population count, the State responds that even assuming arguendo that New Hanover's population was underreported and that the Chesterfield population was overreported due to the inmate population there, the apportionment of board members would in no way be altered. In support of this contention, the State attaches Exhibit A which represents a recalculation of the board member apportionment after the New Hanover military is subtracted from North Hanover and the Chesterfield inmate population is subtracted from Chesterfield. Also attached to the State's submission is Exhibit B, the County Superintendent's original apportionment calculation. The State submits that petitioners would not prevail even if the Department of Education amended its calculations.

Finally, in rebuttal to petitioners' request that the status quo be maintained in this regional district, the State avers that such request contravenes the New Jersey Supreme Court's recent ruling which held that the 1990 federal census figures were final and that legislative reapportionment should immediately begin. It cites State of New Jersey v. Apportionment Commission, decided February 27, 1991 in support of this contention. Such decision establishes that there is no sound legal basis for the Commissioner to forestall the reapportionment of the Northern Burlington County Regional High School District. The State adds that the Supreme Court in said decision noted that "mid-course corrections" may be made in the apportionment process. (State's Letter Memorandum, at p. 4, quoting New Jersey v. Apportionment Commission Slip Opinion, at pp. 14-15)

In sum, the State submits that as there is no irreparable harm to be visited upon the regional district or its constituents and no probability petitioners will succeed on the merits of their claim, the Motion for Interim Relief should be denied.

By way of reply to the memorandum of the Attorney General, petitioners posit that the Oceanport, supra, case should be ignored for at least two reasons. The first, they suggests, is that the Commissioner, not the Chancery Division of the Superior Court, has original jurisdiction over controversies arising under school laws, and, thus, the Oceanport decision is not binding on the Commissioner. The second reason, they contend, notes that the military population of the Earl Ammunition Depot is included in the census for Colts Neck and Howell Townships, which communities are constituent districts of the Freehold Regional High School District. It adds that the high school age children from this Naval Base attend Monmouth Regional High School, however. They counter that if the one-man-one-vote principle applies to regional high school districts other than the North Hunterdon Regional High School District then the military personnel stationed at Earl are being denied representation in the district where their children attend high school, while the civilian population of Colts Neck and Howell receive disproportionate representation on the Freehold Regional Board.

Moreover, petitioners suggest that all residents of Fort Monmouth are considered residents of Eatontown for state aid, voting and, they claim, census purposes. If that is the case, petitioners advance, Eatontown receives disproportionate representation on the Monmouth Regional Board, while Oceanport is deprived of fair representation on the Shore Regional Board.

Petitioners add that no matter in which municipality the military personnel are counted, the Oceanport holding will serve to provide disproportionate representation to the civilian portion of those municipalities which have significant military populations within their geographic boundaries.

Petitioners summarize their position by stating that the County Superintendent's proposed reapportionment will give four votes to a district which pays under a half million dollars to send 800 students to the regional high school and will take two seats from a district that pays over a million dollars a year to educate 200 students. They claim that the Commissioner, as opposed to a Superior Court judge, should evaluate the constitutionality of the military exclusion section of the statute, the applicability of one-man-one-vote principles to all regional school districts and the funding formula that unfairly spreads the tax burdens among the constituent districts of this regional high school district.

Upon his careful review of this matter, wherein the parties agree that there are no material facts in dispute, the Commissioner has determined to consider this matter as a decision for summary judgment. Based upon his review of the pleadings and memoranda submitted by the parties, he denies the Motion for Interim Relief and dismisses the Petition of Appeal inasmuch as the reasons for denial of the Motion for Interim Relief are dispositive of the entire petition as a matter of law.

At the outset, the Commissioner would correct what appears to be a misconception on the part of some of the parties in this matter. The reapportionment of seats for the regional board of education in this matter as explicated in the letter from Burlington

County Superintendent of Schools Arthur E. Merz, dated March 14, 1991 is not a proposed reapportionment. It is the reapportionment. See Exhibit A, Petition of Appeal, at p. 1. See also New Jersey v. Apportionment Commission, supra, wherein, the Supreme Court of New Jersey has held that the federal census figures are final for purposes of reapportionment of legislative districts. Hence, the County Superintendent's reapportionment of the Northern Burlington County Regional High School District therefore represents the official disposition on the number of board seats representing the constituent districts comprising the Regional High School's board of education. N.J.S.A. 18A:13-9

Based upon a careful review of said reapportionment, as well as the arguments of the parties and the law extant in this matter, the Commissioner is persuaded that petitioners have failed to carry their burden of meeting the standards for pendente lite restraints as set forth in such cases as Crowe v. DeGioia, 90 N.J. 126 (1982). They have conceded that this matter presents no hardship to any party. Moreover, the case law is well-settled as to the unconstitutionality of subtracting from the population count for purposes of apportioning regional school district board seats, military or civilian inhabitants of a military installation. See Borough of Oceanport, supra, at 115) where the Court held:

The equal protection argument here is that of all the inhabitants of the Borough of Oceanport. Their proportionate representation on the regional board is diminished by the statutory exclusion of some of the inhabitants who happen to live on the military reservation. Had those same inhabitants, military or civilian, lived off-post in Oceanport, they would have been counted. In final analysis the exclusion turns on the intangible boundary line of property in the borough owned by the United States Government.

The arbitrariness of the statute is patent. The exclusion discriminates against the legitimate concern of all inhabitants of Oceanport in the decisions and policies of the regional board -- policies which will have a direct effect on the tax burden ultimately imposed on them. The denial of equal protection of the laws resulting from the exclusion is clear. Accordingly, the words of the above sentence of N.J.S.A. 18A:13-8, "or who are military personnel stationed at, or civilians residing within the limits of, any United States Army, Navy or Air Force installation," are declared unconstitutionally void and of no effect since they are in derogation of the Fourteenth Amendment of the United States Constitution.***

The judgment entered herein is final as to the issue properly before the Court.

Petitioners' plea that the Commissioner disregard the opinion of the Chancery Division in this case in preference for his own quasi-judicial authority to hear this matter pursuant to N.J.S.A. 18A:6-9 is dismissed as being without merit. No legal authority exists that would permit the Commissioner to cast aside as nonbinding case law precedent on point. The Chancery Division was thorough in its review of that portion of N.J.S.A. 18A:13-8 dealing with military installations. Said discussion and holding are on "all fours" with the constitutional argument concerning the military installations operating in Burlington County in this case, and the Commissioner finds and determines therefrom that the County Superintendent's having included those residents of military installations in arriving at a reapportionment of board seats to the Northern Burlington Regional High School Board to have been in accord with the law in this regard.

Moreover, the Commissioner's authority pursuant to N.J.S.A. 18A:6-9 is limited to the application of constitutional principles already enunciated by the Court. He does not enjoy jurisdiction to

declare as unconstitutional statutory provisions untested before the courts. Therefore, while he clearly may apply the findings in Oceanport, supra, there is no authority on his part to declare the rest of N.J.S.A. 18A:38-8 unconstitutional.

Similarly, the Commissioner dismisses as being without merit petitioners' reliance on the holding of Franklin Tp., supra, for the proposition that the Commissioner should disregard the holding in Oceanport, supra, in favor of a one-man-one-vote means of calculating this reapportionment. The Supreme Court of New Jersey itself commented in a footnote in that very case that it "***entertain[ed] serious doubts whether such an exclusion [deduction of institutional and military populations from the total census population] is constitutional in light of what was said in Mahan v. Howell, 410 U.S. 315, 330 (1973)." (parallel citation omitted) (Franklin Tp., supra, at 348) The Chancery Division in Oceanport, supra, noted the Supreme Court of the United States' observation in Mahan, supra, that "discriminatory treatment of military personnel in legislative reapportionment is constitutionally impermissible." (Oceanport, supra, at 114-115, quoting Mahan, supra, at 332)

Moreover, Franklin Tp. was decided upon review of the then-existing apportionment formula of N.J.S.A. 18A:13-8 dealing with the sole New Jersey regional board of education in existence at that time having nine or more constituent districts. Thus, the holding in that case is applicable to the single regional school district then before the court that fell within that category, North Hunterdon. The Commissioner finds no basis for reliance on such case in that the Regional District in question in this matter has fewer than nine constituent districts.

As to petitioners' claims that North Hanover was erroneously credited with 1,050 military residents who actually reside in New Hanover and their claim that 1,100 inmates incarcerated in the Albert C. Wagner Youth Correctional Facility were mistakenly counted in Chesterfield's 1990 census total, the Commissioner accepts as his own that position advanced by the State that even assuming that New Hanover's population was thus underreported and that inmate populations should be excluded pursuant to N.J.S.A. 18A:13-8, the apportionment of board members would in no way be altered. See Exhibit A of State's Letter Brief dated March 21, 1991. He dismisses such argument as being without merit in that it avails petitioners no gain in the apportionment.

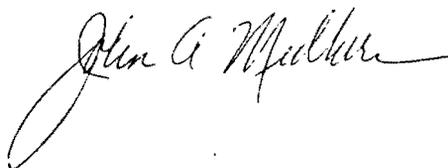
Finally, concerning petitioners' argument related to the Earl Ammunition Depot and Ft. Monmouth, arguing there has been improper application of the statute in other regional school districts, such contentions have no bearing on this matter in that it is the State's position that all regional districts were reapportioned consistent with the Oceanport decision. Further, petitioners have no standing to advance any allegations relative to improper applications of the Oceanport principles in other districts. Finally, petitioners, by their own admission, argue there are no material facts in dispute regarding this case and that the sole issue to be determined herein is whether the State has properly applied the provisions of N.J.S.A. 18A:13-8 to reapportionment of the Northern Burlington Regional High School District. Such arguments, therefore, are dismissed.

Emphasizing that the Supreme Court has stated in State of New Jersey v. Apportionment Commission, supra, that the 1990 census

figures are final for purposes of triggering reapportionment, with the understanding that "mid-course corrections" could be made in the apportionment process (Id., at pp. 14-15), the Commissioner finds and determines that petitioners have also failed in their burden of demonstrating irreparable harm in that any population errors made may be remedied at the next school election.

Accordingly, for the reasons expressed above, the Commissioner denies petitioners' Motion for Interim Relief and grants respondents' Summary Judgment on the merits of the matter. The instant petition is therefore, dismissed, with prejudice.

ACTING COMMISSIONER OF EDUCATION

A handwritten signature in cursive script, appearing to read "John A. Mulder". The signature is written in dark ink and is positioned below the typed name of the Acting Commissioner of Education.

APRIL 1, 1991

DATE OF MAILING - APRIL 1, 1991

Pending State Board

SAMUEL R. BRACIGLIANO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF ELMWOOD PARK, BERGEN COUNTY, :
RESPONDENT. :

For Petitioner, Alfred F. Maurice, Esq.

For the Board, Mathew P. DeMaria, Esq.

This matter has come before the Commissioner of Education by way of Petition of Appeal filed on January 11, 1991 whereby petitioner seeks to enjoin the Board from suspending him without pay and also seeks his immediate reinstatement or, in the alternative, a stay of the Board's action in suspending him without pay from his employment as a tenured elementary principal in the district.

Said Petition of Appeal avers that on November 30, 1990 the Board acted at a public meeting to suspend petitioner from his employment with pay effective on or about December 3, 1990 and then at a public meeting on December 17, 1990 acted to suspend petitioner without pay effective December 18, 1990.

Said Petition of Appeal further avers that such suspensions were inconsistent with the procedures set forth in the Tenure Employees Hearing Law and were in violation of petitioner's tenure

rights pursuant to N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6:24-5.1 et seq., as well as being ultra vires, void and of no effect.

Said petition further seeks an order directing petitioner's reinstatement to an appropriate position in the Board's employ together with back pay and all emoluments denied as a result of the alleged improper suspension of his employ, including seniority credit and pension credit plus interest on any back pay awards.

The Board's Answer to the above-stated petition was filed on January 31, 1991 and admits that the suspensions occurred on the dates suggested by the Petition of Appeal but by way of separate defenses argues that the Board acted in accordance with applicable statutes and decisional law at all times; that petitioner has failed to state a cause of action upon which relief can be granted; that petitioner is not entitled to a stay of any proceedings or of the decision of the Board of Education in this matter; and that petitioner has failed to state any basis upon which a stay can be granted in this matter.

By way of letter dated February 1, 1991 the Director of the Bureau of Controversies and Disputes directed counsel for petitioner to address a letter brief or memo on why the matter should not be dismissed for failure to state a cause of action insofar as no facts were provided in the petition to demonstrate in what manner petitioner's rights pursuant to N.J.S.A. 18A:6-10 et seq. were violated and, further, directed the Board to respond to the arguments contained in petitioner's brief and to explain any circumstances which would support its contention that no cause of action exists to invoke the Commissioner's jurisdiction.

On February 8, 1991 petitioner's counsel submitted such a brief contending that

A tenured employee of a local school may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. A tenured employee is entitled to pay even if criminal charges are brought against him until the time of an indictment. Slater v. Ramapo-Indian Hills Regional H.S. District, 237 N.J. Super. 424 (App. Div. 1989) (Petitioner's Brief, at p. 3)

Petitioner thus submits that he has made a prima facie case for his reinstatement and/or pay pending an investigation, hearing or appeal in accordance with law.

Thereafter, on February 19, 1991 Board's counsel filed a brief in opposition to the Petition of Appeal setting forth additional facts, including that on November 30, 1990 and December 7, 1990 the Board received from the Bergen County Prosecutor's Office copies of warrants of arrest for petitioner, which precipitated the two suspensions mentioned above and that petitioner had been arraigned on those two dates.

Said brief further states that on February 8, 1991 petitioner was indicted on 28 counts of criminal conduct involving moral turpitude and official misconduct touching upon petitioner's employment position of public trust, which would result, if petitioner were found guilty of any of such charges, in forfeiture of his position pursuant to N.J.S.A. 2C:51-2.

The Board argues based upon such facts that its action was in all ways proper in that the statute and regulation upon which petitioner relies are not dispositive of, nor applicable in, matters involving an arrest for crimes involving moral turpitude and

official misconduct which expose the employee to risk of the forfeiture statute, citing Romanowski v. Board of Education of Jersey City, 89 N.J. Super. 38 (App. Div. 1965) averring that where malfeasance in office is at issue, N.J.S.A. 18:5-51 (which petitioner suggests is now N.J.S.A. 18A:6-10 et seq.) is inapplicable and, thus, that a suspension without pay was permissible.

The Board further argues that In the Matter of the Tenure Hearing of James T. Fridy, School District of the City of Long Branch, Monmouth County, decided by the Commissioner December 22, 1980, aff'd with modification State Board May 6, 1981 and June 3, 1981, aff'd with modification New Jersey Superior Court Appellate Division January 26, 1983 A-4470-80T3, is dispositive of the matter, claiming that the Appellate Court's language that "tenure protections do not extend to conduct exposing a school board employee to forfeiture" (Fridy, Appellate Division Slip Opinion, at p. 9) renders meritless the claim of petitioner that he must be reinstated or his suspension stayed since the Board did not follow the requirements of the Tenure Employees Hearing Law. The Board contends such requirement does not exist because he has been charged with crimes involving moral turpitude and official misconduct.

The Board, summarizing its position in said brief that Fridy, supra, and Romanowski, supra, hold that the Tenure Employees Hearing Law is inapplicable to a matter involving moral turpitude and, thus, it was within the Board's inherent authority to suspend petitioner who has been arrested and charged with crimes involving official misconduct in office as these crimes expose the employee to forfeiture.

The Board further argues that Fridy, supra, provides compelling authority for the conclusion that petitioner was properly suspended without pay since December 18, 1990 because N.J.S.A. 18A:6-8 is inapplicable to this matter in that "it too supplements, cross references and has as its underpinning the inapplicable Tenure Employees Hearing Law, supra." (Board's Brief, at p. 7)

The Board's brief also contends petitioner's reliance on Slater, supra, is misplaced in that it is at variance with the decision in Romanowski, supra, a decision from a court of co-equal jurisdiction; that there is no indication in Slater that the crime touched his employment; that Slater is at variance with Fridy, supra, because Fridy follows Romanowski in concluding that the Tenure Employees Hearing Law is inapplicable where the crimes charged expose the employee to forfeiture and did so aware of N.J.S.A. 18A:6-8.3.

Thereafter, on February 28, 1991 the Director of the Bureau of Controversies and Disputes acknowledged that petitioner's counsel would submit a Motion for Summary Judgment and that counsel for the Board would file a reply thereto.

Said Motion for Summary Judgment, Letter Reply Brief and In Support of Petitioner's Motion for Summary Judgment was filed on February 22, 1991, which argues that the Board's choices in this matter were either to employ the provisions of the Tenure Employees Hearing Law or pay petitioner until he was indicted, but that the Board did neither.

Petitioner seeks to rebut the Board's reliance on Romanowski by suggesting that that case concerns a post-indictment suspension and that, additionally, said case was decided in 1965,

seven years before N.J.S.A. 18A:6-8.3 was enacted, thereby rendering Romanowski inapplicable to this matter, although, he contends, Slater, supra, which is a recent published Appellate Division decision binding on lower agencies, affirms the pre-indictment obligation of respondent to pay petitioner.

Petitioner stipulates in his reply brief to the facts recited by Superintendent Victoria J. Williams in her affidavit submitted with the Board's Brief of February 19, 1991 for purposes of the Motion for Summary Judgment only, and concedes that the issues of reinstatement or forfeiture of employment are premature for a determination at this time and a decision on such issues should abide the result of the pending criminal proceedings or the results of a tenure hearing should the Board elect to certify charges.

Petitioner's Motion for Summary Judgment seeks a judgment for back pay against the Board for the period of December 19, 1990 to February 8, 1991.

On March 8, 1991 the Board's counsel submitted a supplemental affidavit filed on behalf of the Board from Superintendent Williams, including a copy of a true bill of Indictment against petitioner herein along with copies of the warrants issued against him on the 28 counts of the indictment.

On March 12, 1991 the Board's counsel faxed a Letter Reply Brief in Opposition to the Motion for Summary Judgment filed on behalf of petitioner first suggesting that an appropriate disposition of this matter would be to dismiss the petition without prejudice after deciding the motion relating to back pay in that petitioner now concedes the other matters are not ripe for

adjudication and also because the issue of reinstatement or continued employment will be an issue forming the subject matter of tenure proceedings initiated by the Board and, therefore, would moot the instant proceedings in that regard.

The Board contends that although it agrees with petitioner that Romanowski concerned a post-indictment suspension of a business manager, it stands for the broader position that the Tenure Employees Hearing Law is inapplicable to a matter involving suspension based on criminal charges or official misconduct which could lead to forfeiture. It avers that the post-indictment nature of the suspension was not a material fact which the Court viewed as determinative on the issue of applicability of the act or the validity of the suspension in that case. It further contends that N.J.S.A. 18A:6-8.3, although not extant at the time Romanowski was decided, is a supplement to the Tenure Employees Hearing Law and thus must be held to be inapplicable to this case.

The Board reiterates its position that N.J.S.A. 18A:6-8.3 controls only suspension related to the Tenure Employees Hearing Law and that the reference in N.J.S.A. 18A:6-8.3 to "except after indictment" (Board's Brief, at p. 2) is intended to categorize as a general exception matters wherein criminal charges form the basis for the suspension rather than only noncriminal, job-related performance as referenced in N.J.S.A. 18A:6-11, such as inefficiency, incapacity and unbecoming conduct, and it contends that Fridy, supra, is on all fours with the case herein.

Again, the Board contends that Slater, supra, is at variance with Romanowski and Fridy, in that Fridy interpreted Romanowski as applicable despite the subsequent enactment of

N.J.S.A. 18A:6-8.3. The Board urges the Commissioner to follow Romanowski in that there is a split between it and Slater.

Upon a careful review of the record before him, the Commissioner grants summary judgment to petitioner on the issue of back pay from December 18, 1990, the date he was suspended without pay, through February 8, 1991, the date of the indictment issued against him. In so finding, the Commissioner rejects as being without merit the Board's elaborate explanation for distinguishing offenses involving moral turpitude or implicating the forfeiture statute from charges arising under the Tenure Employees Hearing Law in determining whether a suspension may occur without pay. The law in this area is now well-settled; there are only two different avenues to suspend a tenured employee without pay, the first through the certification of tenure charges pursuant to N.J.S.A. 18A:6-10 et seq. or the second, through application of N.J.S.A. 18A:6-8.3. (A third means, pursuant to N.J.S.A. 18A:16-4, may exist, but is not applicable to the instant matter.) The matter entitled Gregory Slater v. Board of Education of the Ramapo-Indian Hills Regional High School District, decided by the Commissioner May 5, 1988, aff'd State Board October 5, 1988, aff'd in part, rev'd in part (on other grounds) rem'd 237 N.J. Super. 424 (App. Div. 1989) lays to rest the Board's argument that it might suspend without pay a tenured employee when the offense for which he or she has been arrested, but not indicted, involves moral turpitude or touches upon his or her employment from which forfeiture of public office or position might result upon conviction. Therein the Court stated unequivocally:

Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.

(Slater Appellate Division Slip Opinion, at p. 2)

The Commissioner's decision in Slater, which was affirmed by the State Board for the reasons expressed therein, was also affirmed by the Appellate Division regarding the merits of petitioner's claim for back pay from the date of his arrest for distributing a CDS through the date of his forfeiture of his tenured employment as a janitor in the Ramapo-Indian Hills Regional High School District pursuant to N.J.S.A. 2C:51-2. The Commissioner's decision provided a painstaking review of the case law and statutes pertaining to suspensions without pay, including a careful review of Romanowski, supra, and Fridy, supra. Therein, it is stated:

Such wording [of N.J.S.A. 18A:6-8.3] is plain, clear and unequivocal that the suspension of any employee pending investigation or trial or appeal or hearing shall be with full pay or salary with two exceptions. The first exception arises when suspension is by reason of indictment, whereupon the employee is not entitled to full salary as occurred in Romanowski, supra. The second exception carved out in N.J.S.A. 18A:6-8 arises when tenure charges are brought against the employee, whereupon the suspension may be without pay to the extent permitted by N.J.S.A. 18A:6-14.

In the instant matter, petitioner was not suspended by reason of indictment, thus Romanowski is inapposite as the factual circumstances in this matter differ from that case. Rather his suspension was by reason of his arrest as was true in [Asbury Park School District and Donald Martin v. Bd. of Ed., Asbury Park, N.J., (N.J. App. Div., July 17, 1985, A-5503-83T6) (unreported)] Martin, supra, as stated by the court which found N.J.S.A. 18A:6-8.3 applicable to suspensions even under the tenure law:

The problem is that Martin was not suspended by reason of indictment, he was suspended by reason of his arrest. His indictment did not occur until over ten months after his arrest and no action by the Local Board to suspend him because of the indictment took place at that time. Thus, the statute does not prohibit him from receiving his salary when the indictment was handed down. (emphasis supplied) (Slip Opinion, at p. 10)

On April 15, 1987, petitioner herein was improperly suspended without pay by the Board given that suspension was by virtue of his arrest which requires suspension with pay pursuant to N.J.S.A. 18A:6-8.3. At the time of his indictment, the Board could have but did not act to suspend him without pay just as the Board did not in Martin, supra, thus petitioner was entitled to his salary even after his indictment was handed down. Martin, supra Moreover, the Board herein never availed itself of the second exception to suspension with pay contained in N.J.S.A. 18A:6-8.3, i.e., bringing petitioner up on tenure charges. Thus, the ALJ was entirely correct in ruling that petitioner was entitled to back pay from the day of suspension to the day of sentencing.

As pointed out by petitioner in his exceptions, there is not one scintilla of documentation in the record to support the Board's belated factual assertion that petitioner was in jail during the period back pay has been awarded. Moreover, even if he had been, the Board's argument would be meritless absent any action consistent with the requirements of N.J.S.A. 18A:6-8.3 or 6-14.

Finally, the Commissioner finds unpersuasive the Board's argument that Fridy, supra, controls. While it is true that the Appellate Court decision in Martin, supra, did not disagree with Fridy, the fact remains it never even mentioned that case. More importantly, however, is the fact that the conclusions of the Martin court are diametrically opposed/contradictory to the Fridy decision. Therefore, that decision cannot be deemed implicitly accepting of the Fridy ruling which under N.J.S.A. 18A:25-6 [footnote omitted] found no impediment to Fridy's suspension without pay by the Board in that matter, as well as concluding the claim to back pay was untimely.

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A review of the two decisions makes it clear that the Fridy decision contained no in-depth analysis of the issues as opposed to the Martin decision which was decided after Fridy and which contains a thorough, detailed and searching analysis of the issue of suspension without pay. Thus, just as the Commissioner in Wilma Colella v. Bd. of Ed. of Elwood Park, 1983 S.L.D. 160, aff'd State Board 172, aff'd N.J. Superior Court, Appellate Division, 1984 S.L.D. 1921 (July 19, 1984), when confronted with two conflicting Appellate Court decisions relied on the one which was issued at a later date and contained a more indepth, analytical examination of the law, the Commissioner in this matter sees as controlling the Martin case and not Fridy. (emphasis in text) (Slip Opinion, at pp. 16-18)

The Appellate Division decision affirming such conclusion is plain in stating:

The suspension of Slater's salary as of April 14, 1987, on account of his arrest violated N.J.S.A. 18A:6-8.3. (Slater Appellate Division Slip Opinion, at p. 3)

The Court then analyzed and rejected the Commissioner's conclusion that the Board must formally resolve to suspend without pay a suspended teaching staff member after an indictment is handed up, finding that such formal action elevates form over substance.

Slater, like petitioner herein, was arrested for offenses that, when convicted, trigger application of the forfeiture statute. The Court's decision in Slater, made in reliance upon Martin, supra, renders the Board's attempt herein to justify a suspension without pay before indictment and in the absence of certified tenure charges to be without legal foundation. The Commissioner so finds.

Accordingly, the Board herein is directed to tender to petitioner forthwith back pay from December 18, 1990 to February 8,

1991 at the rate of salary he would have received at the time of his suspension without pay upon arrest. In so directing, the Commissioner notes that petitioner has withdrawn all other requests for temporary relief contained in the Petition of Appeal. See Notice of Motion of Summary Judgment dated February 21, 1991.

IT IS SO ORDERED.


COMMISSIONER OF EDUCATION

APRIL 3, 1991

DATE OF MAILING - APRIL 3, 1991



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1333-90

AGENCY DKT. NO. 22-1/90

PETER BRESCIA,
Petitioner,

v.

**BOARD OF EDUCATION OF THE
TOWNSHIP OF PEMBERTON,
BURLINGTON COUNTY,**
Respondent,

Robert M. Schwartz, Esquire, for petitioner (Lake and Schwartz, attorneys)
Frederick W. Hardt, Esquire, Substitution for Ernest N. Sever, Esquire, for
respondent

Record Closed: December 27, 1990 Decided: February 8, 1991

BEFORE LILLARD E. LAW, ALJ :

STATEMENT OF THE CASE
AND PROCEDURAL HISTORY

Petitioner, Peter Brescia alleges that the action by the Board of Education of the Township of Pemberton (Board) in removing him from the position of Principal of High School II without the Superintendent of Schools' recommendation is ultra virus, in violation of education statutes and regulations. The Board denies

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petitioner's allegations and contends that its actions, at all times, were proper and in accordance with the law.

Petitioner perfected his Petition of Appeal before the Commissioner of Education (Commissioner) on January 17, 1990. Thereafter, on February 14, 1990, the Board filed its Answer to the Petition before the Commissioner. On February 21, 1990, the matter was transmitted from the Commissioner to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et. seq. and N.J.S.A. 52:14F-1A et. seq. On June 1, 1990, a prehearing conference was held at which, among other things, the single issue to be resolved by this administrative tribunal was agreed upon and the parties crossed moved for Summary Decision, pursuant to N.J.A.C. 1:1-12.5

Subsequently, on July 18, 1990, it was ordered for good cause shown, that the instant matter be placed on the OAL inactive list for a period of three (3) months. The matter was placed on the inactive list because counsel for the Board had undergone surgery and was in the process of recuperating. Subsequently, on October 30, 1990, Frederick W. Hardt, Esquire, was substituted as counsel for the respondent Board for Ernest N. Sever, Esquire, as a consequence for Mr. Severs' incapacity to move forward with the matter.

On December 27, 1990, the undersigned was in receipt of a duly executed Stipulation of Facts from the parties. Both counsel stipulate that this matter should be decided by way of Summary Judgment, inasmuch as there are no contested issues of fact.

ISSUE

The issue to be resolved by this administrative tribunal, as agreed upon by the parties, at the prehearing conference, is as follows:

1. Does the Board have the authority to transfer teaching staff members without the recommendation and/or agreement of its Superintendent of Schools?

STIPULATION OF FACTS

The relevant facts have been stipulated by the parties. I, therefore, **FIND** the following as uncontested **FACTS** in this matter:

1. Petitioner, Peter Brescia is a tenured employee having been employed by the Pemberton Township Board of Education since March 1977.
2. Petitioner began his employ in the Pemberton Township School District as an Assistant Principal on or about March 3, 1977. He continued to serve as an Assistant Principal until June 30, 1981.
3. Effective July 1, 1981, petitioner was promoted to the position of principal. He was assigned to the Middle School principalship.
4. On or about July 1, 1986, petitioner was reassigned to the principalship of High School II.
5. On or about, December 19, 1989, the Pemberton Township Board of Education acted to transfer petitioner to High School I.
6. Transfer acted upon by the Pemberton Township Board of Education on or about December 19, 1989, was made without the recommendation of the Superintendent of Schools.
7. The Superintendent of Schools had in fact spoken out against the transfer of petitioner. High School I to which petitioner was reassigned effective January 2, 1990, became a junior high school on July 1, 1990.
8. The Pemberton Township Board of Education knew on or about December 19, 1989, when it voted to transfer petitioner to High School I that High School I would be reclassified as a junior high school effective July 1, 1990.

DISCUSSION AND CONCLUSIONS

The parties have crossed-moved for summary disposition of this matter and, in so doing, have submitted joint Stipulation of Facts. As was stated by the court in Seltzer v. Isaacson, 371 A. 2d. 304 at p. 307:

We recognize the thoroughly settled principles of law that summary judgments are to be granted with extreme caution, Ruvolo v. American Gas. Co., 39 N.J. 490, 189 A. 2d. 204 (1963), and that on a motion for summary judgment, it is the movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact and all inference of doubt are drawn against the movant in favor of the opponent. Judson v. Peoples Bank & Trust Co. of Westfield, 17N.J. 67, 74, 110 A. 2d. 24 (1954). Only when it is palpably disclosed that there is no genuine issue of fact and the movant is entitled to a judgment as a matter of law should such motion be granted. United Advertising Corp. v. Metuchen, 35 N.J. 193, 196, 172 A. 2d. 429 (1961).

Having carefully reviewed the record before me, I **CONCLUDE** that the instant matter is ripe for summary decision, pursuant to the criteria in Judson, supra. and N.J.A.C. 1:1-12.5.

In his Petition of Appeal, respondent alleges that the Board's action in removing him from the position of principal of High School II without the Superintendent's recommendation to be ultra virus and in violation of N.J.S.A. 18A:12-1 et. seq., N.J.S.A. 18A:17-15 et. seq. and N.J.A.C. 6:3-1.12 et. seq. A careful review of the statutes, Chapter 12 of Title 18A, reveals that this portion of the statutes deals with the qualifications, among other things, of members of Boards of Education. There are no references in the various subsections of Chapter 12 concerning the appointment of teaching staff members with or without the recommendations of its Superintendent of Schools. Article 3, Chapter 17 of Title 18A, entitled Superintendent's and Assistant Superintendents of Schools, does, in fact, authorize a Superintendent to make specific recommendations to the Board and/or appointments to specific positions. For example, N.J.S.A. 18A:17-16 reads as follows:

The board or boards of education of any school district or school districts having a superintendent of schools may, upon nomination of the superintendent, by a recorded roll call majority vote of the full membership, of the board or of each such boards, appoint assistant superintendent's of schools. ... (Emphasis supplied)

In addition, at N.J.S.A. 17:24, this statute provides:

The superintendent of schools may appoint, and subject to the provisions of Article 1 of this chapter may remove, clerk's in his office but the number and salaries of such clerks shall be determined the Board or Boards employing him.

Thus, the statutes specifically provide that the superintendent of schools nominate individuals for the appointment of assistant superintendent. It has been held that a board of education may not appoint an assistant superintendent of the schools who has not been nominated by the superintendent. See: Ross v. Jersey City Bd. of Ed., 5 N.J.A.R. 393 (1981). Similarly, it is the superintendent of schools who may appoint the clerks to be employed in his office, subject to the approval of the board of education with respect to the number of clerks and the salaries to be paid to each. The statutes, therefore, are silent with respect to a requirement that the superintendent recommend the employment, or the transfer, of a principal within the Board's school district.

In citing N.J.A.C. 6:3-1.12 entitled, duties of district superintendents of schools; chief school administrator, it is found at Subsection (d) that:

He or she shall appoint such clerks as may be authorized by the district board(s) of education.

And, at Subsection (e):

He or she shall nominate to the district board(s) of education such assistant superintendents as shall be authorized by the district board(s) of education.

And, at Subsection (f):

He or she shall recommend to the district board(s) of education formal appointment of all teaching staff members.

Thus, we have under the regulations adopted by the State Board of Education, the requirement that the superintendent shall recommend the appointment of all teaching staff members to his or her board of education.

The appointment of teaching staff members, however, is vested exclusively with the board of education. At N.J.S.A. 18A:27-1, the statute provides:

No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.

With regard to the transfer of teaching staff members, the statute at N.J.S.A. 18A:25-1, provides:

No teaching staff member shall be transferred, except by a recorded roll call majority vote of the full membership of the board of education by which he is employed.

In the matter of Jeannette E. Williams v. Board of Education of Plainfield, 176 N.J. Super. 154 (App. Div.) 1980, cert. den. 87 N.J. 306 (1981), the Appellate Division of Superior Court affirmed the decision by the State Board of Education holding that a principal's transfer from a high school to an elementary school principalship was a proper transfer and could occur without the affected principal's consent. In the matter Cardman v. Board of Ed. of Township of Millburn, 1977 S.L.D. 746, the Commissioner discussed the authority of a Superintendent of Schools to award a contract for the appointment of a teaching staff member. Therein, at 750, the Commissioner stated:

Consequently, if the Superintendent agreed to an automatic reappointment of petitioner when a vacancy occurred, such an agreement is null and void. This is

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so because the Superintendent has no authority to enter into any such agreement on behalf of the Board or may the Board delegate such authority to its Superintendent. The Commissioner so holds.

In the Cardman matter the Commissioner discusses the authority of local boards of education where he stated at 750:

Boards of Education are agencies of the State and as such have only those powers as are specifically granted, necessarily implied or incidental to authority expressly conferred by the Legislature. Edwards v. Mayor and Counsel of Moonachie, 3 N.J. 17 (1949); N.J. Good Humor, Inc. v. Bradley Beach, 124 N.J.L. 162 (E. & A. 1939). Such powers can neither be increased or diminished except by the Legislature. Burke v. Kenny, et al., 6 N.J. Super. 524 (Law Div. 1949). Boards of Education have been specifically authorized by the Legislature to appoint teaching staff members by a recorded roll call majority vote of full membership. N.J.S.A. 18A:27-1. Neither this Board no any other local board of education may delegate its responsibility to appoint teaching staff members to any of its agents, officers, or other employees.

Similarly, in the matter of Esther Boyle Eyler, et al v. Board of Education of the City of Paterson, et, al. 1959-60 S.L.D. 68, 71, the Commissioner said:

...By the terms of N.J.S.A. 18:6-20 [now N.J.S.A. 18A:25-1 and 27-1], the appointment, transfer or dismissal of principals and teachers and the fixing of their salaries require a majority vote of the whole number of members of the Board. ...It is the opinion of the Commissioner that any action under this statute would be taken a recorded roll call majority vote of the full membership of the Board of Education in a public meeting of the Board properly called. It is well established that Boards of Education may not delegate the appointment of school personnel to committees or school officials. (Citations omitted) It is also well established that full compliance with the statutory requirements as to the formalities of employment is essential to the validity of such employment. (Citations omitted)

As was said by the Appellate bench in the matter of Thomas v. Morris Township Board of Education, 89 N.J. Super. 327 (App. Div. 1965) at 332:

...When such a body acts within its authority its decision is entitled to presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable.

The State Board of Education stated in the matter of Kenney v. Board of Education of Montclair, 1938 S.L.D. 647, Aff'd State Board of Education 649, 653, that:

The school law vests the management of the public schools in each district in the local boards of education and unless they violate the law or act in bad faith, the exercise of their discretion in the performance of duties imposed upon them is not subject to interference or reversal.

Having carefully reviewed the record before me, and the controlling statutes, I **CONCLUDE** that the Board of Education acted within its statutory authority when it transferred petitioner from High School II to High School I. Notwithstanding the fact that subsequently High School I was converted to a junior high school, petitioner's transfer was within the scope of his certification and violated none of his tenure or seniority rights. Williams, Supra.

ORDER

Accordingly, it is hereby **ORDERED** that summary decision be entered on behalf of the Board of Education of the Township of Pemberton, and it is **FURTHERED ORDERED** that the herein petition be **DISMISSED.**

I hereby FILE this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

OAL DKT. NO. EDU 1333-90

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

8 February 1991
Date

Lillard E. Law
LILLARD E. LAW, ALJ

Receipt Acknowledged:

2/14/91
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 1991
Date

Jayne L. Beckler
OFFICE OF ADMINISTRATIVE LAW

lmh

WITNESS LIST

FOR PETITIONER

Peter Brescia

FOR RESPONDENT

Peter Brescia

OAL DKT. NO. EDU 1333-90

PETER BRESCIA, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF PEMBERTON, BURLINGTON :
 COUNTY, :
 RESPONDENT. :
 _____ :

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to the requirements of N.J.A.C. 1:1-18.4 and are summarized below.

Initially, petitioner avers that his appeal is not challenging the prerogative of a board of education to make an assignment or a transfer. What he does aver, however, is that the right of a board of education to make an assignment or transfer is not an unqualified right. One such qualification of that right, he contends, is the requirement that an assignment or transfer be made upon the recommendation of the superintendent of schools as set forth in N.J.A.C. 6:3-1.12*, a regulation which was in full force

* N.J.A.C. 6:3-1.12 was repealed in October 1990. The requirement is now contained within N.J.A.C. 6:8-4.3(a)6vii.

and effect in December 1989 when respondent reassigned him from a high school principalship to one of junior high school against the recommendation of the superintendent of schools. That regulation reads in part that a superintendent of schools "shall recommend to the district board of education formal appointment of all teaching staff members."

Petitioner also avers that N.J.S.A. 18A:17-20 provides the statutory basis for the above-cited regulations. Said statute mandates, inter alia, that the superintendent of schools shall have supervision over the schools of the district under rules and regulations prescribed by the State Board and he or she shall have such other powers and perform such other duties as may be prescribed by the board of education. Petitioner's exceptions consequently argue that while a board may provide the superintendent certain other unenumerated powers, it cannot limit the power or authority vested in the superintendent by statute or regulation.

Petitioner avers that his reassignment from a high school principal position to junior high school principalship constituted a "formal appointment." As such, petitioner contends that respondent violated N.J.A.C. 6:3-1.12 because the recommendation for his formal appointment to the junior high school position did not result from a recommendation by the superintendent and was, in fact, over the objections of the superintendent. Hence, petitioner's exceptions do not challenge the right of a board to assign and transfer but, rather, the process by which a reassignment or transfer may be made by a board of education.

Upon a very careful and thorough examination of the record and the legal arguments advanced by the parties, the Commissioner reverses the recommendation of the ALJ to dismiss the petition.

In the Commissioner's view, the requirements of N.J.A.C. 6:3-1.12(f) and more particularly N.J.A.C. 6:8-4.3(a)6vii, which defines one of the criteria which must be met by a district in order to be deemed certifiable in the area of staffing, make it imperative that a board of education act in personnel matters upon the recommendation of its chief school administrator. While a board pursuant to the above-cited regulation is within its legal right to reject such nomination, it may not arbitrarily act in the absence of a nomination from such chief school administrator. Should the board reject the nomination, it shall be incumbent upon the chief school administrator to make a further recommendation.

In so concluding, the Commissioner does not seek to deny to the Board its ultimate authority to transfer or appoint, but he does seek to emphasize that the proper exercise of such authority requires that it be carried out in full recognition of the appropriate delineation of authority between the superintendent as the administrative leader of the professional staff and that of a board of education composed of lay persons whose primary function is to set policy. For a board of education to unilaterally determine who is best suited to serve as principal in a particular school without benefit of the advice of its chief school administrator oversteps the boundary between policy and administration.

Consequently, the Commissioner directs that this matter be remanded to the Board of Education of the Township of Pemberton so that it may, pursuant to regulation (N.J.A.C. 6:3-1.12 now N.J.A.C. 6:8-4.3(a)6vii) act upon the specific recommendation of its chief school administrator as to the manner in which the principalship of its former high school and present junior high school is to be filled.

The Commissioner does not retain jurisdiction.


COMMISSIONER OF EDUCATION

APRIL 1, 1991

DATE OF MAILING - APRIL 1, 1991

IN THE MATTER OF THE :
REAPPORTIONMENT OF THE :
REPRESENTATIVES OF THE BOARD OF : COMMISSIONER OF EDUCATION
EDUCATION OF PASCACK VALLEY : ORDER
REGIONAL HIGH SCHOOL DISTRICT, :
BERGEN COUNTY. :
_____ :

Whereas, the Pascack Valley Regional Board is a regional school district including the constituent school districts of Hillsdale, Montvale, River Vale and Woodcliff Lake; and

Whereas, the Pascack Valley Regional Board consists of nine members who were last apportioned among constituent districts by the Bergen County Superintendent on the basis of the 1980 Federal census as follows:

<u>Municipalities</u>	<u>1980 Census</u>	<u>Current Apportionment</u>
Hillsdale	10,495	3
Montvale	7,318	2
River Vale	9,489	2
Woodcliff Lake	5,644	2
	<hr/> 32,946	<hr/> 9; and

Whereas, on or about March 14, 1991, the Bergen County Superintendent advised the Pascack Valley Regional Board, based on the New Jersey Supreme Court decision regarding the 1990 Federal census, and the Attorney General advisory to the Department of Education, that based upon the 1990 Federal census, there would be a

reapportionment of representation among the constituent districts, and that such reapportionment must be effected in the 1991 annual school election. The new apportionment calculated by the county superintendent is as follows:

<u>Municipalities</u>	<u>1990 Census</u>	<u>New Apportionment</u>
Hillsdale	9,750	3
Montvale	6,946	2
River Vale	9,410	3
Woodcliff Lake	5,303	1
	<hr/> 31,409	<hr/> 9; and

Whereas, based upon the 1990 census, and the apportionment formula contained in N.J.S.A. 18A:13-8, Woodcliff Lake shall lose one of its two seats on the Pascack Valley Regional Board in 1992, and River Vale shall increase its seats from two to three in the 1991 school election; and

Whereas, the requirement that a reapportionment of representatives among constituent districts must be effected for the next annual school election following the official promulgation of the Federal census, the original pattern of staggered elections within River Vale, a constituent district, is upset, and will perpetuate a system which will result in a disproportionate number of its representatives up for election at the same time and the election of more than one-third of the Pascack Valley Regional Board members at a single annual school election, beginning with the 1994 election; and

Whereas, the New Jersey Legislature has declared that within those constituent districts, which have more than one representative on a regional board, the terms of such members

should be staggered to the extent possible to ensure that a disproportionate number of its representatives are not up for election at the same time and not more than one-third of the board members are elected each year; and

Whereas, the Legislature has, therefore, established a procedure in N.J.S.A. 18A:13-9, whereby a system of staggered elections in terms of office for regional school board members can be maintained by allowing the Commissioner, upon petition by a constituent district board of education, to make a one-year adjustment in the terms of office of any member of a regional school board who represents a constituent district which, due to reapportionment of the regional district, has a disproportionate number of representatives up for election at the same time; and

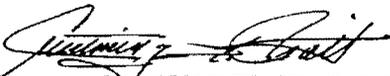
Whereas, by petition dated March 28, 1991 the Board of Education of the Borough of Woodcliff Lake, a constituent district of the Pascack Valley Regional High School District, petitioned the Commissioner pursuant to the authority granted to him pursuant to the provisions of N.J.S.A. 18A:13-9 to alter the term of the new River Vale member of the Pascack Valley Regional Board by not more than one year to ensure that a disproportionate number of River Vale representatives will not in the future be elected at one time; and

Whereas, the Commissioner has reviewed the schedule of board seats to be filled in each election from 1991 to 2000 submitted by petitioner herein and incorporated herein by reference; now therefore

The Commissioner directs that the new seat awarded to River Vale by virtue of the 1990 reapportionment shall be for a term of two years until the year 1993 at which time it shall become a three-

year term, thus, ensuring that no more than one River Vale board seat shall be required to be filled in any single year. Further, the Commissioner directs that the Woodcliff Lake seat on the Pascack Valley Board of Education scheduled to be filled at the 1993 school board election be likewise established as a two-year seat until the 1995 election when it will become a seat to be filled for a three-year term, thus, ensuring that no more than three board seats will be required to be filled in any single year.

IT IS SO ORDERED this 5TH day of April 1991.


ACTING COMMISSIONER OF EDUCATION

APRIL 5, 1991

DATE OF MAILING - APRIL 5, 1991



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ABANDONMENT/DISMISSAL
OAL DKT. NO. EDU 5563-90
AGENCY DKT. NO. 196-6/90

**IN THE MATTER OF THE
TENURE HEARING OF TIMOTHY
SOLOMON, SCHOOL DISTRICT OF
THE TOWNSHIP OF IRVINGTON,
ESSEX COUNTY.**

Nicholas Celso, III, Esq., for petitioner, School District of the Township of Irvington (Schwartz, Pisano, Simon & Edelstein)

Sanford R. Oxfeld, Esq., for respondent, Timothy Solomon (Balk, Oxfeld, Mandel & Cohen, attorneys)

Record Closed: February 5, 1991

Decided: February 19, 1991

BEFORE ARNOLD SAMUELS, ALJ:

This matter involves tenure charges by the petitioner against respondent, a tenured staff member, for dismissal or reduction in compensation pursuant to *N.J.S.A. 18A:6-10 et seq.* After the charges were filed and served, the respondent filed an answer and contested the Board's action.

The matter was transmitted to the Office of Administrative Law on July 16, 1990, for hearing and determination as a contested case pursuant to *N.J.S.A. 52:14F-1 et seq.* A prehearing conference was held on September 25, 1990, defining the issues, providing for discovery and dealing with other procedural matters required for the forthcoming hearing, scheduled to be held on February 5, 6 and 7, 1991 at the Office of Administrative Law in Newark, New Jersey.

On two occasions prior to the hearing dates, counsel for petitioner advised that the Board's requests for discovery, in the form of written interrogatories, had not been answered on time. It was then determined, in telephone conferences with both attorneys, that the respondent was not cooperating with his own attorney and would submit an unconditional resignation from his position, an action which would, in effect, retract his opposition to the tenure charges and the Board's dismissal action. However, the resignation did not occur.

The attorneys for both parties appeared on the first hearing day, February 5, 1991. Respondent's attorney stated, on the record, that he had received no communication from his client since the end of 1990. Appointments had been made, but not kept. Telephone calls and letters from the attorney to respondent were not returned, and more recently Mr. Solomon's telephone had been disconnected.

Counsel further stated that he forwarded petitioner's written interrogatories to his client in October 1990, for preparation of answers. An office conference had been scheduled for a date soon thereafter, but Mr. Solomon did not keep the appointment, nor did he call or write. In mid-December 1990, another appointment was made and not kept. Again, the attorney received no response to calls or letters.

In mid-January 1991, the attorney wrote another letter to the respondent, suggesting that, if he did not wish to contest the charges, he might want to resign his position and withdraw the appeal. Again, no response was received, and no letter of resignation was returned. A second letter was sent on January 31, 1991, again with no response. By that time, respondent's telephone had been disconnected.

Additional attempts to reach Mr. Solomon were made by his attorney during the evening of February 4, 1991, the day before the hearing. No response was received.

The attorney for the Board stated that he had been kept aware of the problems being experienced by respondent's counsel over the past few months, including his inability to secure Mr. Solomon's cooperation so that written interrogatories could be answered. Nevertheless, the Board attorney stated that he was prepared to present evidence designed to prove the tenure charges, despite the lack of discovery.

The Board's attorney also presented an affidavit from the Deputy Superintendent of Schools for the Irvington Township Board of Education stating that inadvertently, the Board had paid salary and benefits to the respondent during the first 120 days of his suspension. *N.J.S.A. 18A:6-14* provides that a board may suspend a person against whom tenure charges are made, without pay, but if a determination of the charges is not concluded within 120 calendar days after certification, then full salary (except for the 120 days) shall be paid, beginning on the 121st day. The total amount of salary and medical benefits paid to Mr. Solomon or on his behalf during the first 120 days of suspension, from September 1, 1990 through January 31, 1991, was \$6,923.05. The affidavit referring to the above was marked Exhibit P-1.

Counsel were advised by this judge that, since the respondent had evidently intentionally abandoned his opposition to the tenure charges and demand for dismissal, the matter would be treated as a default by Mr. Solomon, and his defenses would be dismissed with prejudice. Any monetary claim the Board has against respondent for reimbursement of the amounts erroneously paid to him during the first 120 days of his suspension would be preserved, particularly since the affidavit filed, Exhibit P-1, indicates that Mr. Solomon began working for the East Orange City Board of Education on October 1, 1990.

I therefore **CONCLUDE** that the respondent no longer desires to defend against the tenure charges filed by petitioner, and there is no longer a contested tenure charge to be disposed of herein.

It is therefore **ORDERED** that the respondent's answer and defenses be stricken on account of his default and abandonment of his opposition to the tenure charges and the Board's demand for dismissal.

OAL DKT. NO. EDU 5563-90

It is further **ORDERED** that the petitioner's monetary claims, as set forth in Exhibit P-1, be preserved for any future proceedings that the Board may wish to initiate for reimbursement; and it is further

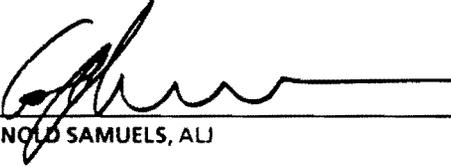
ORDERED that since a contested case no longer exists, this matter is **DISMISSED**, as to respondent's answer and defenses, with prejudice. This dismissal of respondent's opposition to the charges and defenses does not in any way preclude other proceedings that might be brought by any body or agency dealing with the respondent's license and fitness to teach.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 14B-10*.

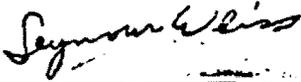
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 19, 1991
Date


ARNOLD SAMUELS, ALJ

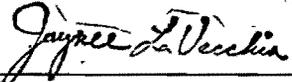
Receipt Acknowledged:

2/20/91
Date


DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 1991
Date


OFFICE OF ADMINISTRATIVE LAW

APPENDIX

EXHIBITS

Exhibit P-1 Affidavit with attachments

SCHWARTZ, PISANO, SIMON & EDELSTEIN
293 Eisenhower Parkway, Suite 300
Livingston, New Jersey 07039
(201) 740-1600

12-1
E.L.D.
6-2/5/91

Attorneys for Irvington Board of Education.

IN THE MATTER OF TENURE HEARING OF TIMOTHY SOLOMON, IRVINGTON BOARD OF EDUCATION, ESSEX COUNTY.	: BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF : ADMINISTRATIVE LAW : OAL Docket No. EDU 05563-90 Agency Ref. No. 196-6/90 : : <u>CIVIL ACTION</u> : : <u>AFFIDAVIT</u>
--	---

I, GUY C. FERRI, of full age and having been duly sworn according to law, upon my oath depose and say:

1. I am the Deputy Superintendent of Schools for the Irvington Township Board of Education, and am fully familiar with the facts and circumstances surrounding the within matter.

2. On June 20, 1990, the Board of Education voted to suspend Timothy Solomon, a tenured teacher, without pay pursuant to the certification of tenure charges against him to the Commissioner of Education.

3. Pursuant to N.J.S.A. 18A:6-14, suspension of salary payments should have lasted 120 days from the date of suspension, or until October 18, 1990.

4. Due to clerical oversight, Mr. Solomon's salary and benefit payments were not withheld, resulting in the following payments (See Exhibits A, B, and C annexed) during the above mentioned 120 day period following his suspension:

<u>Salary</u>	<u>Medical Benefits (Blue Cross/ Shield/Dental/Prescription)</u>	<u>Dates of Payment</u>
\$1321.25	\$295.93	09/01/90 - 09/15/90
1321.25	295.93	09/16/90 - 09/30/90
<u>1321.25</u>	<u>295.93</u>	10/01/90 - 10/15/90
\$3963.75	\$887.79	

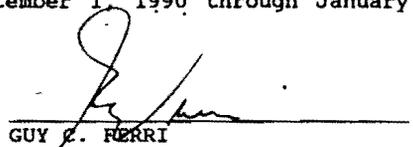
5. During the period of Mr. Solomon's suspension without pay, to the best of my knowledge and belief, Mr. Solomon received other compensation through outside employment beginning on or about October 1, 1990 (Exhibit D), if not earlier.

6. The Board has received no reimbursement of any kind from Mr. Solomon to mitigate its costs, nor has Mr. Solomon responded to interrogatories concerning his outside employment or in any way assisted the Board in discovering the correct status of his employment during the times relevant herein.

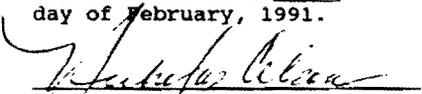
7. Effective October 16, 1990, the Board stopped paying Mr. Solomon's salary, but continued paying his medical benefits until February 1991 when it learned for sure that Mr. Solomon was employed by the East Orange Board of Education. Medical benefit payments made during the period on Mr. Solomon's behalf are as follows:

\$ 295.93	10/15/90 - 10/31/90
591.86	11/01/90 - 11/01/90
591.86	12/01/90 - 12/31/90
<u>591.86</u>	01/01/91 - 01/31/91
\$2071.51	

8. Total salary and medical benefit payments rendered on Mr. Solomon's behalf from September 1, 1990 through January 31, 1991 equal \$6923.05.


GUY C. FERRI

Sworn and subscribed to
before me on this 5th
day of February, 1991.


Nicholas Celso, III
Attorney at Law of New Jersey

C:\WP\IRVINGTO\FERRI.AFF

Exhibit A

Exhibit A

Y.....THURSDAY		IRVINGTON BOARD OF EDUCATION		TYPE RUN: R PERM #		TIME 9:54 AM	
ON: 10							
EMPLOYEE NAME	SOCIAL SECURITY	CONTRACT SALARY	ADD ID-BASE	STIPEND WAGES	TOTAL GROSS	NET PAY	----- D E D U C T I O N S ----- NAME CURRENT
✓ SOLOMON, TIMOTHY	140-50-0392	1,321.25	.00	.00	1321.25	901.73	FEDERAL TAX.... 132.21 FICA TAX..... 101.08 NJ STATE TAX... 28.51 SUI TAX..... 4.08 TPAF PENSION.. 41.62 TPAF CONT LIFE 5.29 BACK PENSION... .00 LOAN DEG..... 64.26 BACK LOANS..... .00 BACK LIFE..... .00 DUES DED..... 20.78 BACK DUES..... .00 WASH. NAT'L.... 21.69 ----- TOTAL TAX & DED 419.52

SPADOLA, MICHAEL	158-46-8336	1,450.00	.00	.00	1450.00	783.31	FEDERAL TAX.... 274.11 FICA TAX..... 110.93 NJ STATE TAX... 35.81 SUI TAX..... .00 TPAF PENSION.. 44.95 TPAF CONT LIFE 5.80 EXTRA FED..... 10.00 DUES DED..... 20.78 WASH. NAT'L.... 19.51 SAVINGS PLAN... 145.00 ----- TOTAL TAX & DED 666.69

SPANN, LENORA KNOWLES	152-50-6720	796.25	.00	.00	796.25	576.96	FEDERAL TAX.... 94.07 FICA TAX..... 60.91 NJ STATE TAX... 17.52 SUI TAX..... 4.98 PERS PENSION.. 27.15 PERS CONT LIFE 4.38 DUES DED..... 10.28 ----- TOTAL TAX & DED 219.29

531

Exhibit B

Exhibit B

PAYROLL WORD SHEET FOR THE 9/28/10 PAYROLL									
EMPLOYEE					DATE RUN: 9/27/10		PAGE 336		
IRVINGTON BOARD OF EDUCATION					TYPE RUN: 8 PERM 8		TIME 10:11 AM		
10	SOCIAL SECURITY	CONTRACT NUMBER	AGE	STIPEND	TOTAL GROSS	NET PAY	DEDUCTIONS		
10	190-00-0392	1,321.25	.00	.00	1321.25	905.84			
EMPLOYEE NAME									
COLLON: TIMOTHY									
LOCATION - 10	DEPT - 02	10/12 - 1	MAR - M	SEX - M					
FED EXMP - 03	STATE - 03	LOCAL - 0	ANNUAL CONTRACT - 24425.00						
CONTRACT 100% - 1,321.25					BCCI				
					0058				
							FEDERAL TAX....	132.21	
							FICA TAX.....	101.08	
							NJ STATE TAX...	28.51	
							SUI TAX.....	.00	
							TPAF PENSION..	41.62	
							TPAF CONT LIFE	5.29	
							BACK PENSION..	.00	
							LOAN DED.....	49.25	
							BACK LOANS....	.00	
							BACK LIFE.....	.00	
							DUES DED.....	20.78	
							BACK DUES....	.00	
							WASH. MAT'L....	21.69	
							TOTAL TAX & DED	415.43	

10	158-46-0336	1,450.00	.00	.00	1450.00	783.31			
EMPLOYEE NAME									
MACALM: MICHAEL									
LOCATION - 10	DEPT - 02	10/12 - 1	MAR - S	SEX - M					
FED EXMP - 00	STATE - 00	LOCAL - 0	ANNUAL CONTRACT - 29000.00						
CONTRACT 100% - 1,450.00					BCCI				
					0098				
							FEDERAL TAX....	279.11	
							FICA TAX.....	110.93	
							NJ STATE TAX...	35.41	
							SUI TAX.....	.00	
							TPAF PENSION..	44.95	
							TPAF CONT LIFE	5.80	
							EXTRA FED.....	10.00	
							DUES DED.....	20.78	
							WASH. MAT'L....	19.81	
							SAVINGS PLAN..	145.00	
							TOTAL TAX & DED	669.89	

10	152-00-6720	796.25	.00	.00	796.25	574.94			
EMPLOYEE NAME									
WYN: LENTON KNOWLES									
LOCATION - 10	DEPT - 03	10/12 - 1	MAR - M	SEX - F					
FED EXMP - 00	STATE - 00	LOCAL - 0	ANNUAL CONTRACT - 15925.00						
CONTRACT 100% - 796.25					BCCI				
					0131				
							FEDERAL TAX....	74.07	
							FICA TAX.....	40.91	
							NJ STATE TAX...	17.82	
							SUI TAX.....	4.98	
							PERM PENSION..	27.15	
							PERS CONT LIFE	4.38	
							DUES DED.....	10.28	
							TOTAL TAX & DED	219.29	

532

PAYROLL WORD SHEET FOR THE 9/28/10 PAYROLL									
EMPLOYEE					DATE RUN: 9/27/10		PAGE 336		
IRVINGTON BOARD OF EDUCATION					TYPE RUN: 8 PERM 8		TIME 10:11 AM		
10	SOCIAL SECURITY	CONTRACT NUMBER	AGE	STIPEND	TOTAL GROSS	NET PAY	DEDUCTIONS		
10	150-42-1148	2,438.72	.00	2.76	2441.31	1,206.70			
EMPLOYEE NAME									
WFOREV: JANEET									
LOCATION - 10	DEPT - 02	10/12 - 1	MAR - S	SEX - F					
FED EXMP - 03	STATE - 03	LOCAL - 0	ANNUAL CONTRACT - 24425.00						
							FEDERAL TAX....	490.44	
							FICA TAX.....	186.76	
							NJ STATE TAX...	66.50	

Exhibit C

TOTAL TAX & DED

Exhibit C

PAYROLL WORK SHEET FOR THE 10/15/90 PAYROLL										
.....PAYROLL					DATE RUN	10/12/90	PAGE 036			
IRVINGTON BOARD OF EDUCATION					TYPE RUN	B	PERM	B	TIME	10 48 AM
10	SOCIAL SECURITY	CONTRACT	AGE	STIPEND	TOTAL	NET	----- D E D U C T I O N S			
EMPLOYEE NAME	NUMBER	NUMBER	INCREASE	AMOUNT	GROSS	AMOUNT	NAME	AMOUNT	AMOUNT	AMOUNT
SHEWY, BRENDAN	147-46-7495	927.25	.00	.00	927.25	649.69	FEDERAL TAX	113.25	FIGA TAX	70.93
LOCATION - 10	DEPT - 08	10/12 - 1	MAJ - M	SEX - F			NJ STATE TAX	20.97	SUI TAX	5.80
FED EMP - 00	STATE - 00	LOCAL - 0	GENERAL CONTRACT - 18545.00				PERA PENSION	30.23	PERA CONT LIFE	5.10
		CONTRACT 100% - 927.25					LDNH DED	.00	DUES DED	10.28
							UNITEA MAY	1.00		
							TOTAL TAX & DED	257.56		

✓ SOLOMON, TIMOTHY	140-50-0392	1,321.25	.00	.00	1321.25	905.83	FEDERAL TAX	132.11	FIGA TAX	101.08
LOCATION - 10	DEPT - 02	10/12 - 1	MAJ - M	SEX - M			NJ STATE TAX	28.51	SUI TAX	.00
FED EMP - 03	STATE - 03	LOCAL - 0	GENERAL CONTRACT - 28425.00				TPAF PENSION	41.82	TPAF CONT LIFE	5.29
		CONTRACT 100% - 1,321.25					BACK PENSION	.00	LDNH DED	44.26
							BACK LDNH	.00	BACK LIFE	.00
							DUES DED	20.78	BACK DUES	.00
							WASH. INT'L	23.49		
							TOTAL TAX & DED	415.44		

SPICOLA, MICHAEL	128-48-8336	1,450.00	.00	.00	1450.00	783.31	FEDERAL TAX	274.11	FIGA TAX	110.93
LOCATION - 10	DEPT - 02	10/12 - 1	MAJ - S	SEX - M			NJ STATE TAX	35.61	SUI TAX	.00
FED EMP - 00	STATE - 00	LOCAL - 0	GENERAL CONTRACT - 29000.00				TPAF PENSION	44.95	TPAF CONT LIFE	5.80
		CONTRACT 100% - 1,450.00					EXTRA FED	10.00	DUES DED	40.78
							WASH. INT'L	19.51	SAVINGS PLAN	145.00
							TOTAL TAX & DED	644.69		

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JIM FLORIO
GOVERNOR
DOUGLAS C. BERMAN
STATE TREASURER

STATE OF NEW JERSEY
DEPARTMENT OF THE TREASURY
DIVISION OF PENSIONS
CN 296
TRENTON, NEW JERSEY 08623-0296

MARGARET M. McMAHON
DIRECTOR

January 18, 1991

Timothy Solomon
1150 Springfield Avenue
Irvington, NJ 07111

RE: TPAF #364514

Dear Mr. Solomon:

In reply to your request, this will confirm that your transfer to the East Orange City Board of Education was effective as of October 1, 1990. Two back deductions were scheduled to begin on December 1, 1990.

If you have any further questions, please do not hesitate to contact this office. We are happy to be of service.

Sincerely,

A handwritten signature in cursive script that reads "Loretta M. DeBonis".

Loretta M. DeBonis
Client Relations

IN THE MATTER OF THE TENURE :
HEARING OF TIMOTHY SOLOMON, : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF IRVINGTON, ESSEX COUNTY. :
_____ :

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the Board of Education were timely filed pursuant to N.J.A.C. 1:1-18.4. Respondent filed neither primary exceptions nor a reply to the Board's submission.

In its exceptions, the Board notes its concurrence with the ALJ's procedural recitation, but argues that rather than dismissing the instant matter, the ALJ should have entered a default judgment finding the district's factual allegations to be true and sufficient to warrant forfeiture of tenure. By failing to do so, the ALJ "aided and abetted respondent in his obvious ploy to circumvent the system and to avert accountability for his deplorable actions." (Exceptions, at p. 1) The Board notes that respondent, knowing that tenure charges were pending against him, accepted employment as a teacher in the East Orange school district as of October 1, 1990 (Exhibit P-1) without having notified the Board or his attorney, thereby rendering the question of his dismissal moot and depriving the Commissioner of the factual record necessary to initiate certification revocation proceedings.

The Board further objects to the ALJ's failure to deal directly with the unjust enrichment enjoyed by respondent by virtue of his having received, solely through clerical error, salary and benefits during his suspension contrary to the express directive of the Board. Rather than preserving this claim for future proceedings as the ALJ did, the Board argues, the Commissioner should enter an order directing respondent's present employer to reimburse the Board for monies owed by way of payroll deductions from respondent's salary.

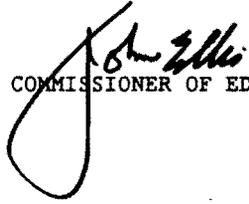
Upon careful consideration, the Commissioner concurs with the Board that the ALJ erred in not bringing this matter to closure. It is clear from the foregoing procedural history that respondent has abandoned all participation in his own defense. In the months since this matter was initiated, respondent has ignored interrogatories; failed to keep appointments with, return calls from and otherwise cooperate with his own attorney; failed to submit promised papers; and failed to appear at hearing. He has further raised no objection to the ALJ's decision by way of exceptions or to the Board's exceptions by way of reply. Under the circumstances, rather than simply striking respondent's answer and dismissing the instant matter as uncontested, the ALJ should have deemed, and the Commissioner hereby does deem, the Board's charges against respondent to be admitted in their entirety. On that basis, the Commissioner has reviewed the charges against respondent, which consist of a lengthy history of absence and tardiness, gross neglect of duty with respect to notification procedures and provision of required medical documentation, and a history of cocaine dependence and alcohol abuse, and found these to be more than sufficient to warrant dismissal from his tenured position.

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On the matter of monies erroneously paid to respondent during his suspension, the Commissioner deems it inappropriate to address this question in the present context and notes that proper remedy for a claim of unjust enrichment lies in a civil action brought before a court of competent jurisdiction. In the Matter of the Tenure Hearing of Anthony Castaldo, Union County Regional High School District No. 1, Union County, State Board of Education decisions November 2, 1983 and July 2, 1986

Accordingly, the initial decision of the Office of Administrative Law is modified to direct that respondent in this matter be dismissed from tenured employment as of the date of this decision and that this matter be transmitted to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.6(a)1. for action against respondent's certificate as it deems appropriate.

IT IS SO ORDERED.



COMMISSIONER OF EDUCATION

APRIL 9, 1991

DATE OF MAILING - APRIL 9, 1991

Pending State Board



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5722-90
AGENCY DKT. NO. 292-89
ON REMAND FROM
OAL DKT. NO. EDU 2763-89
AGENCY DKT. NO. 95-4/89

IN THE MATTER OF THE ELECTION
INQUIRY IN THE BRIDGEWATER-RARITAN
SCHOOL DISTRICT, SOMERSET COUNTY,

Enid Bloch, and Jean Crabtree, petitioners, pro se
Daniel C. Soriano, Jr., Esq. for the Board (Soriano & Gross, attorneys)

Record Closed: January 7, 1991

Decided: March 1, 1991

BEFORE DANIEL B. McKEOWN, ALJ:

BACKGROUND

This initial decision follows a hearing on remand as ordered by the State Board of Education. The background of the matter follows.

On April 4, 1989 the Bridgewater-Raritan Board of Education (Board) conducted its annual school election during which the voters were to elect from the constituent district of Bridgewater Township three candidates to membership on the Board for full terms of three years each. Four persons formally announced their candidacy through the filing of nominating petitions and, consequently, had their names printed on the official ballot. Three other individuals mounted a write-in campaign and sought election to the Board by way of a write-in campaign. These write-in candidates, campaigning as a team, had caused to be prepared pasters which were then distributed to voters throughout the constituent district of Bridgewater Township for use when

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they entered the voting booths at the respective polling districts.

At the conclusion of the election the announced results of the combined balloting from each of the Board's four polling places for all candidates was as follows:

<u>THREE-YEAR TERM</u>	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Albert N. Tornatore	1028	12	1040
Enid Bloeh	894	8	902
Jean D. Crabtree	866	9	875
Bruce E. Kalter	815	3	818
 <u>WRITE-IN CANDIDATE</u>			
H.A. Arthur Wiegand	986	7	993
Raymond Kovonuk	944	7	951
Sharad Tilak	921	5	926

The Board's four polling places were the Crim School, the Adamsville School, the Bradly Gardens School and the Van Holton School. On April 10, 1989 petitioner Bloch and co-petitioner Jean D. Crabtree, each a defeated candidate, filed to the Commissioner of Education a ten page, single spaced, typewritten letter alleging that the announced vote tally was inaccurate and that numerous violations of school election law occurred during the election thereby rendering it impossible to determine the will of the electorate. Petitioners requested a recount of the ballots cast together with an inquiry on the conduct of the election, particularly in respect to the papers rolls used to cast ballots for write-in candidates in each of the ten voting machines at the four polling places. The Commissioner of Education determined that the request for a recount was not a contested case under N.J.S.A. 52:14F-7. The recount was conducted, at the Commissioner's direction, by Frank Arch, the Somerset County School Business Administrator. The inquiry was, however, referred to the Office of Administrative Law as a contested case and the matter was assigned this judge.

Petitioners alleged in their April 10, 1989 letter complaint that the pasters used by voters to case ballots for the write-in candidates caused voting machines to jam;

that loose pasters found inside voting machines and on the floor were placed onto the paper rolls by election workers after the election but before the count of ballots; that several paper rolls were not identified nor are they identifiable to a specific voting machine used in the election; and, that no one of the paper rolls was placed in a sealed envelope by the election workers immediately following the election.

Mr. Arch conducted the recount of ballots on April 24, 26, and 27, 1989. The inquiry was conducted by this judge on May 15 and 16, 1989. The recount and the inquiry were independently scheduled by the Department of Education and the Office of Administrative Law, respectively. At some point after the recount was completed Mr. Arch submitted to the Commissioner a written report of his findings which is characterized as a report of 'the Commissioner's representative.' It is noted that at the remand hearing before this judge, Mr. Arch testified that after the inquiry he prepared his report for submission to the Commissioner in consultation with Paul DeMarco of the Department of Education, Division of Controversies and Disputes. Mr. DeMarco also advised Mr. Arch during the conduct of the recount. Specifically, Mr. Arch testified Mr. DeMarco advised him that paper rolls which could not be identified to a specific voting machine should be reserved for the inquiry even though, it is noted, ballots were cast on those rolls for the write-in candidates; that he should not attempt to match paper rolls to specific machines because that was not his concern at the recount; and, that he should have conducted the recount "differently." Mr. Arch testified that Mr. DeMarco would not accept his first two reports as the 'Commissioner's representative' unless changes were made. Finally, the third draft was accepted by Mr. DeMarco who also then had custody of the entire record of the recount including all paper rolls. Between the time the public recount was concluded until the acceptance of his report, Mr. DeMarco directed Mr. Arch to appear in Trenton where both individuals recounted the ballots privately. This private recount resulted in changed totals reached at the public recount although Mr. Arch cannot now recall the specific changes made. Mr. Arch also testified that the paper rolls, the security and validity of which are so much in issue here, were unwrapped and wrapped by Mr. DeMarco on at least one occasion prior to the private recount and then again when both men conducted their count. The Commissioner issued his decision on the recount June 1, 1989 in reliance upon the 'report of his representative.'

In the meantime, however, this judge conducted the inquiry on May 15 and 16, 1989 at the Greenbrook Township Municipal Building. Petitioner attempted to offer proofs regarding the paper rolls used in each of the voting machines to cast write-in

ballots, but the papers rolls were then in the control and custody of the Department of Education. Petitioners' request of the Department of Education to secure those paper rolls in order to offer proofs thereon was refused. Consequently, petitioner was prohibited at the inquiry, absent the paper rolls, to offer testimony thereon. This judge entered a ruling on the record by which facts to be found by the Commissioner regarding the paper rolls were res judicata for purposes of the inquiry because the Commissioner was to determine facts relevant to the paper rolls based on evidence produced at the recount and not otherwise made available during the inquiry. The facts, as found by the Commissioner with respect to the papers rolls, are as stated in his final decision on the recount and they are reproduced here in full:

1. Not all the write-in paper rolls used on the voting machines were placed in sealed packets at the conclusion of the election. Also, polling place number three (Adamsville School) did not have the paper write-in roll(s) in the sealed packet.
2. There were seven unidentified portions of write-in paper rolls that could not be identified by polling place or by machine number. Write-in paper rolls for polling districts number one (Crim School), number four (Bradley Gardens School), and number five (Van Holten School), were in individually sealed packets and could be identified by the voting machine numbers used at those respective polling places.
3. The paper write-in roll on voting machine number 79558 at polling district number one (Crim School) was torn in several pieces. However, it was mended by the Commissioner's representative without objection of those present at the time of the recheck of the voting machines.
4. At polling district number one (Crim School) the total number on the public counters registered two more than the number of voters who signed the poll list. An unsigned note was

found on the write-in paper roll of voting machine number 79730 stating "one extra vote because Steve repaired the machine." This statement was affirmed by Mr. Steven Scannell, the voting machine mechanic. See Addendum number two. Polling district number one recheck tally resulted in a one count discrepancy.

5. The total number on the public counters of voting machine used in polling district number three (Adamsville School) exceeded the number of voters on the poll lists by one.
6. A difference of an additional three counts was noted on the public counters of the voting machine used in polling district number four (Bradley Gardens School) when compared to the number of voters who signed the poll lists. This discrepancy was reduced to a count of one by the explanation given by the voting machine mechanic who stated that it was necessary to recycle the voting machine which added two to the public counter during the course of the election.

After considering the facts found, the Commissioner held as follows:

It is observed that the failure of the school election officials to properly identify several of the write-in sheets by the appropriate voting machine number and polling place at the conclusion of the annual school election contributed to the confusion and controversy giving rise to the request for a recheck of the voting machines. It is also evident from the report of the Commissioner's representative that there was a large write-in vote at the annual school election and that the school election officials at the Adamsville School Polling Place, district number 3, totally ignored their official responsibility to identify the write-in rolls by machine number or to place all of the contents of the election

results in a sealed package properly identified for the Board Secretary. Moreover each of the torn write-in sheets should have either been mended at the conclusion of the election or the machine number should have been written on these write-in sheets for proper identification.

The Commissioner cannot condone this failure by those responsible school election officials to follow the required election procedures mandated by law. The Board Secretary is hereby directed to provide the necessary instruction to the school election workers employed at all future school elections on order to avoid such unacceptable practices which give rise to school election inquires * * *

(Commissioner's decision on recount, at p.7)

The Commissioner declared the successful candidate to be Albert N. Tornatore with 1040 ballots, and write-in candidates H.A. Arthur Weigand and Raymond Kovonuk with 953 and 991 ballots respectively.

On June 19, 1989, after the inquiry proceedings were closed but before the initial decision issued in the matter, petitioners submitted a letter application not to this judge but to the Commissioner requesting that the hearing on the inquiry be reopened in light of his decision on the recount. The Board opposed that application by letter dated June 21, 1989. The initial decision in the inquiry was held in abeyance until such time that the Commissioner ruled on petitioner's application to reopen. Nevertheless, no communication was received by this judge from the Department of Education regarding petitioners' application and the initial decision issued September 20, 1989. While findings were reached in the initial decision that petitioners' evidence showed some irregularities occurred during the conduct of the election, the conclusion was reached that the irregularities were insufficient to set aside the election.

The Commissioner affirmed the initial decision and took note of the fact petitioners' sought to have the hearing on the inquiry reopened so that they may present testimony and evidence on the paper rolls which they were prohibited from doing at the inquiry. In fact, the Commissioner addressed petitioners' application on reopening in his decision and concluded that the matter of the paper rolls was already factually determined by him based on the report received from Frank Arch, his representative.

The State Board of Education, having consolidated petitioners' appeal of the Commissioner's decisions on the recount and inquiry, saw the matter differently. On July 6, 1990 the State Board held, in relevant part, as follows:

Thus, we conclude that the Petitioners' claims regarding the security and validity of the write-in sheets were neither fairly litigated nor finally determined by the Commissioner in the recount, and that Petitioners should not have been precluded from litigating such issues in the inquiry proceeding. [In a footnote, the State Board observed that petitioners did request a recount and an inquiry in their April 10, 1989 letter to the Commissioner] * * *

Accordingly, inasmuch as we find that Petitioners did not have the opportunity to fully and fairly litigate their allegations concerning the validity and security of the write-in sheets, including those sheets which could not be identified, and inasmuch as the record before us does not provide us with the basis for a fair determination thereon, we remand these consolidated matters to the Commissioner for transmittal to the Office of Administrative Law for the limited purpose of further developing the record on Petitioners' allegations concerning the validity and security of the write-in sheets and for further findings and conclusions thereon. [footnote omitted] in order to avoid further delays [footnote omitted] we direct that the proceedings on remand be conducted in an expedited fashion.

We retain jurisdiction.

The State Board of Education returned the record of the case to the Department of Education which, in turn, transmitted the file to the Office of Administrative Law on July 23, 1990 for a hearing on the remand. The hearing was conducted October 9, 10, 11, 1990 and, in addition a recount of the ballots for write-in candidate as presently shown on the paper rolls, was conducted by this judge October 25, 1990 at the Office of Administrative Law, Mercerville, with the full participation of all legally interested parties. Thereafter, the parties filed written memorandum and the record closed January 7, 1991 upon receipt of the Board's answering brief.

The security and validity of the paper rolls used in this election must be determined in the context of the large number of write-in ballots cast, the district-wide distribution of preprinted pasters by write-in candidates for potential use by voters, the use of the preprinted pasters by voters which because of the measurements of the pasters caused three voting machines to jam, and the absence of thorough knowledge by election workers regarding their responsibilities at the close of the election.

In the initial decision issued by this judge, the following findings were reached which are left undisturbed by the State Board's remand regarding the write-in campaign and use of preprinted pasters.

It is noted that the use of pasters for a voter's personal choice candidate is authorized at N.J.S.A. 18A:14-42 and N.J.S.A. 19:15-28. The pasters in this election which were distributed by write-in candidates and their supporters prior to and on the day of election in large measure contributed to this inquiry being requested. According to the evidence in this record, the three write-in candidates ran as a slate and the stickers they ordered were made too wide to fit into the voting machines' write-in slots to properly affix to the paper rolls. Albert Bareis, the campaign treasurer for write-in candidates Wiegand, Kovonuk, and Tikak testified that 30,000 stickers had been prepared in anticipation of the election. Ten thousand stickers were mailed out to potential voters prior to the election. The stickers were all prepared according to specifications given by the Somerset County Board of Elections. However, during election day it was discovered that all 30,000 stickers were made larger than the slot into which they were to be placed on the paper roll in the machines. John Wimble testified that each of the stickers were then shaved in order to conform with the passage way through the machines' write-in candidate slot. During election day, Wimble testified that he did exchange the shaved stickers for the larger stickers then in the position of potential voters. This exchange occurred more than one 100 feet

from the entrance to the respective polling places.
(Initial Decision, at P.8)

Petitioner raises 16 factual issues in her filed brief. The major issues raised, consistent with the Order of Remand, are that (1) the paper rolls were not identified to the voting machine in which they were placed prior to the election by the Somerset County Board of Elections; (2) while ten voting machines were used, three of which had to be cleared of paper roll jams during the election, and should have resulted in 13 paper rolls, 14 papers rolls exist in evidence; (3) that those portions of the paper rolls removed by the Somerset County Board of Elections voting machine mechanic to clear the jams during the election were left in an unlocked office for the duration of the election; (4) that election workers added preprinted pasters to the paper rolls while removing them from the machines at the close of the election; and, (5) the paper rolls were not placed in sealed packages by election workers for submission to the Board Secretary who, in turn, allowed the paper rolls to be left in an unopened container until the following day. The major mixed factual and legal issue raised by petitioners is that no one of the paper rolls containing write-in ballots should be considered valid for purposes of the election because of the absence of security with which the paper rolls were treated by election officials and by the Board Secretary and, further, the paper rolls identified in this proceeding as C29E, C29F, C29G, C29H, CI, and C29J are not valid because there is no way to identify which of the ten voting machines, if any, from which these paper rolls were removed.

FACTS

I reviewed the testimony of the various witnesses called by the parties at hearing and I reviewed the documentary evidence made part of the record and as specified on the documents in evidence list attached. I find the following facts exist based on a preponderance of the totality of that evidence.

There are indeed 14 paper rolls in this record and they are identified as C27A, C27B, C28A, C28B, C29B, C29E, C29F, C29G, C29H, C29I, C29J, C30A, C30B, and C31A. It is also true that at the time Somerset County Board of Elections prepared the voting

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machines for use in this election the paper rolls which were inserted into each machine were not numbered according to the machine number into which they were placed. However, Steven Scannell, the voting machine mechanic for the County, has assured that henceforth whenever voting machines are prepared for use paper rolls are identified by the number of the machine into which they are placed.

Nevertheless, at the conclusion of the election the election workers in this instance did identify seven of the preceding 14 paper rolls by writing the machine number somewhere on the paper rolls they removed from the machine at the conclusion of the election. These identified paper rolls are:

<u>Paper Roll</u>	<u>From Machine Number</u>	<u>Polling Place</u>
C27A	79561	Van Holten School
C27B	79561	Van Holten School
C28A	79730	Crim School
C28B	79558	Crim School
C30A	79779	Van Holten School
C30B	79785	Van Holten School
C31	79720	Bradley Garden School

The remaining paper rolls (C29D through C29J) had not at all been identified, nor identifiable, prior to the hearing on remand. Nevertheless, the conclusion had earlier been reached by the Commissioner and the Commissioner's representative, Mr. Arch, that these paper rolls had to be legitimate paper rolls used in this election in the constituent district of Bridgewater because the preprinted pasters contained names of the candidates in this election.

At the remand hearing it was established that the paper rolls inserted in each voting machine for the casting of irregular ballots is a long, continuous sheet not quite as wide as the width of the voting machine. The write-in paper is stored in a compartment in the back of the machine. The paper, as noted by the Board in its filed brief, is held on two horizontal spools and moves only if a write-in vote is cast. The type of paper rolls used in this election was numbered sequentially, approximately every 12 inches, and the markings are some times referred to as 'foot markers.' The paper is divided into numerous columns which correspond to the leavers and write-in slots on the machine. The paper is sculptured by the voting machine mechanic when he prepares the machine for use to

resemble a tail or neck to thread the paper into the spool. If the voter casts a ballot for a regular candidate, the voter would have depressed a lever assigned to that candidate, and a vote for that candidate would be mechanically registered on the machine. If a voter cast a write-in vote, the voter would do so by lifting one of the first four write-in slides or doors and either would have written the name of the person for whom the vote was to be cast on that portion of the paper roll appearing in the slide or would have affixed one of the preprinted, prepasted stickers onto the paper roll. Election machine mechanic Scannell arranged the pins and compensators of each of the ten voting machines used in this election so that write-in ballots cast would appear on rows one, two, three, or four of the paper rolls. If somehow a voter managed to cast a write-in ballot which ballot would subsequently appear in row five or six or higher numbered row, than the inference could be drawn that that voter could have had the opportunity to cast a ballot for more than the maximum three candidates allowable in this election. While Scannell was certain that he properly programmed each machine, he could not guarantee that it would be impossible for a voter to cast a write-in ballot which would appear on rows other than one through four on the paper rolls.

During the remand hearing Mr. Scannell testified that at the recount conducted by Frank Arch he, Scannell, opened the voting machines and cut off a small section of paper roll from each machine used. Each such cut section of paper roll was marked with the identifying number from the particular machine. These paper roll cuts are in evidence here as C18A(1) through (10). Mr. Scannell then compared the 'foot marker' from those paper cuts, identifiable to the specific voting machine, with the foot markers on the paper rolls which had not at all been identified. With one exception, C29D, Mr. Scannell identified paper rolls C29E through C29J to a specific machine by sequentially matching foot markers on paper rolls to the 'cuts.' That identification is as follows:

<u>PAPER ROLL</u>	<u>IDENTIFIED TO MACHINE NUMBER</u>	<u>POLLING PLACE</u>
C29E	79724	Adamsville School
C29F	79726	Adamsville School
C29G	101928	Crim School
C29H	79558	Crim School
C29I	79730	Crim School
C29J	79780	Adamsville School

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While petitioners complain that the paper cuts relied upon by Mr. Scannell could have somehow been manipulated by unnamed conspirators to rig the election, the evidence is to the contrary. The paper rolls may be purchased only through one of several suppliers. The paper rolls are shipped in huge paper rolls which are then cut into smaller rolls to fit into voting machines. It is very unlikely, in the absence of any persuasive evidence, that the matching of foot markers by Mr. Scannell between the paper cuts that he personally took from the machines with the identified paper rolls results in anything other than a proper identification of the heretofore unidentifiable paper rolls with the specific voting machine in which they were placed during this election.

Paper roll C29D, however, is an aberration. There is no evidence to explain how this portion of a paper roll, more likely than not used in the constituent district of Raritan, appeared in the record of this case. Nevertheless, when one considers the journey made by this record and the number of times this record has been opened, reviewed, and repackaged at the level of the County Superintendent of Schools for the initial recount, by Mr. DeMarco from the Department of Education, by the Commissioner of Education, by the State Board of Education, and the receipt of the record by the Clerk's Office of Administrative Law, an answer as to how C29D appeared here is not to be found. Consequently, all ballots cast on C29D are void as being invalid.

In regard to petitioners' complaint that three paper rolls removed from three separate voting machines during the conduct of the election in order to clear jams were left in an unlocked office thereby breaching their security, the evidence shows that petitioners' portrayal is not quite accurate. What occurred is this. Mr. Scannell, the voting machine mechanic, did find it necessary to clear paper roll jams in three separate machines during the course of the election. Two of the machines which jammed were at the Crim polling place, while the other machine was at the Van Holten polling place. One of the paper rolls which had to be taken from one of the two machines at the Crim polling place came out in pieces which he pieced together like a "jig saw puzzle." Scannell placed each paper roll in separate envelopes. He, along with the judge of elections, took these two paper rolls to the school principal's office complex and left the envelopes in a conference room in that complex. Scannell explained that he then shut the door to that conference room, exited the door to the complex, and returned to the election area. Scannell explained that at the Van Holten polling place he removed a write-in sheet from

one machine to clear a paper jam, put that excised paper roll into an envelope, sealed the envelope and placed the envelope in the custody of an election official by placing the envelope in a box under the table reserved for the election workers. In regard to the envelopes containing the paper rolls at the Crim School, it is noted that the conference room door does not lock although the door to the principal's complex does, in fact, lock. Furthermore, the evidence is clear that the principal was in attendance in the complex until approximately 6:30 p.m. after which the door to that complex was locked either by the principal or by a janitor. Based on this evidence, I cannot find as petitioners urge that the security of these paper rolls which were properly removed by voting machine mechanic Scannell to clear a machine jam was breached in any sense by Scannell's handling of the envelopes into which he placed the removed paper rolls. There is no evidence that anyone had access to the conference room in the principal's complex once the principal left for the day. There is no evidence that anyone had access to the envelope containing the paper roll from Van Holten School which was placed in an envelope underneath the election workers' table during the conduct of the election.

In regard to election workers "adding" preprinted pasters to paper rolls at the close of the election but prior to the counting of ballots, the evidence shows the following. When election workers removed the paper rolls at the close of the election to begin the ballot count some of the preprinted, prepasted pasters cast as ballots had loosened from the paper rolls either because the pasters were initially affixed by the voters in a loose manner or because the pasters were loosened as the result of the removal of the paper rolls from the machines by the election workers. Patricia Gusciora, an election worker at the Bradley Gardens polling place, acknowledges that when she removed the paper roll from the machine she observed two pasters fall from the roll onto a shelf located in the rear of the machine. Ms. Gusciora also acknowledges that with the aid of tweezers she retrieved those two pasters and affixed them to the paper roll (C31A) in a random manner. Bradley Garden election Judge Walter Kokosinski believes that some pasters had fallen from the paper rolls into the voting machine while the paper rolls were being removed. He further believes that those pasters were retrieved with tweezers and placed back on the paper roll and then counted. Kokosinski bases his beliefs not necessarily on personal observation but on what the election workers told him, and that he took their word for what was to have occurred, or because it is his further belief that all

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pasters had to be counted. Nevertheless, Mr. Kokosinski, a man who appears to be 60 plus years of age, cannot recall with confident specificity the details of what occurred April 4, 1989 regarding pasters falling from the paper roll as it was being removed from the machine or as the ballots cast on the paper roll, more than 60 feet in length, were being counted by the election workers that evening. Kokosinski could not testify with confidence whether any paster fell off while the paper roll was spread on the floor as the ballots were being counted. He believes some pasters were loose based on what others told him, and he believes other pasters were simply placed back on the paper roll when it was rolled up for delivery to the Board Secretary.

It must be noted that the great majority of write-in ballots cast in this election appear on the various paper rolls in an organized manner on rows one, two, three, and four. The two ballots affixed to the paper roll by Ms. Gusciora in a "random manner" would not fit the pattern of ballots otherwise cast by other voters. The 'looseness' of some of the pasters used in this election is established by the fact Frank Arch found it necessary to use cellophane tape over some of the ballots during his recount because they were very loose and this judge also used cellophane tape over some ballots during the recount, with the consent of the parties, because of the possibility of their becoming unattached from the paper rolls.

The more troubling aspect of this entire matter is the failure of the Board Secretary to properly instruct all election workers regarding their full and complete obligations after the election with respect to the submission of election material to his office. In this regard, it is noted that N.J.S.A. 18A:14-61 " * * * demand[s] that all election paraphernalia be sealed in an envelope for safe keeping" at the close of the election by election workers for submission to the Board Secretary. In re School Election held in Galloway Township, 1978 S.L.D. 319, 321. N.J.S.A. 19:52-6 requires that "irregular ballots shall be returned by the district election officers" in a properly secured package marked "irregular ballots." In this instance, there is no evidence that the election workers in any one of the polling districts submitted election paraphernalia, including the paper rolls, to the Board Secretary in sealed envelopes. What the evidence does show, as pointed out by petitioners, is that Beverly Eaton, the election judge at the Crim Polling place, submitted her five paper rolls (C28A, C28B, C29G, C29H, and C29I) to the Board

Secretary in an unsealed red rope folder; Julia Tosco, the Adamsville polling place election judge, submitted her paper rolls (C29E, C29F, and C29J) not in an envelope, nor folder, nor any kind of package; Mary Santora, identified in the earlier initial decision as the election judge at the Van Holten polling place, cannot recall specifically how she submitted her paper rolls (C27A, C27B, C30A, and C30B); Patricia Gusciora, earlier identified here as an election worker at Bradley Gardens, submitted her paper roll (C31A) in an envelope sealed with cellophane tape but she cannot now recall whether the envelope was a manilla envelope or a red rope folder; and, Bradley Gardens election judge Kokosinski simply does not recall how the paper roll was submitted.

Each of the foregoing identified election officials submitted the election paraphernalia to the Board Secretary by going to his office and handing the material to Jean Long, the executive secretary to the assistant board secretary. When the various election officials submitted the election paraphernalia to her, she did not recognize, nor was she advised by the officials, that the papers rolls from the machines were part of the materials being handed her. In fact, Ms. Long thought that the paper being handed her, which were in fact the paper rolls, was extra paper from the various machines so she simply placed the paper rolls in a box which was on the floor behind her. Ms. Long first realized what was in her possession in the box on the floor the following day when she had taken all the material to her work area and began going through them for submission to the County Superintendent of Schools. She then advised assistant board secretary James Cardeneo of what she discovered. Some of the paper rolls had been identified as to machine as noted above and others were not identified to a particular machine. Mr. Cardeneo then directed that those paper rolls not identified to a machine be placed in an envelope marked "Unidentified as to Machine" for submission to the County. It is to be quickly noted that the 'box on the floor' which contained the paper rolls from the various voting machines remained in Ms. Long's office overnight which office was locked the evening of April 4, 1989 after Ms. Long left.

To the extent that petitioners allege the Board itself 'expected and planned that sealed envelopes would remain unsealed' in a manner implying a conspiracy of Board members to determine the outcome of the election, there is not a scintilla of evidence in this record to support such an allegation. The evidence does support petitioners' assertion

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that the Board secretary failed in his duty, as noted above, to insure that election officials comply fully with their obligations following the election in regard to placing election paraphernalia in sealed envelopes for submission to him, who, in turn, is obligated to submit such election paraphernalia to the Somerset County Superintendent of Schools for safekeeping. Board secretaries are obligated by law to perform any such duties necessary for the proper conduct of school elections. N.J.S.A. 18A:14-63 Individual Board secretaries may not escape that statutory obligation by delegation of that responsibility to an assistant.

In summary, the evidence in this record shows that the paper rolls from each of the ten voting machines used in this election were not identified to the voting machine in which they placed prior to the election by the Somerset County Board of Elections; because of voting machine failures there should be 13 paper rolls, while 14 paper rolls exist in evidence here, the 14th being one more likely than not from the Raritan constituent district; portions of the paper rolls removed by Mr. Scannell were placed in a unlocked office which was located in the principal's complex which itself was locked at or about 6:30 p.m. on election night; and the evidence is clear that the paper rolls were not placed in sealed packages by election workers for submission to the Board Secretary and that the Board Secretary allowed the paper rolls to be left in an unopened container, though in a locked office, until the following day.

Next to be presented is the result of the recount conducted by this judge during October 1990 in the presence of the parties.

THE OCTOBER 1990 RECOUNT RESULTS

OBJECTIONS RAISED AT OCTOBER 1990 RECOUNT TO WRITE-IN VOTES CAST ON PAPER ROLLS

In some instances multiple objections were raised by petitioners regarding individual write-in votes. As an example, a voter may have placed three pasters in the large Presidential box, together with other pasters one of which may have ripped while being placed in the

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regular write-in slots. Thus petitioners would object to three write-in ballots being placed in the large Presidential box and object to more than candidates being voted for. The following five classifications of objections raised by petitioner attempts to identify all ballots over which objections were raised. The classifications may contain identical ballots because of multiple objections. If any one objection is deemed valid to void the ballots, that voted ballot is not counted in the final tally for the candidate regardless that another objection to that same ballot may be overruled here.

1. More than one ballot in Presidential Box; more than three ballots cast; and, ballots cast on machine paper roll rows other than row one, row two, row three, or row four

C-27A(4)(5)
C-27B(3)(5)(7)(11)(16)
C-28A(2)
C-28B(1)(2)(4)
C-29(1)(2)
C-29E(3)(4)(12)(18)(19)
C-29F(2)(6)
C-29G(7)
C-29H(3)(4)
C-29I(2)(3)(4)(7)
C-29J(4)(6)
C-30A(2)(3)(4)(7)(12)(13)(15)(16)(17)(18)
C-30B(1)(2)(7)(7A)(8)(8A)(10)(10A)(12)(13)(15)
C-31A(7)(8)(14)(16)(17)

All objections in this classification are upheld as invalid votes except the objections to C27B(7), C29E(18), and C31A(7) and (17). While C27B(7) shows only a part of a candidate's

preprinted paster in row five, the majority of the name is in row four and that portion in row five can easily be attributed to the difficulty of the voter inserting the paster in the slot. C29E(18) is valid because while only part of the candidate's surname appears, the intent of the voter is clear. There are two pasters seemingly close together for one candidate. I do not find any attempt by the voter to distinguish this vote nor is it reasonable to invalidate this voter's ballot simply because two pasters for the one candidate appear. C31A(7) and (17) are valid because while a paster for a candidate appears to cross over into row four, it is clear that the paster is substantially in row four, and (17) is valid even though a paster for one candidate is far removed from other ballots cast. It must be remembered that paper roll C31A is from Bradley Gardens where there is testimony that an election worker affixed pasters which fell inside the machine to the paper roll prior to the recount. More likely than not, this ballot for that candidate is one of those pasters.

2. Part of first name only; last name only; misspelled surnames

C-27A(1)
C-27B(1)(8)(12)(13)(14)(15)
C-28A(1)
C-28B(5)(6)
C-29D void
C-29E(3)(5)(6)(7)(8)(9)(11)(14)(15)(16)(17)(18)(20)(21)(22)
C-29F(7)(8)(9)(11)(12)(13)(14)
C-29G(1)(2)(3)(6)
C-29H(1)(2)(6)(7)
C-29I(1)(5)(8) [Illegible]
C-29J(1)(3)
C-30A(1)(5)(8)(9)(10)(15)

C-30B(4)(5)(9)(11)(14)(17)(18)

C-31A(2)(11)(13)(21)

In this category all ballots to which objection has been registered shall be counted except ballots identified as C29E(3) and C30A(15). C29E has already been invalidated in classification one. C30A(15) is invalid because a paster for one candidate appears in rows five and six. Clearly, this voter could have cast ballots for more than three candidates.

3. Paster ripped, mutilated, stuck one on top of other, or taped over

C-27A(2)(3)

C-27B(2)(4)(6)(10)

C-28A(3)

C-28B -

C-29D -

C-29E(18)

C-29F(10)

C-29G -

C-29H -

C-29I(6)

C-29J(5)

C-30A(6)(11)(13)(14)(19)(20)

C-30B(16)

C-31A(4)(21)

All ballots in this classification to which objections have been registered shall be counted with certain exceptions because the intent of the voter is clear, ballots with cellophane tape are as the result of either election workers or Frank Arch or this judge attempting to insure the ballot did not separate from the paper roll. Ballots identified as C27B(4) and (6), C30A(11) and (13), and C30B(16). C27B(4) is invalid because the voter placed a paster for one candidate over a paster for a separate candidate. It is not clear whether this voter

intended to change his mind and did so by such conduct. C27B(6) is invalidated for the same reason, though with pasters for different candidates, as (4). C30A(11) is invalid for the same reasons of invalid of ballots in C27B. C30A(13) is invalid because a paster appears in rows five and six which suggests that this voter may have cast ballots for more than three candidates. Finally, C30B(16) is invalid because it is impossible to determine whether this voter, who placed pasters on top of each other, attempted unsuccessfully to change his/her mind.

4. Paper on back of or, in some manner, attached to voted paster which petitioner claims is not from paper roll and which, petitioner says, shows that the specific pasters were placed by a person other than voter

C-27A-
C-27B-
C-28A-
C-28B(3)
C-29D-
C-29E(1)(2)(10)
C-29F(1)(3)(4)(5)
C-29G-
C-29H-
C-29I(2)(4)
C-29J(2)
C-30A-
C-30B(3)
C-31A(12)(15)(18)(19)(20)

All ballots in this classifications to which objections were registered shall be counted as valid, except C29I(2) and (4), because the evidence does not support the conclusion urged by petitioners. C29I(2) is invalid because a paster for one

candidate is in row five which suggests that the voter may have cast ballots for more than three candidates. C29I(4) is invalid because a paster is in row five which suggests the voter may have cast ballots for more than three candidates.

5. Miscellaneous

- C-27B(9) Vote cast for regular candidate Crabtree
- C-27A(3A) Objection not articulated.
- C-31A (1) Paster for Tilak not placed horizontally on line
 - (3) Pastors for Tilak and Kovonuk have light pencil lines drawn through their names.
 - (4)(5)(6) Pastors which appear to have been forced together - 2 pasters for Tilak, 2 for Kovonuk, and 1 for Weigand.
 - (10) Paster for Kovonuk at an angle generally inconsistent with other pasters.
- C-29E (13) Paster for Kovonuk placed in a position left of center.
- C-29H (5) Irregular ballot cast for regular candidate Bloch.
- C-29J (7) Paster for Kovonuk placed closer to preceding voter's pasters than ballots cast by other voters.
 - (8) Irregular ballot cast for regular candidate Bloch
 - (10) Pencil line placed through Kovonuk and this objection is in addition to misspelling of name as 'Lovonuk.'

The ballot identified as C27B(9) shall not be counted for regular candidate Crabtree. The ballot identified as C27A(3A) shall be counted for candidates Tilak and Kovonuk because of the absence of a reason for the objection. All remaining ballots shall be counted except C29H(5) for candidate Bloch and C29J(8) for candidate Bloch. All other objections are insufficient to invalidate the clear intention of the voter.

Having considered the foregoing objections to each ballot, and having entered such ruling as set forth above, the tally of the recount conducted during October 1990 is as follows:

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	Not Contested	Contested	Number of Contested Ruled Valid here	Absentee	Total Valid Votes
H.A. Arthur Wiegand	891	94	40	7	938
Raymond Kovonuk	842	119	64	7	913
Sharad Tilak	812	114	61	5	878

It is recognized that the State Board did not directly order on remand a recount of ballots cast. However, so that the record is complete for State Board consideration a recount was completed by this judge and the tally of the recount, together with reasons for accepting or rejecting contested ballots, are offered or whatever consideration is deemed appropriate.

CONCLUSIONS

It is repeatedly recognized by the Commissioner of Education that there are " * * * many difficulties inherent in any election where persons run as write-in candidates for office * * * ." In re election held in Township of Hillsborough, 1971 S.L.D. 102, 104 and cases cited therein. In a massive write-in election campaign such as occurred here, the potential for 'many difficulties' is significantly increased. As the potential difficulty increases, so too should the level of instruction for election workers increase by the Board Secretary to minimize the impact of the potential difficulties on the election result.

This initial decision is not designed to place blame upon any person or governmental body for the irregularities which obviously occurred during and after this election. However, by pointing out established deficiencies it is hoped that such chaos would not soon reoccur in this district or any other school election in this State in which write-in campaigns are conducted.

In that spirit it is recommended that the Department of Education and the Office of Administrative Law agree upon the treatment of combined requests filed with the Department of Education for recounts and inquiries following school election as occurred here when the recount request is inextricably intertwined with the inquiry request. Had the recount request and the inquiry request been initially joined and treated

as a contested case so that an administrative law judge would have heard and recommended a decision in both instances, this remand more likely than not would not have occurred. It is also recommended that the Commissioner of Education consider having his representatives provide in-service training programs for board secretaries throughout the State on their obligations, under school law, for the proper conduct for school elections particularly in regard to write-in contests.

While there is evidence of gross violations of election law having occurred in this election regarding, particularly, paper rolls not being placed in sealed packages and paper rolls not being identified to particular machines at the close of the count of the ballots on election night, and other irregularities such as a paper roll from the constituent district of Raritan being somehow included in this record, there is no evidence of fraud despite the speculative protestations of petitioners. Even when the findings which were reached in the original initial decision in this case are considered, it cannot be said on this record that this election was conducted in a fraudulent manner nor is there evidence of any fraudulent conduct by an individual or individuals to thwart the will of the electorate. True, that there is evidence that this election was not conducted in a manner fully consistent with school election law, N.J.S.A. 18A:14-1, et seq., nor with Election Law and the use of voting machines, N.J.S.A. 19:1-1, et seq. However, such inconsistencies as have been established by the evidence in this record with the respective bodies of law does not translate into a conclusion that the will of the electorate in the constituent district of Bridgewater has been thwarted.

Moreover, the recount conducted by this judge during October 1990 results in candidates Weingand and Kovonuk securing more votes than did petitioners/candidates Bloch and Crabtree. Even discounting two votes cast for candidates and Kovonuk by voters who filed untruthful affidavits as found in the earlier initial decision are discounted from the October 1990 recount results, candidates Wiegand and Kovonuk are still the successful candidates.

In sum, I **CONCLUDE** that the evidence adduced by petitioners at the remand hearing is insufficient to conclude the 'security and validity' of the paper rolls used in this machine reflect anything other than valid ballots cast by voters from the constituent district of Bridgewater. I **FURTHER CONCLUDE** that the security and validity of the paper rolls as set forth above is such that the ballots cast thereon should be counted as a valid expression of the will of the electroate.

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Therefore, consistent with the earlier initial decision which issued in this matter, the matter of the inquiry into the security and validity of the paper rolls resulting from the 1989 annual election conducted April 4, 1989 from the constituent district of Bridgewater Township of the Bridgewater-Raritan school district is hereby **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 6, 1991
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

March 1, 1991
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

MAR 4 1991
DATE

Mailed To Parties:
Jayne Laska
OFFICE OF ADMINISTRATIVE LAW

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could the rights of the public to a free and fair election be asserted. The unconscionable delay caused both by Commissioner Cooperman and by the Bridgewater-Raritan Board in denying us the right to present essential evidence has now rendered this case all but moot.

Yet there remains the need to protect the rights of the public and of candidates in all future elections. We hope that you as Commissioner will take strong steps to see that the convoluted and unfair procedures that characterized our case and the kinds of election law violations that occurred cannot again taint a school board election in New Jersey. (Exceptions, at p. 6)

By way of reply to petitioners' comments, the Board notes that petitioners agree with many of the findings, conclusions and recommendations of the ALJ and disagree with others. The Board submits that because petitioners are not disputing the ultimate conclusions of the ALJ as set forth at the bottom of page 23 of his initial decision, no useful purpose can be served by the Commissioner's addressing the omissions raised by petitioners. Thus, the Board urges the Commissioner to adopt as his own the findings and determination in the initial decision.

In reviewing the comments submitted by petitioners in this matter, the Commissioner observes that notwithstanding that petitioners indicate their acceptance of the initial decision, they continue to assert claims of potential fraud, tampering, "malconduct" and inaccuracy in the recount on remand conducted by ALJ McKeown. Inasmuch as petitioners acknowledge their acceptance of the initial decision, the Commissioner sees no need to address in detail those comments posed by petitioners in such regard other than to admonish the Board's election officials that they must correct those errors of omission and commission acknowledged in this matter

in the upcoming April 30, 1991 school elections. Accordingly, the Commissioner adopts as his own the findings and conclusions of the Office of Administrative Law specifically pertaining to the October 1990 recount results as found on pages 16-24 of the initial decision on remand dated March 1, 1991, as well as those findings and conclusions summarized on pages 9-16 of said initial decision on remand and the conclusions of law derived therefrom pertaining to the election inquiry issues raised in the instant appeal.

However, in so concluding, the Commissioner does not accept those recommendations of the ALJ that recount matters proceed by transmittal to the Office of Administrative Law for disposition in a manner similar to election inquiries. The Commissioner notes that recounts are not considered contested cases as established by N.J.S.A. 18A:14-63.2 and 63.3 and, moreover, as a practical matter, must be completed within a legally prescribed time as set forth at N.J.S.A. 18A:14-63.5. Further, recounts are not always coupled with election inquiries and are widely scattered throughout the State of New Jersey. The Commissioner surmises that it would be an absolute impossibility for the Office of Administrative Law to conduct the recounts in all such areas in which they are required within the requisite 30-day time frame established in law.

As noted by the ALJ in his recitation of the procedural history in this matter, petitioners request for recount and inquiry was filed on April 10, 1989. The recount of ballots was conducted on April 24, 26 and 27, 1989. The three-day span of time necessary to complete this task bespeaks the complexity of the issues extant in the matter. The Commissioner issued his decision on the recount

June 1, 1989 in reliance upon the report of his representative. It is also clear from the ALJ's recitation of the facts in this matter that he proceeded with some haste to conduct the inquiry on May 15 and 16, 1989 without benefit of the paper rolls and other evidence still under consideration by the Commissioner on the recount. Herein lies the explanation for the confusion which followed. The ALJ should have awaited the issuance of the Commissioner's decision on the recount so as to have at his disposal during the inquiry all necessary documentary evidence, as well as the Commissioner's considered decision on the recount aspects of the matter.

Thus, if a request for a recount is received concerning a district when an election inquiry has also been filed, the ALJ assigned to consider the inquiry should await the results of the recount before proceeding on the merits of the inquiry. It is the practice of the Commissioner to transmit the decision on recount, as well as any documentary evidence necessary for disposition of such an inquiry. By following this procedure, the situation that arose in this matter would have been avoided.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal for the reasons expressed in the initial decision and adopts it as the final decision in this matter, although he does not accept the ALJ's suggestions regarding the processing of recounts.

APRIL 11, 1991

DATE OF MAILING - APRIL 11, 1991


COMMISSIONER OF EDUCATION

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State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. PRC 1751-89 AND
EDU 6671-88
AGENCY DKT. NOS. CO-H-89-36
AND 257-8/88
(CONSOLIDATED)

CARL INGLESE, ROSE A. LANING,
AND THE EWING TOWNSHIP
BUS DRIVERS' ASSOCIATION,

Petitioners,

v.

BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING,
MERCER COUNTY,

Respondent.

Arnold M. Mellk, Esq., for petitioners, Ewing Township Bus Drivers' Ass'n,
and Carl Inglese and Rose A. Laning, (Wills, O'Neill & Mellk, attorneys)

David W. Carroll, Esq., for respondents, Ewing Township Board of
Education, (Carroll & Weiss, attorneys)

Record Closed: June 9, 1989

Decided: January 17, 1991

BEFORE RICHARD J. MURPHY, ALJ:

OAL DKT. NOS. PRC 1751-89 & EDU 6671-88

STATEMENT OF THE CASE,
PROCEDURAL HISTORY AND ISSUES

In this consolidated matter, in which the Public Employment Relations Commission (PERC) has been held to have predominant interest, the two remaining individual petitioners are bus drivers formerly employed by the Township of Ewing, who were all terminated by the Township Board of Education on June 30, 1988. They allege, in PRC 1751-89, that their termination was an unlawful unilateral change in terms and conditions of the Collective Bargaining Agreement between the Board of Association in violation of *N.J.S.A. 34:13A-5.4(a)1*, as well as illegal retaliation for union activities or workers' compensation claims. They also claim to have acquired tenure under a Collective Bargaining Agreement. In the (OAL) docket no. EDU 6671-88 petitioners' allege that the Board of Education of the Township of Ewing acted arbitrarily, capriciously, and without reasonable basis by dismissing them, and also violated the Open Public Meetings Act, *N.J.S.A. 10:12-1 et seq.*, and denied certain severance rights.

The procedural history of the matter is accurately set forth at 2 through 4 of respondent's post hearing brief, which I adopt and include:

In these two consolidated matters, the individual petitioners and their association have challenged the respondent Board's action in nonrenewing the contracts of the three individual petitioners as bus drivers for the 1988-89 school year.

In their petition of appeal to the Commission of Education, the individual petitioners alleged that the Board

- (1) acted in an arbitrary and capricious manner;
- (2) violated a purported contractual grant of tenure in the applicable collective bargaining agreement;
- (3) violated the RIF-seniority clause in the applicable collective bargaining agreement;
- (4) violated the Open Public Meetings Act;
- (5) denied petitioners certain severance benefits;
- (6) terminated petitioner Inglesse in retaliation for his prior activities as President of the Ewing Township Bus Drivers' Association;
- (7) terminated petitioner Laning in retaliation for her submitted a workers' compensation claim.

The unfair practice charge filed with PERC essentially reiterated allegations 2, 3 and 6 above, and asserted that these purported violations of the collective bargaining agreement also constituted unfair practices under *NJAC 34:13A-5.4(a)(1)*, (3), and (4).

In the Commissioner matter, the Board filed an answer in which it presented the following positions:

- (1) The collective bargaining agreement does not grant tenure protection to any members of the bargaining unit;
- (2) The cited seniority provisions of the collective bargaining agreement are only applicable to reductions in force and no reduction in force or elimination of positions occurred here.
- (3) The Board had legitimate business reasons, all related to performance and attendance, for not rehiring the individual petitioners. The terminators were reasonable, non-arbitrary, and unrelated to any retaliatory or constitutionally prohibited motivation.
- (4) No violation of the Open Public Meeting Act occurred.
- (5) Petitioners are not entitled to the severance benefits they claim.

On motion by the Board, both matters were consolidated, and PERC was determined to be the agency with the predominant interest. (December 14, 1988 Order of ALJ Murphy; affirmed by Public Employment Relations Commission, February 10, 1989; affirmed by the Commission of Education February 23, 1989; modified April 4, 1989 by joint order of the Commissioner and the Public Employment Relations Commission.) The net effect of the joint order, as modified, was that a single Administrative Law Judge would conduct the evidentiary hearing and render an initial decision on all issues; that PERC would then receive and review the initial decision and render a final decision on all findings and conclusions related to the unfair practice allegations; and that the entire record would then be transmitted to the Commissioner of Education, who would render a final decision on any issue under his jurisdiction.

The matter was tried before the Honorable Richard Murphy, ALJ, on April 24 and 25, 1989. This post-hearing brief is submitted by way of summary of respondent's factual and legal arguments.

To that history, I add that the post-hearing briefs were submitted by June 9, 1989, at which time the record closed. On November 17, 1989, the parties advised that they had reached an amicable settlement of all claims by petitioner Florence Warner and a partial stipulation of dismissal was filed.¹

¹ The due date for submission of this initial decision was extended on a number of occasions for good cause unrelated to this case. The basic reason for the regrettably long delay experienced was a backlog of overdue opinions resulting from a substantial public utilities matter decided in the summer of 1989 and a host of other cases coming due at approximately the same time. I deeply regret this long delay and any hardship, prejudice, inconvenience or aggravation that it may have caused the parties. I have taken steps to ensure that such backlog problems caused by the need to devote large blocks of time to public utility matters affecting the rates of thousands of New Jersey residents will not again occur.

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The specific nature of these proceedings and issues to be resolved were set forth in a prehearing order entered on April 4, 1989 and not objected to by the parties:

The petitioners, Carl Inglese, Rose A. Laning and Florine Warner, are former bus drivers in the Township of Ewing and appeal from the action of the Township Board of Education in terminating their employment effective June 30, 1988. Petitioners' claim that the termination violated their tenure rights as permanent part-time bus drivers under a Collective Bargaining Agreement.

They also claim that the termination was arbitrary and capricious, and violated the Collective Bargaining Agreement as well as the Open Public Meetings Act. Petitioners' further claim that they have not been compensated for the accrued sick time and personal time upon their termination. Petitioner Inglese claims that his termination was in retaliation for his activities as president of the Township Bus Driver's Association and petitioner Laning maintains that she was fired because she applied for and received a Workers' Compensation award.

Petitioners' Statement of the Issues:

PERC Issues:

- A. As to all petitioners, did the Board of Education unilaterally or violate any provisions of the collective bargaining agreement in terminating petitioners Carl Inglese, Rose Laning and Florine Warner in violation of *N.J.S.A. 34:13A-5.4(a)(1)* and (5)?

NOTE: This issue presumes a finding by PERC that the collective bargaining agreement contains provisions that were violated.

- B. As to petitioner Carl Inglese, was his termination an act of discrimination for his activities in furtherance of the policies of the Public Employment Relations Act and thus in violation of *N.J.S.A. 34:13A-5.4(a)(1)*, (3) and (4)?

Commissioner (or Education) Issues:

- A. As to all petitioners, was the Board's action in terminating petitioners' employment arbitrary, capricious and reasonable or otherwise not in accordance with law?
- B. As to all petitioners, was the Board's action in terminating petitioners without prior notice in violation of the applicable provisions of the Open Public Meetings Act?

- C. As to all petitioners, has the Board properly compensated them for accrued sick time and personal time?
- D. As to petitioner Inglese, was the Board's action in terminating his employment in retaliation for his activities as president of the Ewing Township Bus Drivers' Association and accordingly in violation of Carl Inglese's rights under the First Amendment to the Constitution of the United States as incorporated in the Fourteenth Amendment to the Constitution of the United States?
- E. As to petitioner Laning, was the Board's termination of petitioner Laning in retaliation for her application for and receipt of Workers Compensation award and accordingly in violation of the First Amendment to the Constitution of the United States as incorporated in the Fourteenth Amendment to the Constitution of the United States and in further violation of the public policy of the State of New Jersey?
- F. As to all issues, what remedy, if any, is appropriate?

Respondent phrases the issues to be resolved in the following manner, which I include to fully set forth the issues from both sides point of view:

- 1. Does the applicable collective bargaining agreement grant tenure or other job security protection to bus drivers?
- 2. Were any provisions of the Agreement unilaterally changed or violated by the Board in non-renewing the contracts of the three petitioning bus drivers?
- 3. Was the Board's action in non-renewing the contracts of the three petitioners otherwise arbitrary, capricious and unreasonable; or, in the case of petitioner, Inglese, in retaliation for union activities; or in the case of Laning, in retaliation for her submitting a Workers Compensation claim?
- 4. Did the Board violate the Open Public Meetings Act in not notifying petitioners of the pending Board action to not renew their contracts?
- 5. Were petitioners denied any severance benefits?
- 6. What remedy, if any, is appropriate?

FACTUAL DISCUSSION AND FINDINGS

The petitioners and charging party offer the following accurate account of the testimony given at the hearing, which I include and adopt as my own findings:

[Testimony of Carl Inglese]

Carl Inglese testified that he had been hired as a bus driver for the Ewing Township Board of Education ("the Board") in September 1983. On December 7, 1983, his supervisor, Doris Hahn, recommended to Assistant Superintendent, John Gusz, that Mr. Inglese be approved for appointment as a "permanent part-time driver" as he had satisfactorily completed the 90-day probationary period set forth in Paragraph 1.2 of the then applicable Collective Bargaining Agreement. (See Exhibits P-4 and P-1A). The appointment as a permanent part-time driver was approved on December 7, 1983. (P-4). Thereafter, Mr. Inglese continued in his position as a permanent bus driver receiving the highest possible marks in the three evaluations conducted by Supervisor Hahn on May 31, 1984, November 19, 1985 and May 22, 1986. (P-14, P-15 and P-16).

Mr. Inglese was active in the Ewing Township Bus Drivers' Association ("the Association"), eventually becoming President, a position that he held until January 1988. As President he handled all Association problems, grievances, and negotiated Collective Bargaining Agreements. Mr. Inglese testified that he had several run-ins with Mrs. Hahn and went "over her head" to Assistant Superintendent John Gusz and Superintendent Francis. A continuing issue of dispute between Mr. Inglese and Mrs. Hahn was the fair distribution of extra work among bus drivers.

In March 1988, after Mr. Inglese completed his term as President of the Association, Mr. Inglese received the first negative evaluation. (P-17 and P-18). Exhibit P-17, though dated November 20, 1987, while Mr. Inglese was Association President, was not received by him until March 1988. That evaluation rated him average or below average in every category in which he had previously been rated a "10". He responded to evaluation P-17 on March 27, 1988 (P-18), the same day he responded to the negative evaluation contained in the evaluation P-19. (P-20).

On June 15, 1988, Mr. Inglese was informed that the Board, at a meeting held on June 13, 1988, had agreed it was "in the best interests of the Ewing Township Public Schools" that his employment as a bus driver be terminated effective June 30, 1988. (P-13). Mr. Inglese had not received any prior notice of this meeting.

Although the Board did not give any other reasons at that time for Mr. Inglese' termination, in its Answer to Interrogatories, it listed the following reasons for non-renewal of Mr. Inglese:

- (1) Stranding track team on January 21, 1988 in Hightstown; going home without permission; lying to Supervisor;
- (2) Failure to run a scheduled route (FJ-1) on January 27, 1988;

(3) Failure to follow directions of Supervisor on March 16, 1988 when returning from field trip to Philadelphia;

(4) Under-cutting Mrs. Hahn's authority and making accusations that she had lied to all the drivers at the staff meeting. (The Board's answer to Interrogatory No. 9 (P-65).

Mr. Inglese testified that he had received memoranda concerning these alleged incidents and had responded to some of these memoranda. (See P-5, P-6, P-7, P-8, P-9, P-10 and P-12). As to the alleged stranding of the track team, Mr. Inglese testified that the track team coach had told him that he should be back to pick up the track tea by 9:30 p.m. Mr. Inglese told the track team coach that he would be going home in the interim, and gave the track team coach his telephone number. At approximately 9:05 p.m., Mr. Inglese received a telephone call from Mrs. Hahn asking him where he was. Mr. Inglese received that telephone call just as he was walking out the door. In fact, he was at the school to pick up the track team by 9:30 and no one was stranded.

As to the alleged failure to run a scheduled route, Mr. Inglese testified that this was a misunderstanding engendered by the fact that certain of the schools on that route were closed on that day and he assumed that the other school was also closed.

As to the alleged failure to follow directions of the Supervisor on the field trip, Mr. Inglese testified that the bus had broken down on the way to the Philadelphia Zoo that day and Mrs. Hahn had send Assistant Supervisor Jacobs and a mechanic to help fix the bus. This bus was fixed; the school children went to the Zoo. On the way back, Mr. Inglese dropped the mechanic and Mr. Jacobs off first because he did not want to keep the tools on the bus for reasons of safety. No time was lost in taking the children home by having gone that route.

As to the alleged under-cutting of Mrs. Hahn's authority, Mr. Inglese testified that apparently that allegation concerned a meeting held by Mrs. Hahn in March of 1988. All the bus drivers were in attendance. In the course of the meeting and was sorry that he could not make it. After the meeting, Mr. Inglese told one other bus driver, Shirley Homa, that he did not think that Dr. Morgan knew of the meeting. Apparently, Ms. Homa was upset concerning Mr. Inglese' position on equalization of extra work, a position that was set forth in a grievance that Mr. Inglese filed (P-11) and Ms. Homa complained to Mrs. Hahn.

Mr. Inglese testified that he did not think that Mrs. Hahn treated him fairly but rather harassed him after he left office as Association President because of his activities as Association President. Mr. Inglese also testified that he had negotiated the Collective Bargaining Agreement for the 1987-88 School Year (P-1) which for the first time contained a seniority provision that guaranteed that bus drivers would be terminated in reverse order of seniority if there were a reduction in force.
[Testimony of Rose Laning]

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Rose Laning testified that she was hired in 1980 by the Ewing Township Board of Education as a bus driver. In December of 1980, she too achieved permanent status having successfully completed the probationary period. (See P-2, P-3 and P-1B). Throughout her tenure as a bus driver, she achieved uniformly excellent evaluations. (P-55 through P-62).

In October 1987, she was injured on the job and was out of work from that time until she was eventually terminated. She applied for Workers' Compensation. (P-51). From October 1987 forward her doctors continually advised the Board that she was still unable to return to work (R-5) until May 1988 when her doctor indicated that "patient improving in physical therapy . . . possible return to work 306 weeks." (P-52). Before she was able to go back to work, she was terminated without prior notice again in the Board's best interests." (P-53). On July 27, 1988, her temporary disability ended. (P-51).

Although the Board did not give Mrs. Laning a reason for her termination other than "best interest" of the Board, in its Answers to Interrogatories, the Board set forth the "reasons for non-renewal" as "excessive absenteeism." (Answer to Interrogatory No. 9 to petitioners' Interrogatories (P-65)).

Prior to being terminated, Mrs. Laning was never told that her attendance was a problem. In fact, her evaluations indicate that her attendance was good. Her attendance record was, as pieced together from the Board's somewhat inconsistent records, as follows:

School Year	Days Accumulated as of July	Sick Days Taken
1981-82	19	8
1982-83	21	2.5
1983-84	27.5	4.5
1984-85	33	35
1985-86	10	12
1986-87	10	4
1987-88	16	0

Mrs. Laning testified that she never took a sick day when she was not legitimately sick. Nor was she ever warned that her absenteeism was a problem. She testified that she believes that she was terminated because she filed a workman's compensation claim because there was no other reason to justify her termination.

[Testimony of Dr. Morgan]

Dr. Morgan testified on behalf of the Board. He had no firsthand knowledge of any of the incidents concerning Mr. Inglese and relied totally on Mrs. Hahn's recommendation.

Dr. Morgan also testified that there was no administrative view as to what the language in §2.2 of the Collective Bargaining Agreement (P-1) means.

As to Mr. Inglese, Dr. Morgan testified that it was possible that Mr. Inglese may have given the coach his home telephone number, but that the coach may have lost it.

Dr. Morgan testified that Laning was dismissed because of absenteeism, but stated further that he had no idea when she was coming back to work, even though he had the May 31, 1988 doctor's note at the time he made his decision.

[Testimony of Mrs. Hahn]

Mrs. Hahn testified on behalf of the Board. As to Mr. Inglese, she essentially reaffirmed what was stated in her memoranda. Specifically, as to the alleged stranding of the track team, she testified that she received a call at 9:00 p.m. that the bus was not there and the team was ready to come back. She called Mr. Inglese and found him at home. Mr. Inglese told her that he had given his phone number to the coach. The next day, Mrs. Hahn testified, the coach called her and told her that Inglese had not left his phone number.

However, on cross-examination, Mrs. Hahn admitted that in her memorandum written three days after this telephone call with the coach, she did not mention that the coach had told her that Mr. Inglese had not given him his phone number. In fact, all Mrs. Hahn wrote that day was "as I stated to you on Friday, I have difficulty understanding why the coach called me if he had your number." (P-5). As Dr. Morgan testified, it is possible that the coach had lost Mr. Inglese's telephone number.

As to the trip to the Philadelphia Zoo, Mrs. Hahn testified that the existence of the tools on the bus was not a basis for believing that there would be "harm to any child." However, on cross-examination, she admitted that in her memo dated March 17, 1988, she had informed Mr. Inglese that

You should have dropped the students and teachers off first, for safety reasons, as the mechanic had tools and equipment under the seats which could have caused a problem, especially had there been an accident.

As to the alleged undercutting of her authority at the meeting of March 1988, Mrs. Hahn stated that she had called the meeting to tell the bus drivers to stop "petty bickering" and not worrying about the "next driver." On cross-examination, she admitted that these references were to, among other things, the dispute over the equal allocation of extra work that was part of the grievance filed by Mr. Inglese. (P-11). She also admitted that in her memo (P-10), concerning that meeting, when she stated "you . . . once again seem to take great delight in stirring up other drivers with incorrect facts.", she was referring back to Mr. Inglese's activities as Association President. In fact, Mrs. Hahn testified that there was a change was why she gave him a "below average" score for "attitude" in the November 25, 1987 evaluation.

Mrs. Hahn admitted that was not aware of any days that Mrs. Warner or Mrs. Laning had taken off that were not legitimate sick days.

In response to questioning by the Court, Mrs. Hahn could not give any basis for the change in evaluation from the 10's that she had given all petitioners to the average scores that she

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had given them or below average in the 1987-88 evaluations.
[Petitioner's brief of May 15, 1989 at 1-11]

The relevant collective bargaining provision is set forth in §1.2 of P-1a and §1.3 of P-1b, and provides that:

[e]ach new employee will serve a three (3) month probationary period and receive payment according to the minimum level on the salary guide. After completing three (3) months of satisfactory employment, the employee may be approved as a permanent part-time bus driver and continue to receive payment according to the minimum part-time hourly salary schedule. (P-1A).*/ [emphasis added]

Here, it is undisputed that Mr. Inglese, Mrs. Warner and Mrs. Laning was each informed that he or she had satisfactorily completed the probationary period and was to be considered a "permanent" employee. (P-2, P-3 and P-4).

Respondent offers the following supplemental statement of facts, which are also substantially accurate and adopted:

The Association and the respondent Board have been parties to a series of collective negotiations agreements covering the terms and conditions of all bus driver employees since 1969. The applicable agreement for the period at issue in this case (1987-88) is in evidence as P-1. Also in evidence, for purposes of relating the prior bargaining history, are the contracts for the following time periods:

<u>Term</u>	<u>Exhibit</u>
1981-83	P-1A
1979-81	P-1b
1969-70	R-6

The specific contract language at issue in this case is analyzed in respondent's argument under Point I below. [set forth above]

Each of the individual petitioners had been employed for several years as school bus drivers. . . . Laning began employment in 1980, and Inglese in 1982. Each had successfully completed their probationary period during the first contract year, and each in turn had annually offered one year renewal contracts, the last of which were for the 1987-88 school year.

Petitioners' immediate supervisor was Doris Hahn, the district's Transportation Supervisor. Ms. Hahn herself is a former school bus driver, having worked in the district since 1969, and Supervisor since 1975. The district employs 23 bus drivers, who each make an average of 3 to 4 regular runs a

*/ The language in P-1b is virtually identical.

day. In addition, the Department is responsible for an average of 50 athletic runs and field trips per week. Ms. Hahn is also responsible for approximately 25 privately contracted bus routes. Hahn in turn had reported to John Gusz, an Assistant Superintendent, who was in charge of overall supervision of the Department for many years. Beginning with the 1986-87 school year, however, there was an administrative reorganization within the district and Dr. J. Bruce Morgan, Board Secretary and Business Administrator, was given overall supervisory responsibility for the Transportation Department, and became Hahn's immediate supervisor.

Following the reorganization, a new evaluation form was adopted. (Compare Inglese evaluations P-17 and P-19 with previous forms P-14 through P-17; . . . Laning evaluations P-63 and P-64 with previous forms P-55 through P-62). In addition, as Hahn testified, a stricter standard was imposed. Hahn was advised that she had been too "easy" in her evaluations. Indeed, all of the evaluations she wrote prior to 1987-88 show a decided absence of discrimination between different performance levels. Although the scale reads 1 to 10, Hahn nearly invariably gave everyone 10's on every single parameter.

At any rate, Hahn and Morgan met periodically throughout the 1986-87 and 1987-88 school years. Dr. Morgan made clear that renewal contracts for all the employees were not automatic. Morgan and Hahn met near the end of the year and went over each of the 23 employees. A decision was made to recommend the nonrenewal of Inglese, Laning and Warner. That recommendation was formally approved by the Board on June 13, 1988, and petitioners were promptly notified by letter. (P-13, P-29 and P-53).

The testimony and documentary evidence regarding the reasons for nonrenewing the contracts as to each individual petitioner are discussed in the argument section below. (Inglese at pages 15 to 22; Laning at pages 23 to 25; and Warner at pages 27 to 28).

In dismissing Laning, the school district relied on her attendance. Laning's attendance record over the last four years was as follows:

<u>School Year</u>	<u>Days Absent</u>	<u>Reason</u>
1984-85	33 2	Sick Leave Deduct
1985-86	10 2	Sick Leave Deduct
1986-87	4 1	Sick Leave Workers Compensation
1987-88	152	Workers Compensation

[R-8; P-46; P-48; P-50; R-1; R-2; R-3; R-4]

Laning's medical history for the 1987-88 school year is particularly instructive. She was injured on the job on October

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13, 1987. She filed a workers compensation report on October 23, 1987, stating

I was making a turn, as I was turning the steering wheel my hand slipped, as I grabbed the wheel something pulled on the left side of the neck, later in the day I got like a charlie horse in left shoulder blade and pain. Also pain in armpit, forearm and wrist, and left side of back, like a tooth ache. I felt ill. [sic P-51]

She saw Dr. Jenkins, who said that she had a muscle spasm and was not to drive for three weeks. R-5 (packet of all relevant medical notes). He later extended this for another two weeks. On December 3, 1987, however, Dr. Jenkins wrote that she could return to work and was not limited in her ability. The next day, Laning went to Professional Emergency Services of Lawrenceville, where she obtained a note for another week's absence. On December 10, 1987, another physician (Einhorn) wrote a letter that she was still in pain. He prescribed a cervical collar and pain killers, and wrote a note excusing her for another two weeks, later extended for another three weeks (see December 24 note), then another three weeks (see January 14, 1988 note.) At this point the district suggested she might return to work to drive a smaller vehicle (a van) with both power steering and automative transmission. January 22, 1988, memo Hahn to Morgan. On February 4, Dr. Einhorn signed a note that Laning could do light duty, but no van or bus driving should be permitted. R-5. Laning did not return to work, as there was no light duty available other than driving a van or bus. (Testimony of Hahn).

Laning remained out on workers compensation for the duration of the school year. The last medical note received by the district prior to its nonrenewal action was dated May 3, 1988, and was from Dr. Einhorn. He indicated a "possible" return to work in 3 to 6 weeks.

Following petitioner's nonrenewal, the Board's workers compensation administrator (Rasmussen) arranged for an independent medical examination. The result was a July 27, 1988, determination that she was no longer disabled. R-5. In her testimony, however, Laning stated that she did not agree with that determination, and insisted that she remained disabled as of that date.

There is no dispute as to the material facts as set forth above and I so FIND.

LEGAL DISCUSSION AND CONCLUSIONS

The Legal issues set forth in the prehearing order as stated above will be discussed and resolved as follows:

(A) PERC Issues:

- (1) Did the Board unilaterally change or violate the terms of the Collective Bargaining agreement contrary to *N.J.S.A. 34:13A-5.4(a)(1)* and (5)?;
- (2) Was Carl Inglese's termination an act of discrimination in violation of *N.J.S.A. 34:13A-5.4(a)*, (1), (3) and (4) because of his union activities?;
- (3) What remedy, if any, is warranted?

(B) Education Issues:

- (4) Was the Board's termination of petitioners arbitrary, capricious, and unreasonable and in violation of their exercise of First Amendment rights or rights under the workers compensation law?;
- (5) What remedy, if any, is warranted?;
- (6) Did the Board violate the Open Public Meetings Act, *N.J.S.A. 10:4-8 et seq.*, by failing to notify petitioners of its meeting of June 13, 1988, at which they were terminated?;
- (7) Were the petitioners denied any severance benefits, guaranteed by contract or statute?

In order that this matter may be fully presented to PERC and the Commissioner of Education, extensive sections from the arguments submitted in the briefs at the parties will be set forth in full.

(1) Unilateral Change or Violation [PERC]

The petitioner's submit the following argument on this point:

It is settled that an employer's unilateral change in a term and condition of employment constitutes a repudiation of the job security clause contained in the Collective Bargaining Agreement and, therefore, an unfair practice in violation of N.J.S.A. 34:13A-5.4(a) (1) and (5). See Matawan-Aberdeen Regional Bd. of Ed., 13 N.J. PER ¶18118. Here, it is apparent that the Board's repudiation of the guaranty of job security contained in the applicable Collective Bargaining Agreements constitutes an unfair practice.

It is also established that a public employer may create job security for employees who are not within categories covered by statutory tenure. Plumbers & Steamfitters v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978); see also Wright v. Bd. of Education of City of East Orange, 99 N.J. 112 (1985). The crucial question for this tribunal in adjudicating the unfair practice claim applicable to all of the employees is whether or not the above-cited section of the Collective Bargaining Agreement did so provide the employees with a promise of job security.

For instruction, we submit that this tribunal should be guided by the general law of the State of New Jersey as set forth in Woolley v. Hoffman-LaRoche, Inc., 99 N.J. 284 (1985), mod., 101 N.J. 10 (1985) (holding that a distributed company policy manual that is intended to cover the general work force may be construed as an implied contractual offer to abide by the terms contained herein) and Woolley's prodigy. More particularly, in the recently decided case of Preston v. Claridge Hotel & Casino, Ltd., 231 N.J. Super. 81 (App. Div. 1989), the court was confronted with the question as to whether or not a distributed manual or handbook could have led the employees to reasonably believe that the company's policies with respect to job security would be honored as terms and conditions of employment. The court stated that "if plaintiff reasonable could have construed the employment handbook issued to her in 1980 as a contract of employment, then the purposes of the laws set forth in Woolley would be furthered by a retroactive application of that decision. The Claridge's handbook enumerated the types of prohibited conduct that could result in termination and represented that "while you work for the Claridge . . . you will receive maximum job security." The court explained that:

Since all Claridge employees were required to read the handbook and sign a form which indicated that they understood that a violation of the terms contained therein could result in termination, it was reasonable for those employees to expect that compliance with those same terms would prevent their discharge without just cause. Thus, there was sufficient credible evidence in the record for the jury to have found that the first employee handbook created an implied contract of employment under which neither plaintiff nor any other permanent employee could be discharged without just cause.

Thus, the Claridge decision can be construed as standing for the proposition that (1) a promise of job security can be implied from a contract between an employer and an employee and (2) by negative implication, the promise of job security means that the employee will not be subject to termination without "just cause."*/

Here, Carl Inglese testified that he understood the provision of the contract described above as promising job security to the bus drivers. Dr. Morgan testified that the Board construed this provision as distinguishing between probationary employees who could be fired without notice during the three month probationary period and other employees who were "permanent for the year in which they were hired." However, there is not language to that effect in the Collective Bargaining Agreement. In fact, the Collective Bargaining Agreement themselves were for two-year periods. Nothing in the Agreement references any annual contracts that may have been signed by the bus drivers.

Moreover, each of the petitioners were provided with letters informing them of their "permanent" status. Most significant, in June 1988, the Board did not tell petitioners that their contracts were not being renewed. Rather, each petitioner was informed that he or she was "terminated". (P-13, P-53 and P-29).

That the repudiation of the job security promise in §1.2 of the Agreement was in bad faith can be seen from the pretextual nature of the so-called reasons given by the Board for the termination of the petitioners' employment. The four reasons given for Mr. Inglese' termination are at best make-weight and are completely belied by Mr. Inglese' past record of exemplary performance*/

The so-called excessive [is]bsenteeism records of Mrs. Laning also make-weight. With the exception of one year (1985-86), when due to stress, Mrs. Laning was out of work for medical reasons, her attendance record had actually improved up until this year when she was on workers' compensation. The law prohibits the employer from taking away sick time from an employee who is on workers' compensation. N.J.S.A. 18A:30-2.1. Accordingly, the absenteeism argument as to her is frivolous. . . .

Furthermore, the bad faith nature of the Board's action can be seen from its real motivation in acting in relation to these three senior bus drivers. As Mr. Inglese testified, for the first time in 1987-88 the Association had been able to negotiate a seniority provision in the Collective Bargaining

*/ Here, we are not concerned with the issue in Claridge as to whether or not a policy manual did in fact constitute a contract. It is clear that there was a contract between the parties. The only issue before this tribunal is what did the contract provide to the parties.

*/ For reasons stated in Point II below, it is clear that Mr. Inglese' termination was also in retaliation for his associational activities.

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Agreement, specifically §11 which provided that in the event the Board decided that a reduction in force must occur, employees would be RIFed according to seniority, i.e. the last employee hired would be the first fired. (P-1). The Board's termination of three senior employees allowed it to replace them with junior employees who were not only paid at a considerably lower salary but would not be able to complain if and when a RIF occurred.

For all of these reasons we respectfully request that the Public Employment Relations Commission declare that the Ewing Township Board of Education unilaterally changed the term and condition of employment in violation of N.J.S.A. 34:13A-5.4(a) (1) & (5). [petitioner's post-hearing brief at 12-17]

The respondent Board argues that no unfair practice has been established, and no provision of the contract violated, and also rejects the argument that the Collective Bargaining Agreement grants tenure:

POINT I (PERC)

THE COLLECTIVE BARGAINING AGREEMENT DOES NOT GRANT TENURE; NO PROVISION OF THE CONTRACT WAS VIOLATED, AND NO UNFAIR PRACTICE HAS BEEN ESTABLISHED UNDER NJSA 34:13A-5.4(a).

In alleging an unfair practice under NJSA 34:13A-5.4(a) (1) and (5), petitioners rely on the following contract clauses:

2. Salary Guide...
 - 2.2 Each new employee will serve a three (3) month probationary period and receive payment according to the minimum level of the salary guide. After completing three (3) months of satisfactory employment, the employee may be approved as a permanent part-time bus driver and continue to receive payment according to the minimum part-time hourly salary schedule.
11. Reduction in Force
 - 11.1 In the event the Board decides that a Reduction in Force must occur the reduction must be accomplished in the following manner:
 - a. Employees must be RIFed according to seniority. The last employee hired must be the first fired.

The gist of petitioners' contention is that the use of the word "permanent" constitutes a grant of tenure, and that the Board's action in nonrenewing the contracts of the three

individual petitioners constituted a violation thereof and therefore, a unilateral change in terms and conditions of employment.

Neither the language of the contract nor the bargaining history support petitioners' suggested interpretation. First of all, the word "tenure" nowhere appears in the cited clauses. One would think that the granting of such a significant employment right would have been clearly stated and defined, had the parties' intended such a system. Also, what does the word "permanent" mean in this context? Surely it could not have been the parties' intention that a bus driver employee, once attaining "permanent" status following a three month probationary period, could thereafter never be dismissed for any reason or under any procedures.

Nor do we understand petitioners to make that argument. Rather, petitioners' apparent claim is that they have tenure and can only be dismissed thereafter for certain reasons and only through certain procedures for a hearing. But what "reasons"? None are defined. And under what "procedures". Again there is nothing spelled out in the contract. There is not even a statement about who would hear and decide a tenure dismissal matter. The Board? The Commissioner? An Arbitrator?¹

In the analogous area of individual employment contracts, our Supreme Court has noted that a contract for "permanent" or "lifetime" employment "is of an extraordinary nature, outside the regular custom and usage of business." Savarese v Pyrene Manufacturing Co., 9 NJ 595, 603 (1952). In order to be enforceable, such contracts must satisfy strict standards of definiteness, certainty, precision and clarity. Id. at 601-603. None of these standards are met here. Cf. Woolley v. Hoffman-LaRoche, Inc., 99 NJ 284, (1985), where the court applied different standards to a claim of contract based on a company's personnel manual. The Court in Woolley, however, carefully distinguished a broad, unspecified grant of permanent or lifetime employment from a policy manual which detailed both the grounds and procedures under which an employee could be terminated:

The contract arising from the manual is of indefinite duration. It is not the extraordinary "lifetime" contract explicitly claimed in Savarese. For example, a contract arising from a manual ordinarily may be terminated when the employee's performance is inadequate; when business circumstances require a general reduction in the employment force, the positions eliminated including that of plaintiff; when those same circumstances the

¹ The language of Step 5 in the grievance clause of the contract suggests otherwise. The following matters are expressly made not subject to arbitration:

"...d. A complaint of an employee which arises by his/her reason of not being reemployed.

Clearly, this clause contemplates the annual contracts of some bus drivers not being renewed.

elimination of employees performing a certain function, for instance, for technological reasons, and plaintiff performed such functions; when business conditions require a general reduction in salary, a reduction that brings plaintiff's pay below that which he is willing to accept; or when any change, including the cessation of business, requires the elimination of plaintiff's position, an elimination made in good faith in pursuit of legitimate business objectives: all of these terminations, long before the expiration of "lifetime" employment, are ordinarily contemplated in a contract arising from a manual, although the list does not purport to be exhaustive. The essential difference is that the "lifetime" contract purports to protect the employment against any termination; the contract arising from the manual protects the employment only from arbitrary termination. [footnote 8, 99 NJ at 301; emphasis in original.]

The detailed termination procedures and standards in the policy manual of Hoffman-LaRoche (reproduced in Appendix to the Court's opinion) stand in stark contrast to the contract here, which sets forth neither reasons nor procedures for terminating nonprobationary employees for cause.

What then did the parties mean by the use of the work "permanent"? Past practice and bargaining history offer clues in that regard. As testified to by Dr. Morgan, the "probationary/permanent" language has existed since the advent of collective bargaining in 1969. See R-6. The probationary period has always been three months. R-6; P-1a; P-1b; P-1. The Board's consistent interpretation of this language has been that a probationary bus driver can be summarily dismissed at any time during the first three months. If he survives the probationary period, however, he is assured of contractual employment through the current school year. This interpretation is evidenced by R-9, the original appointment notice for Florine Warner. She was notified in that document, dated August 29, 1980, that she was appointed for the period September 1, 1980 through June 20, 1981, "subject to satisfactory completion of a ninety day probationary period." At the conclusion of the ninety days, she received notice of the satisfactory completion of her probationary period, a changeover from temporary to permanent status, and employment "thru June 30, 1981." P-3, emphasis supplied. See also R-10 and P-3 for Rose Laning. It is also noteworthy that the collective bargaining agreement at the time provided for a salary increase upon completion of probation, at least for those with prior experience. P-ib, paragraph 1.3; also compare salary rates in R-9, R-10 and P-3 for Laning and Warner. This further supports the Board's position that a transition from "probationary" to "permanent" had consequences under the contract, but that the consequences or significance of the change were something other than what petitioners claim.

For another case in which a collective bargaining agreement provided for certain employees (janitors) to become "permanent" after 45 days, see Gonzalez v Union City Bd. of Ed., 1986 SLD (May 5), aff'ing ALJ decision of March 19, 1986, OAL Dkt. # EDU 5760-85). The Commissioner in that case dismissed the contractual tenure claim of a janitor whose

contract was not renewed. "It is evident that the word 'permanent' as contained in Article 9E is not synonymous with 'tenured employee'. Rather 'permanent' suggests that custodial employment, after 45 days shall be 'steady', as compared to 'temporary'." *Id.*, Slip opinion at 12. The matter was remanded solely to determine whether petitioner had been dismissed as a result of a reduction in force, in which case a separate seniority clause was applicable.

Respondent's interpretation of the contract language in this case is also supported by past practice. There was uncontradicted testimony that the contracts of two other nonprobationary bus drivers had not been renewed for the next school year on several occasions in the past, and that these nonrenewals were based on dissatisfaction with performance. Again, the proper interpretation of the contract is that permanent employees are protected for the duration of the school year, but that there is no guarantee of contract renewal from year to year.

Petitioners lastly rely on paragraph 11.1. By its very terms, however, that clause is limited to instances where a reduction in force occurs, and states that in such instances seniority shall determine layoffs, with the last hired becoming the first fired. No reduction in force occurred here, however, and the clause is plainly inapplicable. Compare Gonzalez, supra, 1986 SLD (May 5).

In sum, petitioners have failed to show even a contract violation, much less a unilateral change in terms and conditions of employment. The (a) (1) and (a) (5) unfair practice charge must be dismissed. [Respondent's brief at 9-14]

The petitioner's reply:

1. In its first Point, the Board attempts to portray the charging parties' claim for job security in accordance with the Job Security clause of the Contract as one for a so-called "lifetime position". The Board attempts to prove too much. The charging parties do not claim a right to a "lifetime position", but merely a right to a position that cannot be terminated except for "just cause". That is precisely the sort of standard that has been applied to such situations by the court in Woolley and its progeny.

2. Having established a right to a job that cannot be terminated except pursuant to "just cause", the Board's rhetorical questions as to the nature of the procedures and the nature of the tribunal before whom the question of termination can be adjudicated are easily answered. As in other non-statutory "just cause" cases, the petitioners could resort to the contractually negotiated grievance procedures (which here stops them short of mandatory and binding arbitration) and then to the Commissioner of Education*/

3. Petitioner Carl Inglese has fully met the standards set forth in In re Bridgewater Township, 95 N.J. 235 (1984), for proving that his termination was a result of his associational activities. The Board's argument that the only actions complained of by Mr. Inglese occurred "after he stepped down

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is (1) not true and, (2) in any event, irrelevant. Mr. Inglese was evaluated negatively by Mrs. Hahn in November 1987 when Mr. Inglese was still Association President. That evaluation, Mrs. Hahn testified at trial, scored him negatively in "attitude", a direct result, Mrs. Hahn also testified, of his associational activities. Furthermore, even though his termination occurred after he was Association President, the facts are clear that his termination was in retaliation for actions as Association President and for his having attempted to file a grievance in March 1988 dealing with work allocation. It is ludicrous to suggest, as does the Board, that one's protections against retaliatory discharge cease when one is no longer a union official. Under the Board's scenario, a public employer would be free to punish a public employee for having engaged in associational activities are over. The Board's argument is ridiculous on its face.

I agree with the respondent Board's analysis on this point and, substantially for the reasons set forth in respondent's brief above, **CONCLUDE** that the Board did not unilaterally change a term or condition of employment in violation of *N.J.S.A. 34:13A-5.4(a) (1) and (5)*: no tenure was acquired.

(2) Was Inglese's Termination Discriminatory [PERC]?

Petitioner's legal argument of a violation of *N.J.S.A. 34:13A-5.4(a) (1), (3) and (4)* is as follows:

POINT II

THE TERMINATION OF CARL INGLESE WAS AN ACT OF DISCRIMINATION FOR HIS ACTIVITIES IN FURTHERANCE OF THE POLICIES OF THE PUBLIC EMPLOYMENT RELATIONS ACT AND THUS IN VIOLATION OF *N.J.S.A. 34:13A-5.4(a) (1), (3) & (4)*

It is undisputed that Carl Inglese was an active President of the Association. It is equally undisputed that even after his term as President ended in December 1987 he continued to exercise rights granted him under the Public Employer and Employee Relations Act by the filing of grievances and by airing his disagreements with management over its interpretation of the Side Bar Agreement to the Collective Bargaining Agreement dealing with the equitable allocation of extra work. (P-11). Most astonishingly, it was conceded by Mr. Inglese' Supervisor Doris Hahn that she noticed a change for the worse in his "attitude" after he became President of the Association, that she gave him a negative evaluation in the category of attitude in November 1987 for that very reason,

*/ There was no need to resort to the grievance procedures here because the Board, as tacitly conceded by it in its papers, refused to recognize the Job Security clause as such.

and that her reference to his taking "great delight in stirring up other drivers" in her memo to him of March 16, 1988 (one of the stated bases for his termination) (P-10) was a reference to his activities as Association President. On this record there can be no question but that the decision to terminate Carl Inglese in the "best interest" of the Ewing Township Board of Education was an act of discrimination against him not only for his actions as President but for his attempt to grieve the equal work issue.*/

That these facts constitute an unfair practice is illustrated by N.J. Dept. of Human Services, 13 N.J. PER ¶18242. There it was found that the employer's statement that he was "fed up with union crap" and that grievant should "back off" or there would be "trouble" was unlawfully coercive in violation of N.J.S.A. 34:13A-5.4(A) (1), (3) and (4). The statements of Mrs. Hahn to Florine Warner to the effect that she as "fed up" with Mr. Inglese' union activities and her warning to Mr. Inglese to stop "stirring up other drivers" were similarly illegal.

*/ In contrast to this evidence, most of it out of the mouth of Doris Hahn, are the weak reeds upon which the four incidents ostensibly underlying the decision to terminate him was based. The so-called "stranding" of students was not a stranding at all. The testimony is undisputed that Mr. Inglese showed at the Peddie School at the appointed time, 9:30 p.m. Even Dr. Morgan testified that it was possible that the coach had been given Mr. Inglese' telephone number but had lost it. The failure to run one bus route was clearly a misunderstanding as is indicated from Mrs. Hahn's own documentation of the incident. The dropping off of the mechanic first instead of the school children was, as Mr. Inglese testified, for the very safety reasons that Mrs. Hahn noted in her own memorandum to Mr. Inglese. Finally, the criticism of Mr. Inglese for his discussion with Shirley Homa at the March meeting of bus drivers is in itself an unfair practice because it is clear from Mrs. Hahn's testimony that she was criticizing Mr. Inglese for participating in associational activities. [Petitioner's brief at 18-19]

The Board answered with the following argument:

POINT II (PERC)

THE BOARD TERMINATED INGLESE FOR LAWFUL NON-ARBITRARY REASONS, AND NOT IN RETALIATION FOR HIS UNION ACTIVITIES.

The leading case in analyzing unfair practice charges under NJSA 34:13A-5.4(a) (1) and (3) (discrimination or retaliation for engaging in protected union activities) is in re Bridgewater Tp., 95 NJ 235 (1984). The Supreme Court in that case adopted as the law of this state the so called Wright Line test from the private sector.

Under that test, the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra U.S. at _____, 103 S.Ct. at 2474, 76 L. Ed. 2d at 675. Once the prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense. [re Bridgewater Tp., supra 95 NJ at 242]

In further elaboration of the charging party's burden, the Court stated that, in the absence of any direct evidence of antiunion motivation, a prima facie case must be established by showing (1) that the employee was engaged in protected activity; (2) that the employer knew of his activity; and (3) that the employer was hostile toward the exercise of the protected rights. [re Bridgewater Tp., 95 NJ at 246.]

The Prima Facie Case

Here, the charging party's prima facie proofs are inadequate. While it is uncontroverted that Inglesse served as union President for three years, and engaged in a variety of protected activities in that capacity, his own testimony was that he was discriminated against only after he stepped down as President in 1987. And two of the three specific protected activities he described in his testimony (a grievance about overtime paperwork in 1983) occurred so long before the time of his termination that a causal connection is too farfetched to be possible.

Furthermore, several of Inglesse's asserted union actions during the 1987-88 school year are not even protected under the law. These would include (1) his bringing of complaints to Dr. Morgan without following the chain of command; and (2)

Inglese's deliberate undercutting of Ms. Hahn's authority on March 16, 1988, by telling other employees that she had lied to them at a meeting. With regard to (1), there is admittedly a conflict in the testimony which the ALJ will have to resolve. Inglese claimed that Ms. Hahn not only told him he had to bring his complaints to her first, but also that if she denied them he was not allowed to pursue them higher. Ms. Hahn's testimony was that she simply told him to follow the chain of command by coming to her first. If she couldn't resolve the matter, then he was free to go to the next level. This is exactly what the grievance procedure in the collective bargaining contract provides. P-1, Article 7.

It is respectfully submitted that the testimony of Ms. Hahn is the more credible on this issue, particularly given the many other problems with Inglese's credibility, as discussed below.

On the issue of the March 11 meeting, the uncontroverted testimony was that Ms. Hahn was having one of her periodic meetings with all the bus drivers. On specific authority from Dr. Morgan, she emphasized to all employees the importance attached by both her and Dr. Morgan to employees of following all the rules, running all routes on time and generally performing their jobs well. Shortly after the meeting, Inglese told several other employees that Hahn was lying and that she had no authority to speak for Dr. Morgan. One of the other bus drivers told Hahn of Inglese's statements. She confronted him in front of at least one other person. He at first denied, then admitted making the statements. At the hearing, he acknowledged on cross-examination that he had no facts to back up his allegations, and that his accusing her of lying had the purpose and effect of undermining her authority.

Inglese's credibility is further undermined by the conflicts between his statements and those of the athletic coach about leaving his phone number with the coach, and by the conflicts between Inglese's and Jacob's version of the "directions" being given on the trip back from Philadelphia. See below at page 19.

Lastly, with regard to petitioners' prima facie case, the requisite showing of hostility has not been met. Even proving that Inglese engaged in protected union activities and that the administration knew of his activities is insufficient, there must be independent evidence of anti-union hostility or animus. In re Lyndhust Bd. of Ed., Docket No. C0-879345, 13 NJPER 18119, PERC No 870139, 13 NJPER 18177 (1987). Inglese's nonrenewal was not suspiciously timed with respect to an organized drive, ongoing negotiations or a critical grievance. Compare Bridgewater, supra; and In re Mantua Township, PERC No. 84-151, 10 NJPER 15194 (1984). Here, after all, the parties had had nearly 20 years of negotiated agreements, grievances and contract administration. Indeed, Inglese was not singled out at all, but rather was terminated for cause along with two other employees (neither of whom have claimed reprisal for union activities), at a time when the administration was conducting a thorough review of the performance of all its bus driver employees. All of these factors negate any claim that Inglese's nonrenewal was unlawfully motivated by hostility toward unions and union activities.

The Employer's Responsive Proofs

Even assuming arguendo that petitioner has prima facie established that Inglese engaged in protected activities which were a "motivating" or "substantial" factor in the district's decision to terminate him, the employer here has shown that there were independent reasons justifying his dismissal, such that the same decision would have been reached even in the absence of the protected activity.

The Board proved four instances of misconduct:

(1) On January 21, 1988, Inglese was assigned to transport the track team to and from a meet in Hightstown. After dropping the team off about 6:00 p.m., Inglese drove his bus to his home to Hamilton Township without permission. He did not leave his number and the coach was forced to call Ms. Hahn at home, around 9:00 p.m., Hahn then located Inglese, and instructed him to return immediately to Hightstown to pick up the coach and team. (Testimony of Hahn, Inglese; P-5; P-8 and P-9).

(2) Inglese failed to run one of his regularly scheduled routes on January 27, 1988. (Testimony of Hahn, Inglese; P-6; R-12).

(3) Inglese used poor judgment and also failed to follow the directive of Al Jacobs, Ms. Hahn's assistance, to return to children directly to school after a breakdown plagued trip to the Philadelphia Zoo. (Testimony of Hahn, Jacobs; P-12)

(4) Inglese undercut Hahn's authority by making a false accusation that she had lied to all the drivers at a staff meeting on March 11, 1988. (Testimony of Hahn, Morgan, Inglese; P-10).

Inglese himself has admitted to (2) and (4), and to most of (1) and (3). Regarding (1) he claims he left his telephone number with the coach, a contention which he first made in a memo to Hahn (P-8) sent more than five weeks after the incident. The assertion is also inconsistent with both the coach's actions and the coach's comments to Hahn that evening. P-5, P-9.

With respect to (3), there is once again a conflict between Inglese's testimony and that of another witness this time Al Jacobs. See also P-12. It is respectfully submitted that the more credible finding is that Jacobs is indeed told Inglese three times that he was to drop the children off first. P-12. Inglese's excuse that he "was worried about the tools and battery", and therefore went to the garage first, is patently absurd.

With respect to the unfair practice charge, it is well settled that an employer may terminate an employee for good, bad or no reason at all so long as its purpose is not to interfere with the exercise of protected activities.² NLRB v Loy Foods Stores, Inc., 697 F2d 798, 8d (7th Cir. 1983); NLRB v Easter

² In the case of a bad reason, or no reason at all, a public school employee might have a separate claim based on arbitrary action, but that claim would be cognizable before the Commissioner, not PERC. Inglese' "arbitrary" claim in this case is separately discussed in Point III below.

Smelting and Refining Corp., 598 F2d 666, 669 (1st Cir. 1979).
In re Lyndhurst Bd. of Ed., supra, 13 NJPER 18119 at page 287;
In re Gloucester Co. Vo-Tech School, H.E. No. 8-98, 14 NJPER
19258, footnote 29.

Here, the Board had ample justification for terminating Inglese. Indeed, the grounds for terminating him are the most clear cut among the three petitioners. Given the administrative change and the district's obvious toughening of its standards for determining bus drivers' contract renewals, the conclusion is inescapable that Inglese would have been first in line for termination, even had he not been active in union affairs. Thus no unfair practice occurred. In re Gloucester County Vo-Tech School, H.E. No. 8-98, 14 NJPER 19258; In re Burlington County Vo-Tech, H.E. No. 87-70, 13 NJPER 18198 aff'd PERC No 88-35, 13 NJPER 18309 (1987). [Petitioner's brief at 15-21]

I CONCLUDE that Carl Inglese's termination was an act of discrimination in violation of N.J.S.A. 34:13A-5.4(a) (1), (3) and (4). This conclusion is based substantially on the reasons and authority advanced by the Board above.

In particular, I note that, prior to Carl Inglese's involvement in the 1987 Collective Bargaining negotiations, his evaluations were all outstanding in every aspect and he had been described as "an asset to our Department" by Doris Hahn, as early as 1980 (P-3). His evaluations for the period of 1984 through 1986 received the highest rating in every area (P-14-16). Although there was some change in the evaluation system in 1987 due to a new administration, the fact is that the categories rated in 1987 were identical to those evaluated prior to that (compare P-16 and P-17). Despite this, Inglese's evaluations for 1987 and beyond were marked as only average, with an increasing number of below average scores in such areas as attitude, following directions, dependability, and cooperation. This lowering of his evaluation immediately followed his more active role in the bus drivers' association, concerning with the equal distribution of extra work assignments. On March 16, 1988, the same day that Inglese filed a grievance complaining of unequal assignment of extra work (P-11), Doris Hahn sent the following memo, which, in content and tone, lends support to the conclusion that his dismissal was discriminatory:

[t]his memo is a follow up to the meeting I had with you in my office on Monday, March 14, 1988, when I questioned a comment made by you to another driver concerning something I said at the meeting . . . I am very disturbed just to think that you question my statement. I do not drop a person's name just to make a point. You were way out of line and once

again seemed to take great delight in stirring up other drivers with incorrect facts.

I repeat to Dr. Morgan's message was for everyone to stop the petty nonsense and do their job or they will not have a job. This message was given to me just prior to Friday's meeting, since Dr. Morgan can not be present.

In the future just do your job and let me do mine. Any further detrimonile comments to drivers will result in another written warning and, should it still continue, dismissal. [P-10; emphasis added]

Memos from Mrs. Hahn finding fault with various aspects of Carl Inglese's performance in January of 1988 and thereafter should be read together with the above memo and must be considered in the context of what was deteriorating relationship between Inglese and Hahn, attributable, I CONCLUDE, to Inglese's increasing activism and agitation on behalf of himself and other bus drivers on issues of concern to them, such as distribution of extra work. It is apparent that Doris Hahn came to regard Inglese as a troublemaker who was, as she put it, "stirring up other drivers" and that she seized upon relatively minor problems in his job performance as a pretext to dismiss him. Although Inglese did fail to follow instructions on at least one occasion (that being his failure to drop off students before taking a mechanic home), his explanation of this is credibly based on his desire to get potentially hazardous tools and equipment off the bus, before returning the students. His failure to run a scheduled route on January 27, was also credibly explained by him, and the incident of stranding the track team on January 21, 1988 appears, even considering the conflict of testimony, to be largely a manner of miscommunication, as opposed to any question of dereliction of duty or failure to follow instructions.

Also included in the allegations made by the Board justify Inglese's dismissal was his undercutting of Doris Hahn's authority and, in particular, his accusation that she had lied to the drivers at a staff meeting. While Mrs. Hahn's irritation at this accusation by Inglese was understandable, Inglese's actions were undertaken in the context of a dispute as to the terms and conditions of employment. The Board thus candidly admits that the deteriorating work relationship between Inglese and Hahn, which followed Inglese's active involvement in collective bargaining negotiations and his agitation for equal disturbance of extra work, was an overt factor in its decision to dismiss him. Doris Hahn's memo of March 16, clearly and bluntly demonstrates that her intent was to silence an employee perceived by her to be a troublemaker, whom she saw as stirring up other drivers. Under these circumstances

and in light of Inglese's previously outstanding evaluations over a number of years, I **CONCLUDE** that he has established the *prima facie* case under Bridgewater and further **CONCLUDE** that the employer's responsive proofs fail to show that a decision terminating Inglese would have been reached even in the absence of protected activity. The statute prohibiting unfair labor practices is designed to protect employees who "stir up" other workers with complaints concerning working conditions.

(3) The Appropriate Remedy [PERC]

In light of the above conclusion that Carl Inglese's termination was an act of discrimination in violation of N.J.S.A. 34:13A-5.4(a), I further **CONCLUDE** that the proper remedy is reinstatement with backpay, mitigated by any income in the intervening period. See, N.J.S.A. 34:13A-5.4(c); *Galloway Twp. Bd. of Ed. v. Galloway Twp. Association of Educational Secretaries*, 78 N.J. 1 (1978). I further **CONCLUDE** the respondent Board of Education should be ordered to cease and desist unfair labor practices against Carl Inglese, regardless of whether he is directly involved in collective bargaining negotiations on behalf of the Ewing Township Bus Drivers Association. (Ibid).

(4) Were the Terminations Arbitrary, Capricious and Unreasonable [Education]

(a) Carl Inglese

Petitioner submits the following argument as to Carl Inglese:

Even if PERC finds that there was no unfair practice committed against these petitioners so as to compel their reinstatement to their former positions, the Commissioner of Education must nonetheless so order because their dismissals were arbitrary, capricious and not in accordance with law. It is settled that a Board's action, even if within its discretionary and statutory powers, must not be arbitrary, capricious or without good reason in order to escape intervention by the Commissioner of Education. See Helen K. Jungblut v. Board of Ed. of Twp. of Delaware, Commissioner of Education Decision, 1981 SLD 499 (decided April 30, 1981). Here, the decisions to terminate each of these petitioners was arbitrary, capricious or otherwise not in accordance with law.

A. Mr. Inglese' Termination Was Arbitrary And Capricious And Not In Accordance With Law.

The record is clear that for most of his tenure as a bus driver, Mr. Inglese was considered a superb bus driver. It was

only when Mrs. Hahn adopted a prima facie arbitrary evaluation process that mandated rating everyone as average, no matter how good they were, that Mr. Inglese' evaluations were less than perfect. In light of his past performance record, the four ostensible reasons for his termination cannot withstand scrutiny. The so called "stranding" of students was not a stranding at all. No one was stranded. Mr. Inglese showed up to pick up the students at the appointed hour of 9:30 p.m. The failure to run a bus route was nothing more than an understanding on Mr. Inglese part that certain schools were not closed the day other schools were closed. The dropping off of the mechanic before the dropping of the students on the day of the Philadelphia Zoo trip was a reasonable response to Mr. Inglese to a potentially hazardous situation recognized by Mrs. Hahn herself. Mr. Inglese' comments after a bus drivers' meeting to one other bus driver to the effect that he did not believe Mrs. Hahn when she stated that Dr. Morgan wanted to be at the meeting, was protected activity under the First Amendment to the Constitution of the United States. Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2nd 811 (1968). The Board's attempt to distinguish the clear application of Pickering on the basis of Pietruni v. Board of Ed. Brick Twp., 128 N.J. Super. 149 (App. Div. 1974), cert. denied, 65 N.J. 573 (1974), is unavailing. There the communication involved was public, vituperative and insulting. Here, Mr. Inglese merely voiced his opinion that Mrs. Hahn was inaccurate in presenting Dr. Morgan's views.

Mr. Inglese' termination was arbitrary, capricious and without reason. [Petitioner's brief at 20-21]

The Board response:

POINT III (Commissioner)

RESPONDENT'S NONRENEWAL OF PETITIONER INGLESE'S CONTRACT WAS A LEGITIMATE EXERCISE OF ITS DISCRETION, BASED ON SOUND, NONARBITRARY AND NONCAPRICIOUS REASONS.

It is well established under the education laws that a board of education has broad discretion in determining whether to renew the contract of a nontenured employee. The Board's decision is entitled to a presumption of correctness, and will not be overturned unless affirmatively shown to have been arbitrary, capricious or unreasonable. Donaldson v North Wildwood Bd. of Ed., 65 NJ 236, 246-248 (1974) (teacher); Dore v Bedminster Tp. Bd. of Ed., 185 N.J. Super 447 (App. Div. 1982) (teacher); Willingham v. Deptford Tp. Bd. of Ed., Commissioner's dec. dated September 30, 1982 (janitor); D'Amato v. Monroe Tp. Bd. of Ed., (C. dec. July 8, 1985) (bus driver).

Petitioner Inglese here has failed to meet his burden of establishing arbitrary board action. On the contrary, the Board's proofs and his own admissions as to reasons (1) through (4) (discussed above at pages 19-20) firmly establish that the Board had ample cause for nonrenewing his contract. [Respondent's brief at 22]

I agree with the Board's argument that the four reasons cited for Carl Inglese's dismissal were largely pretextual and that his termination was arbitrary, capricious and unreasonable, in that it was based on an unfair labor practice, as discussed in point No. 2, above. The discriminatory and retaliatory intent evident in the Board's action in dismissing Inglese should not be sustained by the Commissioner of Education under *N.J.S.A. 18A:6-9 et seq.*

(b) Laning:

**C. Mrs. Laning's Termination Was Arbitrary,
Capricious And Not In Accordance With Law.**

Similarly, the dismissal of Mrs. Laning should be reversed. We incorporate herein the legal arguments set forth above as the standard with which the Commissioner of Education treats punishment of school personnel for "excessive absenteeism".* As set forth in the Statement of Facts, Mrs. Laning's attendance record was very good with the exception of the 1984-85 school year. Since then, until her on-the-job injury, her attendance was steadily improving to the point where she had only 4 days absences in 1986-87 and no days absences in 1987-88 until she was injured. She was never advised that her attendance was a problem in any way. All of her absences were legitimate.

Certainly, the Board cannot use her workman's compensation absences as underlying a decision to terminate her for excessive absenteeism. *N.J.S.A. 18A:30-2.1* prohibits a school board from charging absences due to injuries within the purview of workman's compensation to the employee's sick leave. Certainly those absences alone cannot be the basis for any other adverse action against the employee.

* It is established in school law that action against a school employee on the basis of absenteeism cannot be taken unless there is "clear evidence" that the Board considered "(1) the nature of the illness and not just the number of the absences . . . and (2) the impact of the absences . . ." on the education process. See e.g. *Vonita Smith v. Board of Ed. of Trenton, Commissioner of Education No. 89-89*, decided April 18, 1989; *Meli v. Board of Ed. of Burlington Co. Vocational Technical School*, OAL Dkt. No. EDU 4515-84 (January 28, 1985), rejected Commissioner of Education, March 15, 1985, reversed State Board, December 4, 1985, affirmed Superior Court, App. Div. A-2237-85T7 (March 4, 1987); *Montville Twp. Education Association v. Montville Twp. Board of Ed.* OAL Dkt. No. EDU 8247-83 (February 29, 1984), rejected Commissioner of Education (April 16, 1984), reversed State Board (November 7, 1984), reversed Superior Court of New Jersey App. Div. A-1178-84T7 (December 6, 1985). In addition, a school employee cannot be punished for having exercised, legitimately, his or her contractual or statutory right to sick leave. See *Dunnellen Education Association, et al v. Board of Ed. of Borough of Dunellen*, 1983 SLD (State Board decided October 26, 1983).

Although not stated as a reason in the Answers to the Interrogatories, at trial, Dr. Morgan seemed to indicate that the real reason to dismiss Mrs. Laning was that the Board was unsure whether she would come back. However, as of May 1988, before the decision was made to terminate Mrs. Laning, the Board was given the first indication by Mrs. Laning's doctors that she would be able to return.

In fact, by July 1988, her temporary disability was up. The Board's action in this regard was clearly arbitrary and capricious*]

Respondent Board replies:

RESPONDENT'S NONRENEWAL OF PETITIONER LANING WAS A LEGITIMATE EXERCISE OF ITS DISCRETION, WAS NOT IN REPRISAL FOR HER FILING OF A WORKERS COMPENSATION CLAIM, AND WAS BASED ON SOUND, NON-ARBITRARY AND NONCAPRICIOUS REASONS.

With respect to Laning's claim of arbitrariness, the legal standard before the Commissioner is the same as set forth for petitioner Inglese (See cases cited on previous page).

With respect to her claim of reprisal for filing a workers compensation claim, the law is that there is both a statutory and common law cause of action for such a retaliatory firing. N.J.S.A. 34:15-39.1 and 39.2; Lally v Copygraphics, 85 NJ 668 (1981) aff'ing 173 N.J. Super 162 (App. Div. 1980).

But the facts do not support any such claim here. Laning's employment was ultimately terminated, not because she had exercised her right to file a workers compensation claim but rather because she had been absent for long periods of time, and there was insufficient evidence that she would be capable of returning to work. A board of education is not required to hold an employee's position open indefinitely during absence due to disability. The right of a Board to terminate an employee "solely because of [her] disability and consequent inability to do the job," although unquestionably work related, has been judicially established. Theodore v Dover Bd. of ED., 183 NJ Super 407, 411 (App. Div. 1982). In addition, R-7 in evidence lists numerous other bus drivers and aides who have filed workers compensation claims. None have been penalized therefor.

In dismissing Laning, the school district relied on her attendance. The facts available to the Board as of June 13, 1988, were that petitioner had been out on disability for most of the 1987-88 school year. At best, there was only a "possibility" that she might be able to return to work shortly. Further, the Board's action is supported by petitioner's own acknowledgement that she was still not well enough to work by July 27, 1988.

*] In addition, the Board's action may very well have been in retaliation for Mrs. Laning's having filed a workman's compensation claim. Pierce v. Ortho. such retaliatory action is clearly illegal. [Petitioner's brief at 24-25]

A similar fact situation was presented in Hargrove v Bridgewater-Raritan Regional School District, C. Dec. March 13, 1986. The employee in that case, a janitor, had been out on workers compensation for an extended period. His physician wrote in May that the employee would be able to return to work October 1. On September 3, the physician wrote again, this time extending the disability period to November 1. The Board declined to hold petitioner's position open any longer, and terminated his employment effective October 1, 1985. The Commissioner upheld the Board's action based on the employee's lack of medical fitness to perform the duties, as of the date of termination. The same is true here, and the Board's action should be upheld. [Respondent's brief at 23-26]

I **CONCLUDE**, substantially for the reasons advanced by the respondent Board, that Rose Laning's termination was not arbitrary, capricious, or unlawful in that it has not been proven to have been an action taken in retaliation for filing of a Workers Compensation claim, and also had a reasonable basis in the fact in that there was a legitimate question as to petitioner Laning's ability to return to work, as late as July of 1988. The Board's action was based on this uncertainty and its need to obtain a full staff of bus drivers physically capable of doing the job. Under these circumstances, I **CONCLUDE** that Rose Laning's termination was not arbitrary, capricious or unreasonable.

(5) Remedy as to Carl Inglese

I **CONCLUDE** that the appropriate remedy of the Board's arbitrary, capricious and unreasonable dismissal of Carl Inglese is reinstatement, with backpay mitigated by any income received during the period of dismissal.

(6) Open Public Meetings Act

The petitioner's argue as follows:

D. The Board's Actions To All Petitioners Violated The Open Public Meetings Act.

N.J.S.[sic]A. 10:4-12(b) (8) guaranties that a public employee who may be adversely affected by a personnel action or decision of his employer has (1) a right to privacy, that is, to a nonpublic discussion at a closed meeting, and (2) a right to a public discussion at an open meeting upon his request in writing. Oliveri v. Carlstadt - East Rutherford Board

of Ed., 160 N.J. Super. 131,133 (App. Div. 1978). It is undisputed that here petitioner were never given notice of the June 13, 1988 meeting, at which the decision to terminate them was made. Implicit in this fact is that they were never given the choice as to whether any discussion concerning them could be held publicly. See Oliveri, Supra., 160 N.J. Super. at 135. Alternatively, if at the meeting there was public discussion of them, they had the right to request that this be done privately. Under either situation, a violation of the open public meetings occurred. [Petitioner brief at 25-26]

The respondent replies:

NO VIOLATION OF THE OPEN PUBLIC MEETINGS ACT HAS BEEN SHOWN.

Respondent admits that petitioners were not notified prior to the June 13, 1988, Board meeting. But there is nothing in case law or statute which would require the Board to give such notice. Compare NJSA 10:4-12 (a) (8); Rice v Union Co. Reg. H.S. Bd. of Ed., 155 N.J. Super 64 (App. Div.) and Jamison v Morris Sch. Dist. Bd. of Ed., 198 N.J. Super 411 (App. Div. 1985) holding that notice is required only if the Board meets to discuss the employees in closed session. Here there is no evidence that the Board met in closed session at any time relative to petitioners' dismissals. [Respondent's brief at 29]

I agree with the petitioners' argument that the Board was required to notify them prior to the meeting on June 13, 1988, at which their terminations were voted upon and so CONCLUDE. But, I further CONCLUDE that this violation does not invalidate the action taken at that meeting, although it did preclude the petitioners from requesting that any public discussion of their termination take place in private, or, in the alternative, that any discussion concerning them be held publicly. As the Board points out, there is no evidence that it met in closed session at any time relative to the petitioners' dismissal. There is also no evidence of public discussion of termination. Apparently, there was only a motion to terminate based on written recommendations and a vote to terminate on that basis. The Board is legally required to vote in public session to terminate employees, and it did so in this instance. Petitioners did not have the right to request that the Board's vote to terminate be conducted in closed session.

(7) Severance Benefits

On this point, the respondent Board argues:

PETITIONERS HAVE NOT SHOWN THEIR ENTITLEMENT TO ANY SEVERANCE BENEFITS UNDER EITHER STATUTE OR CONTRACT.

Petitioners produced no proofs at hearing, other than the number of sick days that they had left when they were dismissed. Under the collective bargaining agreement, only employees who retire under PERS after completing 15 years of service in Ewing Township are entitled to receive any payment for unused, accumulated sick leave. P-1, paragraph 4.1(f). None of the petitioners meets either of these criteria. [Respondent's brief at 30]

Petitioners' make no written argument on this point. I agree with the Board that the petitioners have not established entitlement to any severance benefits under statute or contract and so **CONCLUDE**, substantially for the reasons set forth by the Board in its brief.

DISPOSITION

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that petitioner Carl Inglese shall be reinstated to his position as a bus driver employed by the Ewing Township Board of Education, with backpay mitigated by income received during the period of dismissal. It is further **ORDERED** that the petition of Rose A. Laning for reinstatement is **DENIED** for the reasons set forth above. It is further **ORDERED** that the petitioner's allegation of violation of the Open Public Meetings Act and their claim of entitlement to severance benefits is **DENIED** for the reasons set forth above.

Under the terms of consolidation, PERC is to consider and decide this matter first, after which any remaining issues will be resolved by the Commissioner of Education.

I hereby **FILE** this Initial Decision with **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for consideration.

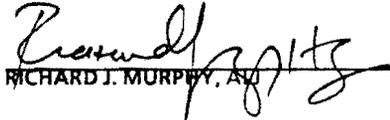
This recommended decision may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION**, which by law is authorized to make the final decision on all issues within the scope of its predominant interest. If the **Public Employment Relations Commission** does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHAIRMAN OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, 495 West State Street, CN 429, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to *N.J.A.C. 1:1-17.8*, upon rendering its final decision **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall forward the record, including this recommended decision and its final decision, to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its statutory grant of authority.

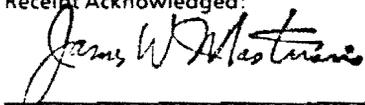
Upon transmitting the record, **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall, pursuant to *N.J.A.C. 1:1-17.8(c)* request an extension to permit the rendering of a final decision by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** within forty-five (45) days of the predominant agency decision. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

DATE Jan. 17, 1991


RICHARD J. MURPHY, ESQ.

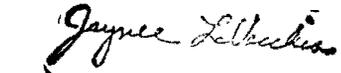
Receipt Acknowledged:

DATE Jan. 22, 1991


PUBLIC EMPLOYMENT RELATIONS COMMISSION

Mailed to Parties:

DATE JAN 29 1991


OFFICE OF ADMINISTRATIVE LAW

/ct

List of Witnesses

For Petitioner:

Carl Inglese
Rose Laning
Florine Warner
Ruth Tantum

For Respondent:

Alexander Jacobs, III
Dr. Jon B. Morgan
Doris Hahn

List of Exhibits

For Petitioner:

P-1 Collective Bargaining Agreements 1987-88
P-1a Collective Bargaining Agreements 1981-83
P-1b Collective Bargaining Agreements 1979-81
P-2 Memo Cade to Hahn, dated November 26, 1980
P-3 Memo Hahn to Gusz, dated December 1, 1980
P-4 Memo Hahn to Gusz, dated December 7, 1983
P-5 Memo Hahn to Inglese, dated January 22, 1988
P-6 Memo Hahn to Inglese, dated January 27, 1988
P-7 (Not Admitted)
P-8 Memo Hahn to Inglese, dated March 3, 1988
P-9 Memo Hahn to Inglese, dated March 15, 1988
P-10 Memo Hahn to Inglese, dated March 16, 1988
P-11 Grievance filed by Inglese, dated March 16, 1988
P-12 Memo Hahn to Inglese, dated March 17, 1988
P-13 Letter Morgan to Inglese, termination, dated June 15, 1988
P-14 Evaluation Inglese, dated May 31, 1984
P-15 Evaluation Inglese, dated November 19, 1985
P-16 Evaluation Inglese, dated May 22, 1986

- P-17 Evaluation Inglese, dated November 20, 1987
- P-18 Inglese's response, dated March 27, 1988
- P-19 Evaluation, dated March 18, 1988
- P-20 Inglese's response, dated March 27, 1988
- P-21 Absence Record-Warner, from July 1, 1982 to June 30, 1983
- P-22 Absence Record-Warner, from July 1, 1983 to June 30, 1984
- P-23 Memo Personnel Office to Warner sick days, dated October 28, 1986
- P-24 Change or Display as of July 1, 1982, Warner
- P-25 Absence Record for Warner 1987-88
- P-26 Attendance sheet printout for Warner
- P-27 Absence Record for Warner, from 197-88
- P-28 Letter Personnel Office to Warner, dated April 3, 1989
- P-29 Letter Morgan to Warner, dated June 15, 1988
- P-30 (Not Admitted)
- P-31 Evaluation for Warner, dated December 1, 1980
- P-32 Evaluation for Warner, dated May 29, 1981
- P-33 Evaluation for Warner, dated November 30, 1981
- P-34 Evaluation for Warner, dated November 3, 1982
- P-35 Evaluation for Warner, dated April 14, 1983
- P-36 Evaluation for Warner, dated May 31, 1984
- P-37 Evaluation for Warner, dated November 20, 1985
- P-38 Evaluation for Warner, dated May 23, 1986
- P-40 Evaluation for Warner, dated November 18, 1987
- P-41 Letter Cade to Warner, dated July 7, 1981
- P-42 Letter to Dr. Francis & Bd. member of parent, dated May 24, 1985
- P-43 Memo Cade to Laning, Accumulated sick days, dated August 10, 1981
- P-44 Letter Personnel Office to Laning accumulated sick days, dated September 22, 1982
- P-45 Letter Personnel Office to Laning accumulated sick days, dated October 15, 1985
- P-46 Attendance record print out of Laning from 1985-86
- P-47 Memo Personnel Office to Laning accumulated sick days, dated October 28, 1986
- P-48 Attendance record print out of Laning from 1986-87
- P-49 Attendance sheet print out of Laning
- P-50 Attendance record print out of Laning from 1987-88

- P-51 Employees' Report (Accident) for Laning, dated October 23, 1987
- P-52 Doctor's note from Laning, dated May 3, 1988
- P-53 Letter Morgan to Laning (termination), dated June 14, 1988
- P-54 Letter Rasmussen to Stark & Stark, dated July 27, 1988
- P-55 Evaluation of Laning, dated December 1, 1980
- P-56 Evaluation of Laning, dated May 29, 1981
- P-57 Evaluation of Laning, dated November 30, 1981
- P-58 Evaluation of Laning, dated November 4, 1982
- P-59 Evaluation of Laning, dated May 18, 1983
- P-60 Evaluation of Laning, dated May 30, 1984
- P-61 Evaluation of Laning, dated November 17, 1985
- P-62 Evaluation of Laning, dated May 23, 1986
- P-63 Evaluation of Laning, dated November 20, 1987
- P-64 Evaluation of Laning, dated March 18, 1988
- P-65a Board's Answers to Interrogatories (No. 9 - Inglese)
- P-65b Board's Answers to Interrogatories (No. 9 - Laning)
- P-65c Board's Answers to Interrogatories (No. 9 - Warner)

For Respondent:

- R-1 Note from Dr. Giangiano for Rose Laning
- R-2 Two memos in re Rose Laning from Dr. Jenkins, dated September 1986 and Dr. Levin, dated February 3, 1986
- R-3 Rose Laning notice re exhausted sick leave
- R-4 Rose Laning notice re exhausted sick leave
- R-5 Medical notes and documents for Rose Laning, dated October 29, 1987 through July 1988
- R-6 Bus Driver's Salary Guide
- R-7 List of Workers Compensation cases
- R-8 1984-85 Absence Record of Rose Laning, dated September 1, 1980
- R-9 Laning's initial employment memo
- R-10 Warner's initial employment memo
- R-11 (same as P-3) December 1, 1988 memo, Hahn to Gusz
- R-12 Route packages.
- R-13 Pennington School Closings and Warner days off
- R-14 Other Warner absences (handwritten)

OAL DKT. NOS. EDU 6671-88 AND PRC 1751-89 (CONSOLIDATED)

CARL INGLESE, ROSE A. LANING, AND :
THE EWING TOWNSHIP BUS DRIVERS' :
ASSOCIATION, :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF EWING, MERCER COUNTY, :
RESPONDENT. :
:

The record and initial decision of this consolidated matter, in which the Public Employment Relations Commission (PERC) has been held to have predominant interest, have been reviewed. The Board filed timely exceptions to the initial decision, asking that the exceptions be considered by both PERC and the Commissioner of Education.

The Board excepts only to those portions of the initial decision pertaining to the termination of Carl Inglese, wherein the ALJ concluded that Mr. Inglese's termination was in retaliation for union activities constituting, inter alia, an arbitrary Board action. The Board reiterates that argument from its post-hearing brief, which was quoted in the initial decision at page 28 stating:

RESPONDENT'S NONRENEWAL OF PETITIONER INGLESE'S
CONTRACT WAS A LEGITIMATE EXERCISE OF ITS
DISCRETION, BASED ON SOUND, NONARBITRARY AND
NONCAPRICIOUS REASONS.

The Board would ask that the Commissioner apply his standard of review to this matter, revise the ALJ's findings of fact,

particularly as set forth in its exceptions brief, and conclude that the Board's reasons for termination were nonarbitrary.

More specifically, the Board claims the initial decision fails to satisfy the standards of fact finding extant in such cases as State Dept. of Health v. Tegnazian, 194 N.J. Super. 435, 443, 446-447, 448-449, 450 (App. Div. 1984). The Board avers that with the exception of two sentences, the ALJ's findings of fact are a "regurgitation of one side or the other's brief." (Exceptions, at p. 6) It claims that based on the single sentence written by the ALJ at the bottom of page 12, it must conclude that the ALJ found no factual disputes. The Board advances the position that to the contrary, the case is replete with conflicts in testimony which the ALJ did not address.

The Board first claims that contrary to the ALJ's finding, it is hard to credit Inglese's statement that he gave the track coach his home phone number, citing Mrs. Hahn's testimony in rebuttal. The Board suggests that the ALJ erred in evaluating the incident as one "largely a matter of miscommunication, as opposed to any question of dereliction of duty or failure to follow instructions," (Exceptions at p. 7, quoting the initial decision at page 26). It claims instead that if there was a communication failure, it was Mr. Inglese's that resulted in the coach having to contact Mrs. Hahn for transportation home. Moreover, the Board contends, Mr. Inglese had no permission to drive his bus to his home in Hamilton from Hightstown while on duty with the track team. It adds that the employer has the right to hold the employee accountable for such failures.

The Board next claims that the ALJ erred in dismissing Mr. Inglese's admitted failure to perform an assigned duty as grounds for discipline by concluding that Mr. Inglese had explained his mistake. The Board poses the question as to whether such conclusion means that in the future, an employee cannot be disciplined for failing to show up for an assignment, so long as he has a credible excuse about why he failed to perform the task. Moreover, the Board contends that as a matter of fact petitioner missed his run and, further, that his purported explanation, credible or not, cannot erase the dereliction in duty.

As to the zoo trip, the Board submits that the ALJ failed to set forth the critical testimony from Assistant Supervisor Jacobs who stated that he directed Mr. Inglese to return the children to school first, before going to the maintenance yard to drop off Jacobs, the mechanic, and the tools. The Board cites the transcript at T84-86 in this regard. It adds that the same witness testified that dropping children off first was standard practice, citing T85 in this regard. It submits that the Commissioner should find as a fact that Mr. Inglese failed to follow a specific directive of his superior and that his actions also warranted an employer finding that he had used poor judgment.

Citing the transcript in support of its versions of the facts which transpired on March 11, 1988 the Board proposes that the ALJ missed the sequence of events surrounding petitioner's encounter with Mrs. Hahn at the March meeting and that he distorted the facts, citing the initial decision at pages 25-27. Rather, the Board submits:

Hahn's memo (P-10) was not aimed at Inglese's filing of a grievance or at his complaints about equalization of extra work (both of which are concededly protected activities). What upset her, and justifiably so, was his accusing her, behind her back, of lying at the staff meeting. And that is not protected activity under the Act. (emphasis in text) (Exceptions, at p. 11)

The Board suggests it is clear that P-10 is merely a memorialization of a verbal reprimand given two days before Mr. Inglese filed his grievance. There is simply no causal connection at all to warrant a finding that P-10 was in retaliation for a yet-to-be-filed grievance about extra work, the Board avers.

Finally, the Board claims his nonrenewal was not suspiciously timed with respect to an organized drive, ongoing negotiations or a critical grievance. Instead, the Board claims, he was terminated for cause along with two other employees at a time when the administration had undergone a major reorganization and was conducting a thorough review of the performance of all its bus driver employees. It cites T145-148; 2T 56-62, 76-81 in support of this position. Further, the Board notes, Mr. Inglese's service as Union President ended in 1987 and that, of his own admission, he was never harassed while Union President, citing T58-59 for support of this claim.

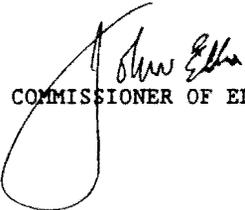
The Board summarizes by stating that the employer here has shown that there were independent reasons justifying Mr. Inglese's dismissal, such that the same decision would have been reached even in the absence of the protected activity. In this regard, the Board relies on the four instances of misconduct discussed above to support its dismissal of Mr. Inglese. The Board seeks a finding by the Commissioner that its reasons for terminating Mr. Inglese were

nonarbitrary. In all other respects it submits the initial decision should be affirmed.

Upon a careful and independent review of this matter, the Commissioner acknowledges that the issues before him involve whether the Board's action in dismissing petitioners under the education laws was arbitrary, capricious or unreasonable. However, inasmuch as PERC enjoyed primary jurisdiction in this case, the determination by PERC finding Mr. Inglese's dismissal was a result of his engaging in protected activities makes it unnecessary to address the issue of whether such Board action was arbitrary, capricious or unreasonable.

Accordingly, the Commissioner affirms the findings of the Office of Administrative Law directing Mr. Inglese's reinstatement with back pay, less any income earned since his dismissal. In the absence of exceptions, the Commissioner likewise agrees with the conclusions and findings of the ALJ relating to Ms. Laning. Her claim is therefore dismissed, with prejudice. Finally, he concurs with the ALJ's assessment of the Open Public Meetings Act as applied to the facts of this matter.

Accordingly, for the reasons expressed in the initial decision, as well as for those contained in the PERC decision in this matter dated February 27, 1991, the initial decision is adopted, in its entirety.


COMMISSIONER OF EDUCATION

APRIL 15, 1991

DATE OF MAILING - APRIL 15, 1991



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5822-90

AGENCY DKT. NO. 177-6/90

**BOARD OF EDUCATION OF THE TOWNSHIP
OF BARNEGAT,**

Petitioner,

v.

**MAYOR AND TOWNSHIP COMMITTEE OF
THE TOWNSHIP OF BARNEGAT, OCEAN
COUNTY,**

Respondent.

Paul J. Carr, Esq., for petitioner (Gelzer, Kelaheer, Shea, Novy & Carr,
attorneys)

Thomas G. Gannon, Esq., for respondent (Hiring, Hoffman, Garvey &
Gannon, attorneys)

Record Closed: January 15, 1991

Decided: February 25, 1991

BEFORE STEVEN L. LEFELT, ALJ:

The Barnegat Board of Education adopted and submitted to the voters of the Township of Barnegat, Ocean County, a proposed 1990-1991 school budget, which included \$9,438,965.50 for current expense and \$154,144.35 for capital expense. This budget was rejected by a majority of the voters on April 24, 1990. In accordance with *N.J.S.A. 18A:22-37*, the budget was then submitted to the Mayor and Township Committee of Barnegat which cut \$307,049 from current expense and \$106,650 from capital expense. (As explained below, the Township actually cut \$306,999 from current expense.) Thus, the current budget is set at \$9,131,966.50 for current expense and \$47,494.35 for capital expense. Therefore, the amount of money in dispute in this case is \$413,649.

New Jersey Is An Equal Opportunity Employer

At a Board of Education meeting held on May 14, 1990, a resolution was passed authorizing an appeal of the 1990-1991 school budget and the Board served a Notice of Intention to Appeal upon the Township on May 15, 1990. A Petition of Appeal was filed with the Commissioner of the Department of Education by the Board on June 13, 1990 and the Township filed an Answer to Petition on July 12, 1990.

This matter was transmitted to the Office of Administrative Law on July 24, 1990 for a hearing pursuant to *N.J.S.A. 52:14B-1* and *N.J.S.A. 52:14F-1* et seq. Several unsuccessful settlement conferences were held through the end of December 1990.

The evidentiary hearing was held on January 14, 1991, continued to January 15 and concluded on that date. After the record closed, the Township was provided an opportunity to correct its Reasons for Reduction and also to submit the final Barnegat Board of Education Budget Report for last year. (I have marked the Reasons R-2 and the Budget Report R-3.)

This district sends its high school students to Southern Regional and contains four schools: Elizabeth V. Edwards K-5; Lillian M. Dunfee K-5; Cecil S. Collins K-5; and Russel O. Brackman 6-8, which was opened in September 1990.

In evaluating the Township's \$404,999 reductions I must be guided by three concerns: "(1) fulfillment of minimum educational standards under the 'thorough and efficient' constitutional mandate; (2) negating procedural or substantive arbitrariness; and (3) fulfillment of mandatory legislative and administrative educational standards." See, *Deptford Board of Education v. Deptford Mayor and Council*, 116 N.J. 305, 313 (1989). Applying this standard, I will address the reductions chronologically by line item.

The following discussion is based upon written and oral testimony presented by Dr. Robert L. Horbelt, Superintendent, Gary Bahr, President of the Board, and Dolores Coulter, Township Committee member. Most of the basic evidentiary facts in this matter are uncontested. Accordingly, I FIND as fact the discussion relating to the Township's and Board's positions for each line item.

CURRENT EXPENSE LINE ITEMS

LINE ITEM J110B (\$12,700)

\$12,700 was budgeted to fund a new secretary for the Board office. The Township believes that increased computerization should eliminate the need for this position, especially since the pupil population in Barnegat has remained the same even though the Brackman Middle School was opened in September. The district constructed the Brackman school to cure overcrowding in the district, not to accommodate new students. Thus, the Township reasoned that the cut would not impact upon the District's educational program.

The Board argues that with the new school there is additional work such as purchase orders, payroll calculations, insurance benefits for employees, and additional deadlines mandated by the State and county. Furthermore, the Board argues that the secretary in question was supported by the Commissioner of Education when he approved a \$1,800,000 cap waiver for the District.

I do not find this cut to be arbitrary. The Township assumed that increased computerization would eliminate the need for this position and the Board's proofs do not challenge this assumption. Furthermore, the proofs do not specify whether any educational programs would be impaired by this cut. While adequate secretarial support is important for any school district, this Board office currently has five secretaries and several administrative support persons for a four-school district. While the Commissioner approved a rather sizable cap waiver, the Commissioner did not specifically focus on the issue I am confronting, whether to restore this cut after budget defeat. I do not believe that eliminating this one secretarial position will impair the efficient operation of the new school, which was the reason for the cap waiver. If the Board has already hired the additional secretary, this may present a collateral problem for the Board, but the reduction was reasonable. I do not see any impairment of the thorough and efficient mandate by this cut and accordingly, I sustain the Township for this reduction.

LINE ITEM J130A (\$1,000)

\$1,000 was budgeted so that Board members could attend a national convention. The Township believes that for the 1990-91 school year, elimination of this expense could relieve the tax burden caused by the opening of the new school.

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The Township also felt that some Board members who attend the Atlantic City convention could commute and reduce the expense associated with this convention.

The Board basically argues that attendance at conventions by non-professional educators (Board members) is the only source of knowledge concerning the Board's obligations, and attendance results in an overall savings to the District because of the knowledge acquired from attendance.

This line item already contains approximately \$20,000 for NJSBA dues and \$3,000 for the NJSBA convention. It also includes \$1,000 for workshops and \$500 for board dinners. I do not think the Township was arbitrary in this cut. The funds remaining in the line item should provide adequate networking opportunities for this year. The proofs relating to this cut do not establish any adverse implications to thorough and efficient obligations or specific educational programs. Accordingly, I sustain this cut.

LINE ITEM J130B (\$3,800)

In this line item, the Township zeroed in on an apparent \$5,200 increase from 1989-90 to this year. In 1989-90 the Board had budgeted \$14,300 for Board Secretary expenses. For this school year, the Board budgeted \$19,500. The Township reasoned that postage will likely increase, but when it reviewed the actual expenditures from this line item for the end of 1989 it found an estimated balance of \$7,858.43. The Township did not believe that this was the year to "bulk up inventory."

The Board claims that the increase for office supplies and postage is necessitated because of a substantial reduction in inventory, which required the bulk repurchasing of district-wide Board office forms and vouchers, computer paper, writing instruments, etc. Since most of the items are bulk ordered, the budgeted amount anticipates increased cost as well as increased quantity needs.

When considering the Barnegat Board Budget Report, an accounting document, we see that at the end of last year, of the \$15,300 budgeted for office supplies and postage, the Board had remaining \$1,344.96. (R-2) Since the Board had over \$1,000 left from last year and still increased this account by over \$5,000 for 1990-91, I believe the Township was reasonable in making this cut. Since no educational goals will be jeopardized, it is sustained.

LINE ITEM J130D (\$500)

The Township cut \$500 from \$2,500 budgeted for election expenses. It claimed that "only \$1,780 was expended" last year from the \$2,500 budgeted.

The Board claimed it did not increase the 1990-91 budgeted amount over 1989-90 and it anticipates, though this has not yet been determined for the April 1991 elections, "that with the opening of a new school, there will be an additional facility involving additional machines and election workers and ballots, along with advertising."

The proofs do not establish any geographic necessity for establishing a new polling place in the new middle school. There is nothing in the proofs that would allow me to conclude that \$2,000 would not be more than sufficient to run an adequate election. Of the \$2,500 budgeted for 1989-90, the Board had remaining \$1,190.38 at the end of the school year. (R-2) Accordingly, this cut is not arbitrary, is clearly not related to any educational program or to a thorough and efficient education and is therefore sustained.

LINE ITEM J130N (\$3,800)

Here, the Township cut convention expenses (other than the NJSBA convention) for the Superintendent and Assistant Superintendent because of the increased expenses caused by the new school. The Township felt that the district had been fortunate in attending conventions each year. Given the large budget increase for this year, the Township believed convention attendance could be forgone for this one year. Since \$3,600 was budgeted for convention attendance, the additional \$200 must come from \$1,800 budgeted for the Superintendent and Assistant Superintendent petty cash.

The Board believes this cut directly relates to curriculum and programs since attendance is a vital source of information for both program and curriculum development, especially as it relates to the new middle school.

Since the middle school program has been established, curriculum and program assistance must already have been obtained from previous convention attendance. There are other less costly ways to obtain additional curriculum and program ideas for a new middle school. I agree with the Township that this reduction for this one year will not adversely impact on thorough and efficient education or the fulfillment of any other educational standard. This reduction was not arbitrary.

LINE ITEM J213 (\$11,400)

The Township claims the opening of the Brackman school dramatically increased the local tax burden and therefore it cut "a percentage" amounting to \$11,400 from overtime for field trips, summer curriculum development, writing consultants and the computer camp.

The Board agrees that the new school dramatically increased the local tax burden. However, it argues that overtime is necessary for students to travel to and from field trips which are scheduled for example to Baltimore's Inner Harbor/Fort McHenry and the Statue of Liberty. Summer curriculum development is a vital beginning step in the process of developing curriculum. Without the summer start, the Board asserts it would be impossible to complete curriculum development during the school year. Writing consultants are a vital part of the district-wide writing program and the Board has determined that computer knowledge is a district-wide commitment. The computer camps enable students to enhance their abilities to utilize the computer within the curriculum.

Here, the Township admittedly cut a percentage from the line item and highlighted certain areas in which it thought reductions could be made so the Board could decide how best to implement the reduction. In this way the Township attempted to avoid impacting upon the educational program. When reviewing the actual figures, however, it is difficult to discern how the full \$11,400 was to be reduced without impairing the educational program. In 1990-91 the Board budgeted \$12,280 for overtime field trips compared with \$9,184 in 1989-90. The writing consultants line was increased \$900 from 1989-90 and the 5th and 6th-grade computer camp was increased from \$3,360 to \$4,800. Summer curriculum development was increased from \$5,200 to \$9,600. When all of the increases are added they equal \$9,836. The percentage selected for the reduction appears arbitrary.

With normal inflation you can expect increases in overtime, writing consultant fees and computer camp expenses. With the new Brackman Middle School, curriculum development will have an increased importance, especially if adjustments are to be made to the curriculum after the first year of operation. Accordingly, I believe these budgeted expenditures relate to educational opportunities and are important to thorough and efficient education, *i.e.*, writing, curriculum development, computer education and even field trips, which can play an essential broadening and enhancement role especially for young children. Accordingly, I believe the Township's percentage to be arbitrary and the cut adverse

to important educational concerns. Therefore, \$11,400 should be restored to the budget.

LINE ITEM J215 (\$12,900)

The Township believed the secretarial workload would increase to a degree with the new school, but should decrease in the other schools because students were being moved into the new facility and no new students were added. The Township therefore cut \$12,900 because it concluded that one new secretary should be hired and one moved from another school to service the Brackman Middle School.

The Board pointed out that moving the students might reduce the work load, however, that load had been extremely overburdensome already. The Township admitted that two secretaries were needed for the new school. However, the Board claimed it could not remove a secretary and abandon various functions like telephones, permanent record folders, admission of students, transfers of students, scheduling, etc. Furthermore, the Board argued that the Commissioner already approved the secretary in the cap waiver.

The cap waiver decision is not controlling here and I agree with the Township that 12-13 secretaries for four schools seems adequate. I do not follow the logic of the Board's argument that school secretarial functions are not rendered less burdensome when overcrowding is reduced and student populations decreased. If the secretaries had been overburdened, the need for another secretary should be reevaluated after this year's experience in the no-longer-overcrowded schools. This reduction is not arbitrary and no argument has been made that the program or thorough and efficient education would be impaired. I sustain the \$12,900 reduction.

LINE ITEM J230 (\$24,449)

The Township cut \$24,449 for this line item because books could be moved from the Collins school where the 7th and 8th graders had been housed to the new school. Book expenditures could be phased in and periodicals also reduced from \$6,900 to \$2,000. Also audio visual (A.V.) materials could be borrowed without inconvenience, reducing another \$2,499. Finally, general library supplies could be reduced to \$2,000 since there was a \$7,000 increase over last year's budget for this item.

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The Board points out that the substantial increases in library books, periodicals, A.V. materials and library supplies represent the start-up costs for the Brackman Middle School. The Commissioner allowed the cap limit to be exceeded by \$95,156 in these line items, after he considered these start-up costs. Library books, A.V. aids, periodicals and library supplies cannot be easily shared. All library materials and A.V. materials attributable to the 7th and 8th grades were moved, but this left a substantial deficiency in the new library and the Board wishes to have a working library in the new school. To share A.V. aids the materials would have to be transported approximately 500 to 600 yards across athletic fields, parking lots, and the travel portion of roadways through inclement weather throughout the school year several times during the day. This would expose students and employees to safety hazards.

First, the reduction adds to \$24,449 and not the \$24,499 claimed by the Township in its May 12, 1990 Reasons for Reduction. (R-2) For library books, after the Township's \$12,150 cut is subtracted, the budget still retains \$63,686 for these purchases. Here, I believe that given the rejection of this budget by the voters, it was not unreasonable to expect the Board to phase-in book purchases. Since the books that were previously being used by the 7th and 8th graders have been transferred to the new school, I do not see an immediate impairment of the program. With the periodicals, I also do not believe it unreasonable for the Township to expect some reductions in this account. However, since the Brackman school is just starting, I believe the full cut will impair periodical acquisition unreasonably. Accordingly, I believe this account should be reduced \$2,000 to \$4,900. The Township should understand that the acquisition of books and periodicals for the library is an important component of thorough and efficient education and therefore additional expenditures will have to be incurred in subsequent years. These expenses are only deferred.

A fully-functioning library, however, requires its own A.V. materials and supplies. Supplies cannot be shared. With regard to the A.V. materials, they cannot be safely shared given the physical separation between the Collins and Brackman schools. The effort necessary to schedule the sharing of A.V. materials would not be worth the amount cut. Given the normal working of schools, the schedules would not be 100% effective and some last-minute transfers would be necessary. I do not believe this is appropriate. Accordingly, I approve the \$12,150 reduction for books and \$2,000 reduction for periodicals. I restore \$10,299.

LINE ITEM J240 (\$60,000)

The Township cut \$60,000 after it observed that teaching supplies had escalated from \$313,650 last year to \$583,418 this year. (Hammett's order increased from \$75,000 to \$193,168.) Even allowing for the new school and new program, the Township believed a \$60,000 cut appropriate.

The Board claims the Commissioner approved a cap waiver of \$636,677 to allow for the start-up of the new school. Also, the Board owns a warehouse and achieves savings by purchasing supplies in bulk. The supplies had run low and it was necessary to resupply and to start-up the new school.

Obviously, having adequate teaching supplies is related to thorough and efficient education. School districts cannot have an effective program without adequate supplies. In 1989-90 for three schools, Hammett's expenses were set at \$75,000. In 1991 with four schools this expense was set at \$136,318. Additionally, purchases for the warehouse from Hammetts amounted to \$56,850. Presumably, the \$60,000 cut by the Township was to come from these two items.

The amount the Board budgeted for the four schools was based on "need" as reported by principals and teaching staff along with an estimated figure for normal cost increases. I believe the \$60,000 to be arbitrary given the precision with which other cuts were made in this case. However, I agree with the Township that this is not the year to stock a warehouse. I do not believe that warehousing supplies is necessary for thorough and efficient education or any other educational program, even if long-term economic savings are achieved. The record does not indicate whether any of the warehouse purchases were to be used this spring or at any other time during this school year. If these amounts had been established, I would have reconsidered the reasonableness of this cut. However, on the basis of this record and given the amounts budgeted, I approve a \$56,850 reduction and restore \$3,150.

LINE ITEM J250 (\$31,250)

The Township cut \$31,250 from this line item. They noted office supplies increased \$18,500 without the new school and after removing 6th grade classes from each building and the 7th and 8th grade classes from the Collins School. The Brackman Middle School was allocated \$13,365. The Superintendent's office supplies increased over the previous year by \$3,500. Assemblies increased overall and while they have educational value, perhaps they need not be as intense for this

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school year. The Township also believed that the principals and supervisors could cut back in their convention attendance.

The Board points out that this cut is an overall reduction which is not specifically targeted. Office supplies have increased in cost and volume because of the new building. Assemblies increased because of the availability of the new auditorium in the Brackman school. The District also increased assemblies because they had been restricted by available space in previous years and the District hoped to improve this deficiency in their program. Principal and supervisor dues and convention attendance is a contractual obligation established by past practice and the increase is approximately \$10,000, which corresponds directly with the three new administrators for the Brackman school. The Board again argues that attendance at conventions is vital for the District, especially with the new school.

In 1988-89 the District budgeted \$3,907 for office supplies at the Collins school. In 1990-91, the District budgeted \$19,089 for Collins even though the 7th and 8th grade classes were removed to Brackman. This is a \$15,182 increase that is largely unexplained. Also, office supplies for the Dunfee school appear to have been increased from \$5,502 to \$16,440, a total increase of \$10,938. The Brackman Middle School had only \$3,365 budgeted for office supplies and not the \$13,365 asserted by the Township in its May 12, 1990 statement of reasons. The Superintendent's office supplies were increased by \$3,500, almost triple the 1989-90 amount, again without explanation except for escalating costs and the new school. Some of these budgeted increases for office supplies appear to be excessive. While assemblies are important, especially for younger children, excluding the \$4,800 budgeted for Brackman assemblies, the assembly line item was increased by \$8,625. Some of these program enhancements can be phased in over time. Also, of the \$20,535 allocated for the principals and supervisors dues and convention expenses, the record does not reflect the proportion of dues to convention expense. The record also does not reflect what convention expense may be contractual. I have already stated that I believe that convention attendance can be cut back during this year without sacrificing educational quality. Just considering the amounts I have highlighted leads me to conclude that the reduction proposed by the Township for this line item is not arbitrary and will not impact upon through and efficient education or any mandatory educational program. I therefore affirm the reduction.

LINE ITEM J610 (\$30,000)

The Township cut \$30,000 because it contended that with 15 new custodians added to the 21 currently employed custodians, there should be less overtime earned if the Board properly schedules its work force.

The Board claimed that all overtime cannot be avoided by proper scheduling. Overtime is needed to address emergencies that occur outside the normal school day such as plumbing problems, loss of heat in the winter, snow removal and emergency alarms that are inexplicably activated. Furthermore, there is general carpentry, masonry and electrical work throughout the buildings that cannot be addressed while classes are in session. Thus, the need for overtime is based on incidents that occur without any relation to the numbers of custodians that are employed. This cut, if sustained, would result in \$10,000 less available for overtime than the previous school budget which did not include monies for the Brackman school. Additionally, the Brackman school opened only a week before the school year started and the maintenance and custodial staff was unable to prepare the building properly.

The Collins school contains approximately 40,000 square feet; the Edwards school, which was built in 1931, has approximately 10,000 square feet; and Dunfee contains approximately 25,000 square feet. The District owns three other structures with approximate square feet as follows: transportation complex, 2,400 square feet; warehouse, 2,400 square feet; administrative building, square footage is unknown. There are also approximately 30 feet between the transportation complex and the warehouse which houses the Child Study Team offices. Therefore, the District had 21 employees to care for approximately 80,000 square feet and has added 15 custodians to service the new building.

Based on the Township's testimony, it is apparent that at least one committeeperson believed that the District had been using 21 employees to cover three schools and that Brackman contained only 50,000 additional square feet. Consequently, one can imagine why the Township thought the 15 additional employees might be excessive and could handle many of the District's overtime needs. Based on the convincing testimony of Gary Bahr, President of the Board of Education who played an active role in the construction of Brackman, however, I **FIND** that the new school contains 112,000 square feet. Therefore, I do not believe the number of budgeted custodians is proportionately excessive.

In 1989-90 the District budgeted \$40,000 for overtime. It seeks \$60,000 for the 1990-91 school year when the District has expanded to include a facility that

almost doubles the square footage in the District. The record does not indicate whether all of last year's overtime was expended. However, R-2 indicates that the District ran a \$21,569 deficit in the custodian salary account. Furthermore, all of the schools are open until 11 pm each night. And contrary to the Township's argument, I believe that maintaining clean, safe and secure buildings is important for thorough and efficient education. In addition, I believe the Township's position was largely based on the mistaken idea that the numbers of custodians proportionately exceeded the need as measured by square footage. Consequently, I restore the \$30,000.

LINE ITEM 720B (\$30,000)

General repairs within this line item increased from \$25,000 in 1989-90 to \$40,000 for 1990-91. Even though the overall line item was reduced by \$17,869, the Township believed another \$5,000 could be eliminated from this line. Because the Brackman building was new it would have guaranties and warranties which should cover much of the construction and heat, plumbing and other systems. Also, since Brackman was new it should not have too many repair problems during its first year. In addition, \$25,000 to replace ceiling tiles in the Dunfee school was eliminated because the Township believed the tiles were merely water stained.

The Board clarified that it reduced this line item overall because it does not anticipate budgeted maintenance problems in a new school. The general repairs line item covers expenditures for repairs to buildings by personnel who are not on the District payroll. Since Brackman was opened only one week before school started, the Board believed it was reasonable to increase general repairs from \$25,000 to \$40,000. Additionally, Brackman has a state-of-the-art new heating system which relies on geothermal heat. This system was approved by the Departments of Energy and Education and is a novel concept. If this system malfunctions, it would necessitate substantial general repairs. The District also clarified that the tile replacement is part of its five-year maintenance program and is necessary because the tiles were drooping and presented a safety hazard for students in the facility. Furthermore, the ceiling tiles are interlocking one-foot-by-one-foot panels and thus it is not possible to replace one or more tiles without affecting the entire ceiling. L brackets have been installed to hold part of the ceiling because of safety concerns. The Superintendent is afraid the remaining tiles will fall, but is not sure when and believes the tiles should be replaced with a suspended ceiling. The District can do some of this work itself. According to the

Superintendent, the District can install the tiles after the tracks are installed. If the District were not to do a portion of this work itself, the cost would exceed the \$25,000 budgeted.

First, I do not believe the Board can justify the \$15,000 general repairs increase by the delay in opening Brackman since the District at the time the line item was budgeted did not know of this delay. Furthermore, no proofs were presented concerning any warranties or guaranties relating to the new heating system. Without these proofs, I would infer that major problems would be covered by warranty at least for the first year of operation. Consequently, I believe the \$5,000 reduction which left \$10,000 more for general repairs for this year than last was reasonable.

With regard to the ceiling tiles, I believe that the Township's reduction was mistakenly based on its belief that the tiles were merely discolored. This is apparently not the case and these tiles must be replaced for safety reasons. Consequently, I believe that the \$25,000 reduction which in effect deferred this replacement was unreasonable under the circumstances. I restore \$25,000 for the tile replacement and affirm the \$5,000 reduction in general repairs.

LINE ITEM 730C (\$65,200)

For this line item, the Township concluded that the Board could reduce items with the computer package, the mouse, mouse pad, some printers, terminals, chairs and any consumable items which could be added at a later date. The Township was aware that the Board had entered into a contract for these items but believed some items were being purchased beyond the scope of the contract. Electives, playground equipment and the playground equipment storage areas are other expenses that could be phased in at a later date. Therefore, the Township reduced this line item by \$65,200.

The Board responds by asserting it entered into a lease purchase agreement with Apple Computers Inc. for the furnishing of hardware and software including a service contract and all supplies for 48 months. According to the Township everything was covered in this deal at a substantially reduced cost. The amount of the contract is \$235,894 and cannot be diminished. After the four years, the District will own the computers for \$1. Under this lease the Board received close to 200 Macintosh computers. If the District had purchased all this equipment outright, it would have cost over one million dollars. To plan for this lease purchase a study was done by the District computer coordinator and one of the principals.

Also, the Board has established as a goal that all youngsters have the opportunity to be computer literate so they are capable of dealing with the modern world.

With regard to the other items reduced by the Township, the Board budgeted \$15,530 for electives which represents a program expansion for the 6th, 7th and 8th-grade students. Last year electives were not available because of the lack of available space. Some of the programs are home economics, vocational education, computers, library, music and earth science. These electives are part of the curriculum approved by the Board for this budget year and are being offered this semester. Finally, the playground equipment is located at Dunfee and Edwards schools and must be replaced because the old equipment is dangerous. It is broken, cut, bent and torn out of the ground. For Edwards, the district budgeted \$1,500 for the playground equipment. The District wishes to purchase for the Dunfee school one piece of equipment with monkey bars, rope, climber, etc., and the \$6,871 budgeted is an actual price.

Here, the amount budgeted for the computer package covers a lease purchase agreement that not only appears to make good economic sense but is an important means for the District to achieve one of its educational goals. Computer literacy in my opinion is a crucial part of a thorough and efficient education. The Board and District must be accorded a great deal of discretion in how to achieve this important educational goal. I believe that the Township's impression that items were being purchased beyond the contract, even if true, is an insufficient reason to hamper the achievement of this very important goal by budget reduction.

With regard to the elective program, electives are also a crucial means to keep youngsters interested in school and enthused about learning. Electives for many children are the reason they continue coming to school. Consequently, an effective elective program is important to thorough and efficient education and should not be impaired by budget cuts. Similarly, playground equipment for young children is an important aid to building sturdy bodies, one of the aims of primary physical education. To remove without replacing playground equipment because it is broken is an insufficient response to the children's needs. Unless the equipment is replaced, it gives the impression to the children that something that had been theirs has been removed and however wrongly, conveys an uncaring attitude. This should not be permitted to occur.

Consequently, for all of the above reasons, I restore the entire \$65,200.

LINE ITEM 740B (\$10,000)

The overall budget for this line item increased by \$28,780. Since the Township believed that the new school should not have many repairs at all, it reduced the line item by \$10,000.

The Board responds by explaining that it is not anticipated that a substantial portion of these expenses will be for the purchase of materials and parts in the new school. But, the Edwards school is approximately 60 years old; the Dunfee school is approximately 20 years old; and Collins is approximately 10 years old. This line item allows for the purchase of wood, lights, pipes, bathroom fixtures, and paint; maintenance of boilers; cleaning and waxing of floors; and general maintenance and upkeep of the buildings. Replacement of light bulbs alone in these facilities is substantial. Additionally, since before Brackman opened the District has had approximately 20 substandard classrooms which need attending.

In 1989-90 the District budgeted \$4,500 for maintenance to the then existing three schools. In 1990-91 the District expanded the total budgeted for these three schools by \$780, which seems modest especially if the District was concerned with substandard classrooms and asbestos removal as it claimed at the hearing. The District had also separately budgeted \$3,000 in this line item for Brackman signs. The amount the Township undoubtedly focused upon was an increase of \$25,000 for materials, parts, etc. The District increased the \$40,000 budgeted in 1989-90 to \$65,000 for 1990-91. Given the fact that the only major difference between this year and last is the addition of the Brackman school, for which the Board does not anticipate substantial expenses in this line item, I do not believe the Township's reduction was arbitrary. While there was testimony about substandard classrooms, a room can be substandard because of overcrowding, which admittedly was a problem in the District before Brackman opened. After the reduction, there still remains a \$15,000 increase for materials, parts, etc. If asbestos removal is necessary as the Superintendent contended at the hearing, I cannot believe that it would not have been specifically mentioned in the budget. Consequently, I sustain the \$10,000 reduction.

LINE ITEM 1020 (\$10,000)

The Township cut \$10,000 from trips and award banquets. It contended that there are many local areas of interest in Ocean County and the adjoining counties of Atlantic and Monmouth. Also, the previous year, the awards banquet had been held at a restaurant and the Township believed the banquet could be held

for less than \$6,240 by holding the banquet at the new school. The Township asserted that the banquet cost was almost \$10 per student and perhaps the District could eliminate the 6th-grade field trip.

The Board explained that many of the field trips are in adjoining counties and the awards banquet is held in a cafeteria within the District. The trips incur admission fees, payment to drivers and in some cases the necessity of private transportation carriers when the District can not afford the use of a substantial number of its school buses for the special trip. The \$6,240 includes a total of three awards banquets throughout the year, which will be held in the Brackman cafeteria and involve parents for the first time. In written testimony, the District Superintendent said: "Any further reductions [in this account] would severely impact the culminating activities of our educational programs."

First, as I have already indicated, field trips are an important part of an elementary school curriculum. They remain important for middle school students, and especially for 6th graders. The Township undoubtedly believed that the 6th-grade trip which was budgeted for \$5,563 could be eliminated as could an additional approximately \$4,500 from the Brackman awards banquet. The Township mistakenly assumed that the banquet was to be held in a restaurant, when actually the District planned on holding a banquet after each of three major sport seasons in the Brackman cafeteria and intended to involve parents in these activities. It is important to thorough and efficient education for districts to involve parents in school activities. Also, the Township's reduction in this line item was dependent upon its mistaken impression about the banquet location. Therefore, I find the reduction arbitrary and possibly detrimental to thorough and efficient education concerns. Consequently I restore the \$10,000.

CURRENT EXPENSE RECAPITULATION

The Township reduced the current expense budget by \$306,999. For the reasons explained above, I have restored \$155,049 and sustained \$151,950 in reductions.

CAPITAL EXPENSE LINE ITEM 1220

Elizabeth V. Edwards School (\$16,650)

Because enrollment was decreasing at the Edwards school, the Township did not believe additional parking spaces were necessary and they reduced the line item by \$8,000. The Township also concluded that the air conditioners for the cafeteria and library should be eliminated and further reduced the budget by \$8,650 for these items.

The Board counters by indicating that while Edwards had fewer students, the school had two additional teachers and two additional aides because special education classes were added to the building. Furthermore the building was built in 1931 as a high school with 10 teachers. Since the school was built, the Board constructed at the same site its office, warehouse, transportation compound and the Child Study Team office and all employees must park at this site. Now the teachers and bus drivers must park on adjoining side streets and the Board wishes to improve convenience and safety. The air conditioners are not needed during the school year, but they are needed during the hot summer months for PTA meetings, curriculum development, and other such activities.

The Township undoubtedly believed that the parking lot and air conditioner improvements were mostly for staff convenience. People had been making due for years and they could make due for another year. Without more significant evidence about safety problems associated with the parking situation, I cannot find this conclusion arbitrary. Consequently, I sustain the \$16,650 reduction.

Lillian M. Dunfee School (\$30,000)

The Township criticized the District's intention to spend \$40,000 to build a retaining wall to cure an erosion problem. The Township instead recommended that \$10,000 be spent on ground cover and that \$30,000 be cut.

The Board notes that the \$40,000 expenditure was to build two retaining walls, one along Barnegat Boulevard and the other along Bayside Avenue, which according to the Board also creates a safety problem when children sleigh towards Bayside Avenue. The Board asserts that various letters from the Department of Agriculture, Soil Conservation Service (Exhibits A and B), at least with regard to the Barnegat Boulevard site, "placed the district under a mandate to accomplish the suggested solutions." The District contends that ground cover is not enough to cure the problem and "does not comply with the mandate issued to the Board of

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Education by the Soil Conservation District." The \$40,000 will be insufficient to cover the materials necessary to accomplish what the Soil Conservation District suggested. But to save money, the Board entered into a joint venture with the Township to utilize in-house public works employees and equipment. But, even with the savings derived from this joint venture, there "will still be insufficient funds to accomplish purchasing materials for both sites with the allocated amount of \$40,000." At the hearing, the Superintendent claimed that both sites could be done for the \$40,000 with the joint venture. The Board also argues that it is inconsistent for the Township to enter into the joint venture and yet insist on cutting the funds from the budget.

It is obvious that soil erosion has been a problem at both of these locations for some time. No testimony was provided to describe exactly what was to be constructed at the sites and the exact costs of the projects are also unclear. (See Exhibit C.) I also do not read Exhibits A and B as "mandating" action. Conspicuous by their absence are timelines and threatened penalties, which I believe would be necessary to establish "mandates." Additionally, I do not believe that a retaining wall is the District's only option to prevent sleighing children from venturing onto Bayside Avenue. A sign, temporary rope barrier, bales of hay or other similar devices might provide adequate protection. However, I do not have to evaluate whether the proposed project makes sense. I merely decide that the Township's decision under these circumstances does not appear to be arbitrary and does not impair any educational programs. Consequently, I sustain the \$30,000 reduction.

Russell O. Brackman School (\$60,000)

The Township reduced the budget by \$20,000 because proposed fencing would not cover the entire field and therefore would not provide the anticipated security. The Township further reduced the budget by \$30,000 because providing an athletic building for storage of equipment is not necessary the first year of the new school. Athletic equipment storage can be handled as it is presently. Finally, \$10,000 was taken from the amount allotted to purchase athletic field bleachers since as of May 12, 1990 the fields had not yet been started.

The Board explains that it never intended to fence all of the Brackman fields. It wants to construct a fence to prevent access to the fields from a wooded section that is adjacent to a commercial zone. Brackman security persons do not frequent that remote portion of the property as much as other areas and the absence of the fence encourages persons with recreational vehicles to cut through the property at that location.

The Board further explains that the Brackman school with its several new athletic fields has necessitated an increase in maintenance equipment such as lawn mowers and also has required an increase in athletic equipment. Presently, some equipment is stored on Township recreation property and some field maintenance equipment is stored at the Superintendent's office. The District is storing lining machines, lawn mowers and tractors, equipment to operate a baseball pitching machine and goal nets, etc., "all over." Therefore, equipment must be trucked to the site. Also, the District is unable to store gasoline and other flammable material inside any school building. The District has been managing but now, since the addition of the Brackman school, there is much more equipment to be stored.

Finally, the Board claims that there are no bleacher facilities at any of the athletic fields and not only have the fields been started but they have been completed.

Based on the evidence, I believe that the Township cut \$20,000 for the fence because it misunderstood the reasons for the fence and \$10,000 for the bleachers because it assumed the fields would not be ready for this school year. The fence appears necessary to protect the fields from having vehicles ride over them and the bleachers are important to provide a safe place from which students and parents can observe athletic events. The new school also has increased substantially the maintenance equipment and athletic equipment owned by the District. Therefore, the Township's position that the District should be able to continue storing athletic equipment as it has been doing in the past is based on an incorrect assumption that the amount of equipment has not increased. Storing all of the Brackman school athletic and maintenance equipment in a safe and secure area is an important component of a properly-managed athletic program, which is part of a thorough and efficient education. Consequently, I restore the \$60,000 to this line item.

CAPITAL EXPENSE RECAPITULATION

The Township reduced the capital expense budget by approximately \$106,650. For the reasons explained above, I have restored \$60,000 and sustained \$46,650 in reductions.

Surplus Unavailability

In order to prevent a conclusion that large surplus amounts are available for this District to cover the relatively modest total cut that was accomplished by the Township, evidence was submitted concerning current obligations that will have to be paid from surplus. At the end of last year, the District's surplus was \$1,086,835. The District carried forward \$385,000 into this year's budget to offset the tax increase. This left \$701,835. Since the District sends its high school students to Southern Regional, it must pay tuition. On September 10, 1990, the District received notice of an extraordinarily high tuition adjustment due Southern Regional. (Exhibit E). Therefore, from the \$701,835 surplus must be subtracted the \$321,445 tuition adjustment which leaves the District with \$380,390. The District also committed \$197,000 to offset the tax rate for Brackman purchases above and beyond specifications. This leaves \$183,390 for surplus from which the District already knows it must expend at least \$67,000 to upgrade an existing underground gas tank (Exhibit F). This reduces the available surplus to \$116,390 from which the District knows it must pay approximately \$75,000 for Brackman construction change orders. Therefore, the operating surplus is believed to be at approximately \$41,390, to which would be added approximately \$7,000 in anticipated interest earned each month from invested money. The District also has several law suits pending against it for additional site work and the Superintendent asserted that he cannot anticipate any free balance from any other line items at the time of the hearing.

TOTAL AMOUNTS RESTORED OR REDUCED

For the reasons explained above, I restore \$155,049 to current expense and \$60,000 to capital expense, but affirm reductions of \$151,950 from current expense and \$46,650 from capital expense. The total Barnegat Board of Education budget after this appeal should include \$9,287,015.50 in current expense and \$107,494.35 in capital expense.

I hereby FILE this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

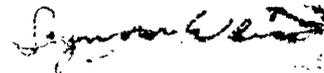
Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

3/27/91
Date


STEVEN L. LEFELT, ALJ

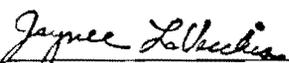
Receipt Acknowledged:

2/27/91
Date


DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 4 1991
Date


OFFICE OF ADMINISTRATIVE LAW

WITNESSES

FOR THE PETITIONER

Dr. Robert L. Horbelt
Gary Bahr

FOR THE RESPONDENT

Delores Coulter

EXHIBITS

FOR THE PETITIONER

- Exhibit A Letter dated June 8, 1990 from Ruben C. Keesee to Frank Servis, regarding Barnegat Boulevard School (RC&D) O&M Annual Inspection
- Exhibit B Inventory and Evaluation of Land, Water, and Related Resources, dated August 22, 1990 and signed by Ruben C. Keesee
- Exhibit C Letter dated August 22, 1990 from David C. Thomas, P.E., to Frank Servis, stating cost estimates for retaining wall on Barnegat Boulevard
- Exhibit D Cap waiver approval from the Commissioner, Department of Education, to Vincent Palmieri, dated March 30, 1990
- Exhibit E Letter dated September 10, 1990 from James A. Moran to Dorothy Carpo, enclosing Barnegat Tuition Adjustment 1988/1989
- Exhibit F Letter dated December 12, 1990 from Dorothy J. Carpo to Paul Carr, Esq., regarding bid opening for fuel tank modification
- Exhibit G 12 color photographs of Barnegat Boulevard and retaining wall
- Exhibit H Seven color photographs of Bayside Avenue sleigh riding hill

EXHIBITS UNMARKED but admitted into evidence FOR PETITIONER

1. A complete line item budget including actual expenditures for school year 1988/89, actual budget amount for school year 1989/90 and proposed budget for school year 1990/91 (as submitted to voters).
2. Amount of reduction by Barnegat Township Committee with written statements by the Board of Education explaining the necessity for thorough and efficient education.
3. Staffing numbers for school years 1989/90 and 1990/91.
4. Pupil enrollment by grade for school years 1988/89, 1989/90 and 1990/91.
5. Salary schedule for employees.
6. Number of schools and classrooms in each.
7. Costs for transportation for school years 1988/89, 1989/90 and 1990/91.
8. Tuition received and paid during 1988/89 and 1989/90.
9. Advertised budget for 1990/91 (See # 1 also).
10. Cap review fact sheet used for cap waiver granted by the Department of Education for school year 1990/91.

FOR THE RESPONDENT

- R-1 Barnegat Board of Education Budget Report dated 4/3/90
- R-2 Township of Barnegat May 12, 1990 Reasons for Reduction
- R-3 Barnegat Board of Education Budget Report dated 6/30/90

BOARD OF EDUCATION OF THE TOWN-	:	
SHIP OF BARNEGAT,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
MAYOR AND TOWNSHIP COMMITTEE OF	:	DECISION
THE TOWNSHIP OF BARNEGAT,	:	
OCEAN COUNTY,	:	
	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by the Board of Education and replies thereto by the Mayor and Township Committee (hereinafter "the Township") were timely filed pursuant to N.J.A.C. 1:1-18.4. Primary exceptions by the Township were untimely filed and have not been considered herein.

To facilitate discussion, each line item considered by the ALJ will be addressed separately by the Commissioner below.*

REDUCTIONS TO CURRENT EXPENSE ITEMS

1. Line Item J110B (\$12,700), new secretarial position at Board office, cut sustained, Initial Decision at p. 3.

The Board objects to the ALJ's having sustained this cut and reiterates its prior arguments relating both to need for the

* The Commissioner notes the Board's preliminary observation (Exception No. 1) that its actual level of surplus is even lower than projected by the ALJ on p. 20 of the initial decision.

position and to the cap waiver granted by the Commissioner. The township in turn urges affirmance of the ALJ's recommendation on the grounds that this cut poses no impairment to the district's ability to provide a thorough and efficient (hereinafter "T&E") education. (Exception and Reply No. 2)

Upon review, the Commissioner finds no evidence that he specifically reviewed and approved the proposed Board office position as part of the district's cap waiver request (Unmarked Exhibit No. 10). He further concurs with the ALJ that no need for this position was demonstrated so compelling as to compromise T&E education or significantly impair district operation by its absence. Accordingly, the Commissioner adopts the ALJ's recommendation that this cut be sustained.

2. Line Item J130A (\$1,000), board member attendance at a national convention, cut sustained, Initial Decision at p. 4.

The Board reiterates its prior arguments, noting that because there are no networking opportunities in the vicinity, national convention attendance on the part of Board members is crucial. The Township argues that no nexus between convention attendance and a T&E education has been demonstrated, so that this cut should be sustained. (Exception and Reply No. 3)

Upon review, the Commissioner concurs with the ALJ's recommendation to sustain this cut. He emphasizes, however, that he does so not because convention attendance is unnecessary or unimportant for Board members, but because the \$23,906 remaining in this account is specifically earmarked for NJSBA membership (which brings numerous no- and low-cost networking opportunities) and for Board member participation in state conventions and workshops.

These functions, used to advantage by the district and coupled with attendance at similar functions by administrators as discussed below, should adequately serve the legitimate need of Board members for instruction and information relating to adequate provisions of a T&E education in the district. Accordingly, this reduction is sustained.

3. Line Items J130B (\$3,800) and J130D (\$500), Board Secretary/election expenses, cuts sustained, Initial Decision at pp. 4-5.

The Board does not object to the ALJ's recommended cuts in these areas, which the Commissioner adopts for the reasons stated by the ALJ.

4. Line Item J130N (\$3,800), convention attendance by superintendent and assistant superintendent, cut sustained, Initial Decision at p. 5.

The Board objects that this money is necessary not only for T&E curriculum and program information, but also because convention attendance is an established past practice for the named administrators. The Township argues that no nexus between convention attendance and a T&E educational program was established and that the Board's past practice exception is without merit. (Exception and Reply No. 4)

Upon review, the Commissioner concurs with the ALJ that this cut is not unreasonable in view of the budget increases associated with the new school. Further given that the district's middle school program is already established, inability of administrators to attend conventions during this one year will not demonstrably impair provision of a T&E education. Finally, no evidence was proffered that would require the Commissioner to view

convention attendance as a contractual obligation not susceptible to budgetary reduction.

5. Line Item J213 (\$11,400), staff overtime for field trips, curriculum development, etc., cut restored, Initial Decision at pp. 6-7.

Upon review, the Commissioner concurs with the ALJ that the proposed reduction would negatively impact on district provision of T&E. Consequently this cut is restored for the reasons stated by the ALJ.

6. Line Item J215 (\$12,900), secretarial services, cut sustained, Initial Decision at p. 7.

The Board argues that the Commissioner's cap waiver decision, wherein a need for two* secretaries in the new school was approved, should control here, and that the Board cannot meet its need by hiring one secretary and transferring another from an existing position without disrupting the T&E operation of existing schools. In reply, the Township argues that the Commissioner's cap waiver decision was made in the context of a pre-budget proposal and that it should be binding only when the Commissioner specifically allocates funds to a specific job position, not where, as here, he waives line items which include a multiplicity of employees. (Exception and Reply No. 5)

Upon review, the Commissioner cannot concur with the ALJ that the Commissioner's cap waiver decision does not control with respect to this reduction. In its cap waiver application, the Board

* The Board's exceptions erroneously state that the Commissioner approved three secretaries as part of the cap waiver, when in actuality two positions were proposed and approved, as accurately reflected in the ALJ's discussion. See Unmarked Exhibits 1 and 10.

specifically requested two secretaries to be assigned to the newly opened school (Unmarked Exhibits No. 1, p. 10 and No. 10, Project 3--Schedule D). Inherent in the Commissioner's approval of the line item for this project was a determination that the specific needs enumerated therein could not be met by reallocating existing resources and that the proposed positions were necessary for district provision of a T&E education. N.J.S.A. 18A:7A-25, Exhibit D, Unmarked Exhibit No. 10 The Township in making this reduction, and the ALJ is sustaining it, have effectively substituted their judgment for that of the Commissioner in determining what is essential for a T&E education. That judgment having been made by the Commissioner in the prior cap waiver proceeding, it is not subject to review or upset here. Board of Education of Borough of Highlands v. Mayor and Council of the Borough of Highlands, Monmouth County, decided December 17, 1981; Board of Education of the City of Garfield v. City Council of the City of Garfield, Bergen County, decided March 27, 1986; Board of Education of the Borough of South River v. Mayor and Council of the Borough of South River, Middlesex County, decided November 20, 1986 Accordingly, the recommendation of the ALJ sustaining the Township's cut of \$12,900 is reversed and this amount restored to the district budget.

7. Line Item J230 (\$24,449), books, library and A.V. materials, \$14,150 sustained/\$10,299 restored, Initial Decision at pp. 7-8.

The Board argues that in permitting it to exceed cap by \$95,156 specifically to outfit the new school, the Commissioner reviewed and approved the educational specifications set forth by the Board; further, in so doing, he substantially reduced the Board's original request so that any additional reductions will

jeopardize provision of T&E at the new school. The Township reiterates its arguments with respect to the Commissioner's approval of general line items as opposed to specific expenditures in the context of a cap waiver. (Exception and Reply No. 6)

Upon consideration of this reduction, the Commissioner cannot concur with the ALJ's determination to sustain a cut of \$14,150 on the grounds that book and periodical purchases for the new library can be phased in over time. In his prior review of the district's cap waiver application, the Commissioner examined the Board's specific proposals in this area and, as the Board notes in its exceptions, made a careful determination as to degree of outfitting and level of expenditure level necessary for the new library/A.V. program to meet the requirements of a T&E education. That determination inherently precludes a conclusion herein that all of the approved library/A.V. purchases need not be made during the current budget year. Highlands, Supra; Garfield, Supra; South River, supra Accordingly, the recommendation of the ALJ sustaining the Township's cut of \$14,150 is reversed and this amount restored to the district budget.

8. Line Item J240 (\$60,000), teaching supplies, \$56,850 sustained/\$3,150 restored, Initial Decision at p. 9.

The Board contends that the ALJ based his decision to sustain the vast majority of this cut on the erroneous assumption that the eliminated monies would have been dedicated to stockpiling of supplies. The truth, the Board avers, is that supplies are so low that major purchases must be anticipated simply to meet current year needs, particularly in view of opening a new school, as the Commissioner recognized in approving a cap waiver on this line

item. The Township in reply directs the Commissioner to the superintendent's testimony to the effect that the district purchases supplies in bulk as a long-term economy measure, with no reference to T&E needs. (Exception and Reply No. 7a*)

Upon review of this reduction and the supporting information related to it (Unmarked Exhibit No. 1, p. 15; Unmarked Exhibit No. 10; Exceptions, Exhibit B), the Commissioner concurs with the ALJ that the Board's supply situation appears to be sufficiently under control for the current year without the necessity of expending the \$56,850 earmarked for restocking the district warehouse (Unmarked Exhibit No. 1, p. 15). The Commissioner further finds no indication of having made, in granting a cap waiver in conjunction with the district's opening of a new school, a determination that this particular expenditure was necessary for a T&E education or that the line items waived based on specific needs of the new school would preclude a lesser level of expenditure in this precise area. Accordingly, he affirms the ALJ's recommendation that \$56,850 of the Township's \$60,000 cut be sustained.

9. Line Item J250 (\$31,250), office supplies and building administrator conventions, cut sustained, Initial Decision at pp. 9-10.

* Two of the Board's exceptions, and consequently two of Township's replies, bear the designation "Exception #7." For convenience in identifying the record, the first of these is labeled "Exception No. 7a" and the second "Exception No. 7b," and subsequent exceptions are given the designations assigned them by the parties.

The Board references its arguments before the ALJ and further notes that the "conventions" referred to therein are in fact in the nature of workshops which are crucial to curriculum and program development in an isolated rural district such as Barnegat. In reply, the Township reiterates its earlier arguments with respect to bulk purchase of supplies and convention attendance. (Exception and Reply No. 7b*)

Upon review, the Commissioner is satisfied with the ALJ's careful analysis of expenditure increases in the area of supplies and their relationship to the proposed cut. With respect to convention attendance, while the Commissioner emphasizes the importance of this activity, he is unpersuaded that funds to cover the specified convention/dues expenses for principals and supervisors could not be reallocated from elsewhere in this account, which totals over \$200,000 even after the Township's reduction. Accordingly, the ALJ's recommendation that this cut be sustained in full is adopted herein.

10. Line Item J610 (\$30,000), custodial services, cut restored, Initial Decision at pp. 11-12.

Upon review, the Commissioner adopts the ALJ's analysis of the Board's history of usage in this line item and concurs with him that the Township's cut was arbitrary under the circumstances, in part because of an erroneous understanding of the extent of buildings to be covered. Further, he concurs with the ALJ's assessment of the nexus between safe, clean buildings and a T&E

* See note on previous page.

education. Accordingly, the Commissioner directs restoration of these funds.

11. Line Item 720B (\$30,000), general and special repairs, \$5,000 sustained/\$25,000 restored, Initial Decision at pp. 12-13.

The Commissioner concurs with the ALJ that the Township's \$5,000 cut in the general repair account was reasonable in view of the history of district expenditures in this area and the likely modest needs of the new school. He further concurs that the Township's cut of \$25,000 for tile replacement appears to have been based on an erroneous assumption as to the safety of existing tiles and that the eliminated monies are needed to provide a hazard-free environment for students. Accordingly, the Commissioner adopts the ALJ's recommended directive regarding this line item.

12. Line Item 730C (\$65,200), computer supplies, electives, playground equipment, cut restored, Initial Decision at pp. 13-14.

Upon review, the Commissioner concurs with the ALJ that the three areas targeted for cuts in this line item are all essential for district provision of a T&E education: the computer supplies because needed to accomplish district computer literacy goals, the electives because necessary to provide sufficient breadth of instructional program, and the playground equipment because crucial to the physical development of young children. Accordingly, he adopts the ALJ's recommendation that this cut be restored in full.

13. Line Item 740B (\$10,000), materials and maintenance, cut sustained, Initial Decision at p. 15.

The Commissioner is satisfied that the ALJ's discussion adequately reflects both the district's needs and the Township's rationale for proposing this cut, and he concurs with the ALJ that

the Township's reduction should be sustained as reasonable and appropriate.

14. Line Item 1020 (\$10,000), field trips and award banquets, cut restored, Initial Decision at pp. 15-16.

The Commissioner fully concurs with the ALJ that the items to be funded with the eliminated monies are critical to successful effectuation of a T&E education and to public support and understanding of the school system. Accordingly, he directs that the funds reduced by the Township be restored as recommended by the ALJ.

REDUCTIONS TO CAPITAL EXPENSE ITEMS

1. Edwards School (\$16,650), additional parking and air conditioners, cut sustained, Initial Decision at p. 17.

The Board contends that, contrary to the impression created by the ALJ, additional parking spaces are necessary for student safety as well as staff convenience, because without them students are required to exit buses on a major municipal artery and cross the road in order to enter school. The Township replies that the evidence established no proof of a nexus between parking spaces and district provision of a T&E education. (Exception and Reply No. 8)

Upon review and consideration, the Commissioner concurs with the ALJ that while the improvements proposed by the Board may be desirable, there is no safety or educational need so pressing that this cut should not be sustained in view of the extraordinary increase in this year's budget due to the opening of a new school. Accordingly, this cut is sustained as recommended by the ALJ for the reasons stated by him.

2. Dunfee School (\$30,000), retaining wall, cut sustained, Initial Decision at pp. 17-18.

The Board objects to the ALJ's proposed temporary solutions to the district's erosion problem as inadequate, reiterates its prior arguments and adds to the record February 21, 1991 and March 14, 1991 letters from the Ocean County Soil Conservation District (OCSCD) in response to the ALJ's contention that prior communications from OCSCD did not constitute a mandate to the district. The Township replies that while soil conservation is admittedly a problem, it is not so severe or immediate as to justify the Board's proposed actions, and that there is no relationship between the OCSCD's letters and a T&E education. (Exception and Reply No. 9)

Upon review, the Commissioner finds that while the ALJ's conclusion was not unreasonable based on the record before him, the additional letters submitted by the Board with its exceptions (which submission was not objected to by the Township) clearly indicate that the Board is under a mandate to accomplish the proposed work (Exceptions, Exhibit D). Under these circumstances, the Commissioner cannot concur with the Township's assessment that OCSCD directives have no relation to T&E, as the Board's obligation to expend funds on OCSCD directives and the reallocation of funds from other areas that would result therefrom in the face of a cut, would certainly impact on the district's ability to offer a T&E education. Accordingly, the ALJ's recommendation that this cut be sustained is reversed and the full amount restored to the district budget.

3. Brackman School (\$60,000), fence, athletic storage building and bleachers, cut restored, Initial Decision at pp. 18-19.

The Commissioner adopts the ALJ's recommendation that this cut be restored in full for the reasons stated by him in the initial decision.

RECAPITULATION OF REDUCTIONS RESTORED/SUSTAINED

As detailed above, of the \$413,649 total reduction disputed in this matter, the ALJ restored \$215,049, \$155,049 in current expense and \$60,000 in capital outlay. The Commissioner concurred with the ALJ's restorations, but reversed his decision with respect to \$57,050 of the \$198,600 in reductions sustained as summarized below:

Current Expense

Cuts Restored by ALJ, Restoration Affirmed by Commissioner:

\$ 11,400	Field Trips, Curriculum Development, J213
10,299	Books, Periodicals, A.V., J230
3,150	Supplies and Equipment, J240
25,000	Repair of Ceiling Tiles, 720B
65,200	Computers, Electives, Playgrounds, 730C
30,000	Custodial Services, J610
<u>10,000</u>	Field Trips, Award Programs, 1020

\$155,049 Total ALJ Restorations Affirmed

Cuts Sustained by ALJ, Restored by Commissioner:

\$ 12,900	Secretary for New School, J215
<u>14,150</u>	Books, Periodicals, A.V., J230

\$ 27,050 Total ALJ Reductions Restored

\$182,099 Total Restored to Current Expense

Cuts Sustained by ALJ and Affirmed by Commissioner:

\$ 12,700	Central Office Secretary, J110B
1,000	Bd. Member Conventions, J130A
4,300	Bd. Sec./Election Costs, J130B/D
3,800	Supt./Asst. Supt. Conventions, J130N
56,850	Supplies and Equipment, J240
31,250	Supplies, Adm. Conventions, J250

5,000 General Repairs, 720B
10,000 Materials and Maintenance, 740B
 \$124,900 Total Reduction in Current Expense

Capital Outlay

Cut Restored by ALJ, Restoration Affirmed by Commissioner:

\$ 60,000 Fence, Bleachers, Storage Shed, 1220

Cut Sustained by ALJ, Affirmed by Commissioner

\$ 16,650 Parking Spaces, Air Conditioners, 1220

Cut Sustained by ALJ, Restored by Commissioner:

\$ 30,000 Retaining Wall, 1220

\$ 90,000 Total Restored to Capital Outlay

\$ 16,650 Total Reduction in Capital Outlay

Accordingly, for the reasons expressed herein, the Commissioner adopts in part and reverses in part the initial decision of the Office of Administrative Law. The following schedule therefore applies to the 1990-91 school budget in Barnegat Township:

	<u>CURRENT EXPENSE</u>	<u>CAPITAL OUTLAY</u>
Original Tax Levy	\$9,438,965.50	\$154,144.35
Reduction	306,999.00	106,650.00
Tax Levy After Reduction	9,131,966.50*	47,494.35
Amount Restored	182,099.00	90,000.00
Tax Levy After Restoration	9,314,065.50	137,494.35

* The current expense tax levy originally certified to the Ocean County Board of Taxation was \$9,156,966.50. A \$25,000 transfer error was subsequently discovered and adjustments to the record were made by the parties during the course of proceedings herein (Letter to Judge LeFelt, January 4, 1991, with amended township resolution). Accordingly, all calculations are based on the revised tax levy figure correctly reported by the ALJ in the initial decision.

The Ocean County Board of Taxation is hereby directed to make the necessary adjustment as set forth above to reflect a total of \$9,314,065.50 and \$137,494.35 to be raised in 1990-91 tax levy for current expense and capital outlay purposes, respectively, for the 1990-91 school year.

IT IS SO ORDERED this 15TH day of April 1991.


COMMISSIONER OF EDUCATION

APRIL 15, 1991

DATE OF MAILING - APRIL 15, 1991

IN THE MATTER OF THE TENURE :
HEARING OF CALVIN HARRIS. : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF : DECISION
TRENTON, MERCER COUNTY. :

For the Board, Andrew George, Board Secretary

This matter having been opened before the Commissioner of Education on December 20, 1990 through certification of a tenure charge of other just cause against respondent, a tenured custodian in the School District of the City of Trenton, on the grounds of his failure to maintain the boiler operator's license required as a condition of his employment; and

The Commissioner having directed respondent, by two prior notices and by letter sent via both regular and certified mail on February 26, 1991, to file an Answer to the charge against him; and

As of this date, respondent having filed no Answer to the tenure charge against him, so that each count of the charge is deemed to be admitted; now therefore

IT IS ORDERED this 15th day of April 1991 that summary judgment shall be granted to the Board and that respondent shall be dismissed from his tenured position as a custodian in the district's employ as of the date of this decision.

APRIL 15, 1991

DATE OF MAILING - APRIL 16, 1991


COMMISSIONER OF EDUCATION

STEPHEN M. BRODSKY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION
BOROUGH OF FLORHAM PARK, MORRIS :
COUNTY, STEPHEN AWERMAN, MARTIN :
L. GREEN AND JOHN J. CRANE, :
RESPONDENTS. :

For Petitioner, Jacob Green, Esq. (Green & Dzwilewski)

For Respondent Board of Education, Donald B. Ross, Esq.
(Whipple, Ross & Hirsch)

For Individual Respondents, Stephen Awerman, Martin L.
Green and John J. Crane, Pro Se

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on March 21, 1991, in which it was alleged that the Secretary of the Florham Park Board of Education had acted improperly in determining, upon being challenged by petitioner on March 18, 1991, not to remove the names of the above-named individual respondents from the ballot for the 1991 annual school election. The basis for petitioner's challenge rested in allegations, which he believed he had satisfactorily proven, that one or more signatures on the petitions of Respondents Awerman and Green were invalid and that the petitions therefore

lacked the requisite number of signatures for acceptance;* and that the petition of Respondent Crane had been filed prior to the existence of the vacancy to which it pertained and was therefore void ab initio.

In responsive papers filed on April 8, 1991, to which petitioner replied on April 10, 1991, the Board argued as a threshold defense that petitioner's challenge was filed with the Board Secretary six days beyond the date (March 12, 1991) on which unchallenged nominating petitions are deemed presumptively valid for purposes of the impending election pursuant to N.J.S.A. 18A:14-12, so that the Secretary acted properly in rejecting petitioner's challenge. The Board further contested the validity of some of petitioner's substantive allegations and the import of others if true. For their part, Respondents Awerman and Green argued in letter submissions filed on April 8, 1991 that they had collected signatures in good faith and had seen no reason to probe the qualification of their signatories, while Respondent Crane argued that the vacancy for which he filed had been publicly announced at a Board meeting and reported in the press well before the date of his filing.

Upon review of the initial papers in this matter, the Commissioner found that the nature of the case required prompt

* Respondent Awerman's petition contained 11 signatures, of which petitioner challenged three, two on the basis of the signator's voter registration status and one on the basis of a handwriting discrepancy between the disputed signature and voter registration documents. Respondent Green's petition had 10 signatures, of which petitioner challenged one on the basis of the signator's voter registration status.

resolution and that the threshold issue of timeliness was amenable to summary judgment, as no facts were in dispute with respect to the date and circumstances of petitioner's presentation of his challenge to the Board Secretary. Accordingly, the Commissioner has reviewed this matter on an expedited summary basis and, after consideration of the arguments of the parties, determined for the reasons set forth below that the filing deadline of N.J.S.A. 18A:14-12 is fully applicable to all three of the challenges at issue herein and that the Secretary of the Florham Park Board of Education acted properly in rejecting those challenges as untimely.

N.J.S.A. 18A:14-12 reads:

If, on or before the 49th day preceding the date of the election, the secretary of the board finds a nominating petition to be defective excepting as to the number of signatures, the secretary of the board shall forthwith notify the candidate of the defect and of the candidate's right to remedy the defect not later than the 49th day preceding the date of the election, and the candidate endorsing the petition may amend the same in form or substance, but not to add signatures, so as to remedy the defect at any time prior to said date. A nominating petition not so found to be defective shall be, as of the 48th day preceding the election, conclusively valid for the purposes of this chapter. (emphasis supplied)

Petitioner argues that by its own terms this statute excludes from its purview any challenge which reaches to the sufficiency of the number of signatures on a candidate's nominating petition. He further contends that the 49-day filing limit embodied within the statute applies only to technical defects curable upon notice to the candidate by the Board Secretary, and it is well established that lack of signatures is not curable even when a challenge is timely

filed. Kumpa v. Page, 178 N.J. Super. 589 (App. Div. 1981); William D. Sokolosky v. Board of Education of the City of Elizabeth et al., Union County, decided March 31, 1989. Therefore, because Respondents Awerman and Green could not have saved their petitions regardless of the filing date of petitioner's challenge, that challenge cannot be time barred by invoking 18A:14-12.

The Board for its part argues that the statute is plain on its face, and that petitioner has erred in equating a simple insufficiency of signatures with a substantive challenge that operates to reduce an otherwise sufficient number. In the Board's view, if the Board Secretary finds a petition to have fewer than 10 signatures, that petition is defective and cannot be remedied. If, on the other hand, the Board Secretary does not so find, as of the 48th day before the election, the petition is conclusively valid.

The Commissioner, in reviewing this matter, finds that when 18A:14-12 is read in context with its companion statutes in 18A:14 rather than as an isolated enactment, it is clear that its primary purpose is to establish a date certain beyond which election officials, candidates and the public may presume the technical validity of the nominations which will be before them in the upcoming election. Such a terminus post quem is essential if conduct of the election is to proceed in an orderly, efficient manner, for to hold otherwise would allow challenges of the type raised by petitioner -- which is noted, reach not to the qualification of candidates, but to the correctness of their nominating petitions -- to be made at virtually any time prior to the election, wreaking potential havoc on the district's preparation

process and thwarting the entitlement of the public to knowledge of candidates for office reasonably in advance of the election at which they must choose among such candidates.

Moreover, even the statute's own language, as quoted above, does not act to limit the applicability of the date certain; rather, it acts solely to limit curability of defects in nominating petitions and the Board Secretary's role therein, so as not to effectively extend an unfair advantage to prospective candidates lacking sufficient signatures as of the deadline for filing nominating petitions. Nor is the Commissioner persuaded otherwise by petitioner's analysis of the legislative history of N.J.S.A. 18A:14-12. Indeed, contrary to his assertions that the 49-day rule was not intended to act as a bar because it was merely a technical adjunct to a bill changing the date for distribution of absentee ballots, examination of that bill (enacted as P.L. 1985, c. 92) suggests instead that a Legislature scrupulously concerned with procedural dates certain chose to add one to 18A:14-12, a statute where such a date was plainly needed but had not previously been included.

Neither does the Commissioner find any reason for altering his determination based upon the prior case law cited by petitioner. To the contrary, in two of those cases, Frank X. Clark et al. v. Board of Education of the City of Union City, Hudson County, decided May 17, 1988, and In the Matter of the School Board Candidacy of Janice I. Leenhouts, School District of the Township of Barnegat, Ocean County, decided April 5, 1988, the Commissioner specifically noted the applicability of 18A:14-12 notwithstanding the ALJ's determination to treat these matters on the merits; in

another, Sokolosky, supra, the Commissioner explicitly predicated his determination on the merits on the fact that Sokolosky was prevented by action of the Board's agent from filing a timely challenge; and in Board of Education of the Township of Delran, Burlington County v. Sean Conaway and Leo Mahon, decided April 17, 1986, the issue of a time bar was never raised as an affirmative defense or by the ALJ, so that petitioner cannot rely on the absence of discussion of that issue by the Commissioner to establish non-applicability of the 49-day bar to a challenge similar to the one made herein.

Having determined that the filing deadline of 18A:14-12 is applicable to the present circumstances, there remains the question of strict application of the bar. Although relaxation of procedural dates certain in election matters is not unprecedented under unusual circumstances where such application would not serve the overall purpose of election law, In re Application of Cucci, 92 N.J. Super. 223 (Law Div. 1966), the balance of interests in the present matter militates against relaxation herein. Petitioner has given no explanation for his delay in making a challenge to the Board Secretary. He did not contact the County Superintendent of Elections to check on voter registrations and signatures until six days after the deadline, on March 18, 1991 (Petition, Exhibit E), when the county board's immediate response (Petition, Exhibit F) enabled him to write the Board Secretary on the same date (Petition, Exhibit G). There is no allegation of school officials having denied or impeded access to petitions so as to have prevented petitioner from timely exercising his right to challenge, as was the

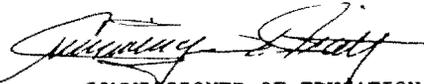
case in Sokolowsky, supra; rather, in all respects they appear to have acted promptly, responsibly and in full accord with what they reasonably perceived to be a clear statutory directive. Nor is there any indication that the individually named respondents and the qualified signators of their petitions acted out of anything less than a good faith desire to participate in the school election process; certainly there is no allegation of fraud or improper conduct. Accordingly, the Commissioner must give greater weight to the need to ensure the integrity and orderly progress of election procedures and hold firm to the statutory date certain.

With respect to the nominating petition of Respondent Crane, it is undisputed that the resignation of Thomas Arnold was not received by the Board until February 26, 1991 and was not effective until two days later (Petition, Exhibit D). Respondents have attested, however, and petitioner does not dispute, that this impending vacancy was announced at a public Board meeting on January 22, 1991 and reported in the press immediately thereafter. In the Commissioner's view, it would have been placing form over substance for the Board Secretary to have determined that a good faith candidate who had no reason to be aware of the technical niceties of resignation announcements is barred from standing for election because he filed his nominating petition prior to the actual effective date of the resignation and hence prior to the existence of the vacancy he sought to fill. Moreover, the Commissioner notes that Crane filed his petition on February 7, 1991, which would have been the statutory deadline for such filing had not the date of the annual school election for 1991 been changed by action of the Legislature on February 6, 1991 (P.L. 1991, c.21).

The resultant changes in election calendar deadlines, including shifting of the date for filing nominating petitions to March 7, 1991 were not promulgated by the Commissioner until February 7, 1991, the very day that Crane filed his petition in the reasonable belief that it was then due. Even assuming arguendo that petitioner's legal position on this issue is technically correct, his challenge was made after Crane's petition was deemed presumptively valid pursuant to 18A:14-12 and the Commissioner therefore declines to consider barring Crane's nomination in the present context.

Accordingly, for the reasons stated herein the Petition of Appeal in this matter is dismissed. The nominating petitions of Respondents Awerman, Green and Crane are deemed presumptively valid by operation of N.J.S.A. 18A:14-12 and the actions of the Board Secretary of the Florham Park School District are judged to have been proper in all respects. Having so determined, the Commissioner does not reach to the merits of petitioner's substantive challenges.

IT IS SO ORDERED.


ACTING COMMISSIONER OF EDUCATION

APRIL 18, 1991

DATE OF MAILING - APRIL 18, 1991



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7603-89

AGENCY DKT. NO. 286-9/89

**HILLSBOROUGH TOWNSHIP BOARD OF
EDUCATION,**

Petitioner,

v.

**SAUL COOPERMAN, COMMISSIONER OF
EDUCATION, AND NEW JERSEY DEPARTMENT
OF EDUCATION,**

Respondents.

Paul E. Griggs, Esq., for petitioner

Arlene G. Lutz, Deputy Attorney General, for respondents (Robert J. Del Tufo,
Attorney General of New Jersey, attorney)

Record Closed: January 26, 1991

Decided: March 12, 1991

BEFORE DANIEL B. McKEOWN, ALJ:

The Hillsborough Township Board of Education (Board) appeals a determination by the New Jersey Department of Education (Department) and the then Commissioner of Education, Saul Cooperman, that it not eligible for state aid under N.J.S.A. 18A:58-7 in the amount of \$95,911 for its 1987 purchase of school vehicles. The Department, it is acknowledged, declared the Board ineligible for state aid on the grounds that it failed to secure prior approval of the Somerset County Superintendent of School for the purchase of the vehicles. After the matter was transferred October 4, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was conducted June 6, 7, and 8, 1990 and continued on November 28, 1990 at the Office of Administrative Law, Mercerville. The record closed January 26, 1991 upon the

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receipt of reply memorandum filed by each of the parties.

The issue of the case as agreed upon at a prehearing conference conducted January 29, 1990 is whether under the following facts the Board is entitled on an equitable or legal basis under N.J.S.A. 18A:58-7 to the controverted state aid towards its 1987 purchase of one or more school transportation vehicles.

N.J.S.A. 18A:58-7 provides in part as follows:

Each district shall also be paid 90% of the cost to the district of transportation of pupils to a school when a necessity for such transportation and the cost and method thereof have been approved by the county superintendent of the county in which the district paying the cost of such transportation is situate * * *

In North Arlington Board of Ed. v. New Jersey State Department of Education, et al, 1989 S.L.D. - (Feb. 21, 1989) the Commissioner of Education held that local school districts which seek state aid reimbursement under the statute are obligated to have secured from their county superintendent knowing and prior approval regarding the necessity for the transportation, together with the cost and method thereof. This decision comports with the decision of the State Board of Education in Fairfield Borough Board of Ed v. Bureau of Pupil Transportation, Department of Education, 1984 S.L.D. - , affirmed, State Board of Education, December 5, 1984. In this case, the State Board of Education held that the statute, N.J.S.A. 18A:58-7, specifies that the county superintendent must approve the necessity, cost and method of transportation as a prerequisite to receiving state aid. The State Board went on to observe that such approval is only one of several predicates to the receipt of aid and that the ultimate responsibility for determining who receives state aid lies with the Department of Education.

Curiously, while the Board argues the application of the Fairfield decision and the holding of the State Board of Education in its letter memorandum, it fails to cite the Commissioner's decision in North Arlington.

FACTS

The facts are essentially not in dispute. What is in dispute is the significance which should attach to the facts. Within that framework, then, I **FIND** a preponderance of credible evidence in this record establishes the following facts. On or about February 11, 1987 the Board submitted its proposed 1987-88 school budget (P-5) to the Somerset County School Business Administrator, Frank Arch, for review. Frank Arch, as the county school business administrator, assists local schools within the county on financial matters. The Board's proposed 1987-88 school budget was reviewed by Mr. Arch for accuracy of figure totals, the necessity, if any, for cap waivers, and to determine whether the Board anticipated expenditures sufficient to provide a thorough and efficient program of education in the district.

The Board's multi-page proposed 1987-88 school budget shows in account 530, Replacement of Vehicles, an anticipated expenditure of \$114,000. No other documents were submitted by the Board in support of that anticipated expenditure. During May 1987, prior to the commencement of the 1987-88 school year on July 1, 1987, the Board determined to purchase one Dodge Caravan in the amount of \$13,974. On June 15, 1987, again prior to the commencement of the 1987-88 school year, the Board determined to purchase one wheel chair van in the amount of \$20,745 and three 1987 school buses in the amount of \$66,666. There is no evidence in this record that the Board at any time either prior to or after, even until this very day, submitted specifications of the vehicles purchased to the County Superintendent of Schools as it had earlier done in 1981, (R-3) 1982, (R-4) 1984, (R-5) and on two separate occasions in 1985. (R-6) (P-14) Each of these requests was filed by the Board's transportation coordinator, Dominick Sassano.

It is true that during this period of time the Board was experiencing some problems with its school business administrator in terms of filing reports in a timely manner with various agencies, including the County Superintendent of Schools. During December 1987 the Board engaged a new school business administrator, Thomas Venanzi, to assume the responsibilities of its business office. Mr. Venanzi, soon after his employment, met with Frank Arch to discuss the failure of the former school business administrator to file certain forms in a timely mannner. Mr. Arch reviewed reports for 1987-88 which were to be filed by the Board and notified Mr. Venanzi of the forms from the Hillsboro district which were missing. No mention was made at that time that the Board had failed to secure prior approval of the County Superintendent to purchase school vehicles during May and June, 1987 in order to be eligible for state aid.

During April 1988, the Board engaged a new transportation coordinator, Barbara Reed Robinson Scherer, to replace Mr. Sassano. Ms. Scherer had earlier been the Somerset County transportation coordinator, and a colleague of Mr. Arch. During the following August, the Board submitted to the County its District-Wide Program Cost Report (DWCR) for its transportation program. The DWCR is, according to the evidence in this record, the first time the Board notified the County office that it had expended \$109,768 on school transportation vehicles from its 1987-88 school budget and that it sought state reimbursement aid on that expenditure. In fact, aside from the DWCR, which it is noted only reflects the combined net cost of the purchases, there is no other information provided in regard to the specifications of the vehicles which had been purchased. The person who reviewed the DWCR at the County Office, Marlene Gayle, signed the report for submission to the Department of Education, Division of Finance on September 23, 1988. In fact, the then county superintendent of schools, Donald Van Sant, through his signature, approved the DWCR report for submission to the Department of Education despite the absence of prior approval by him for the expenditure. County superintendent Van Sant did acknowledge that as a general rule when he was made aware that a local school district was subject to losing state aid for failure to file a particular form, he would allow that district to file the forms which when the district did he would approve that form retroactive to the date it was due and forward the document to the Department of Education. However, Van Sant also testified, as cited by the Board in its letter memorandum, that the affected school district would have had to have done everything properly including the submission of the specifications which, it is noted, was not ever done by this Board.

Lorraine Leary, of the Department's Bureau of Pupil Transportation, reviewed the Board's DWCR as filed and approved by the Somerset County Superintendent of Schools. Ms. Leary observed that the report did not include the county superintendent's prior approval for the purchase of the transportation vehicles. Ms. Leary, in turn, advised Linda Wells, the manager of the Bureau of Pupil Transportation, who in turn notified the Board on June 5, 1989 (P-2) that in the absence of approval by the Somerset County Superintendent of Schools for the purchase of the school vehicles, the expenditure was ineligible for State aid. The Board's superintendent of schools took issue with the determination of Ms. Wells in a letter (P-3) on August 25, 1989 to the assistant commissioner in charge of the Department's Division of Finance, Robert Swissler. In part,

the Superintendent wrote as follows:

* * *

The purchase of these vehicles was included in the district's 1987-88 budget under the 530 account (replacement of vehicles). The amount appropriated for this was \$114,000. This budget was approved by the County Superintendent, so that the Somerset County office was aware of the district's plan to purchase vehicles.

Our records indicate that this purchase was authorized in May 1987 by the former school business administrator and coordinated by the previous transportation supervisor. Both individuals left the district during the 1987-88 school year several months after this purchase was authorized. Apparently these individuals did not submit documentation to the County Superintendent seeking approval for this purchase of vehicles. My reason for making this point is that the new Transportation Supervisor and I were not aware that this documentation was not submitted to the County Superintendent.

When the new business administrator, Mr. Venanzi, assumed responsibility for the financial operations in the district in December 1987, he knew full well that the district's business office was going through difficult times and was embroiled in a great deal of controversy. Knowing this, he made a conscious effort to meet the County Business Administrator Mr. Frank Arch * * * Unfortunately Mr. Arch did not mention any problems relating to the purchase of school vehicles and prior to June 12, 1989 which is when we received your letter, no one in the State Department advised us that any transportation forms were missing or incomplete. Since the County Office was aware that we were planning to purchase vehicles and that a complete turnover took place in the Business Administrator and Transportation Supervisor positions, I strongly believe that the County Office should have alerted us that the district did not submit what the State

- 5 -

Department considers to be the required documents * * *.

On September 11, 1989 Mr. Swissler advised the Superintendent that under N.J.S.A. 18A:58-7, as interpreted by the Commissioner of Education, "* * * no portion of a purchase price is qualified for State aid reimbursement unless the necessity for transportation, the cost, and the method have knowingly been approved by the county superintendent in advance of the purchase. (P-4). Mr. Swissler then denied the appeal of the Superintendent and declared that the expenditure was not eligible for state reimbursement aid.

ARGUMENTS OF LAW

The Board argues that N.J.S.A. 18A:58-7 does not, on its face, require prior approval of the county superintendent in order to receive reimbursement aid because in the final analysis the determination of whether an applying district receives such aid is a determination of the Department of Education. In this regard, the Board cites Fairfield Borough Board of Ed v. Bureau of Pupil Transportation, 184 S.L.D. (Jan. 24, 1984) aff'd St. Bd. of Ed., 1984 S.L.D. - (Dec. 5, 1984) in which the State Board held, in part, that "The ultimate responsibility for determining who receives State aid pursuant to N.J.S.A. 18A:58-7 lies with the Department of Education which has plenary responsibility for school transportation matters." The Board, therefore, concludes that the review by the County Superintendent of requests by local boards of education regarding school vehicles purchases determines only that specific costs can be considered by the Department as being eligible to receive state aid and whether that determination of eligibility comes before or after the expenditure is made by the local board is not addressed by the statute. In addition, the Board contends the Department is equitably estopped from withholding state aid because it was not until June of 1989, two years after the vehicles were purchased and paid for, that the Department advised it would not receive the anticipated state transportation aid. In the Board's view, the Department is equitably estopped from denying it the anticipated state aid because County Superintendent Van Sant operated the county office under the policy that school districts are to receive all state aid to which they are entitled. The Board notes that Van Sant operated the county office under a policy by which applications for prior approval were treated as a 'formality', borne out of the necessity of insuring that local school districts filed all necessary reports with it in order to receive State aid to which it was entitled. The Board complains that the county

superintendent's office failed to advise it at any time that whatever forms may be necessary for State aid eligibility had not been filed and, consequently, it should not now be denied that to which it is entitled.

Finally, the Board contends that based upon the custom and practice of the county superintendent office, and in the absence of evidence to the contrary, that it, the Board, more likely than not, filed a request for prior approval with the county superintendent's office but that the county lost the forms, particularly with respect to the failure of Marlene Gayle to notify it that its DCWR report did not include the prior approval when it filed for State aid reimbursement.

The Department contends, to the contrary, that N.J.S.A. 18A:58-7 requires, on its face, prior approval of the county superintendent of schools for the purchase of school vehicles in order for the applying district to be eligible for State aid; that the review and approval of the Board's budget for the 1987-88 school year by Frank Arch does not constitute prior approval of the County Superintendent of Schools for school bus purchase because the review by Frank Arch was solely for purposes of insuring correct mathematics, cap waivers, and that the budget provided the financial resources for a thorough and efficient program of education; that Frank Arch could not have notified the district in December 1987 that it failed to file forms for its earlier purchase of school vehicles in May and June 1987 because he had no way to know the Board made such purchases and, even if he did, have such knowledge seeking approval after the fact by the Board is contrary to the statute; and, based on the evidence the Board was well aware of the statutory requirements for prior approval because of its earlier compliance with the law between 1981 through 1985.

ANALYSIS

When the Commissioner adopted the initial decision of the administrative law judge in North Arlington Borough Board of Ed., supra, he held that the statute, N.J.S.A. 18A:58-7, " * * * does require that no portion of the purchase price of a vehicle to transport students is qualified for state aid reimbursement unless the necessity for such transportation and the cost and method thereof have knowingly been approved either by the county superintendent in advance of the purchase or by state fiscal officials thereafter." (Initial Decision, at p.-) The Commissioner went on to hold through the

administrative law judge

The pertinent provisions of N.J.S.A. 18A:58-7 admits of no interpretation other than that the obligation placed upon the state to reimburse transportation costs to a local district is conditioned upon an approval. To permit otherwise would be disserve the clear trust of the statutory provision which plainly is designed to protect the public fisc from the inappropriate local expenditures. Indeed, the approval requirement also seems to me to be designed to protect local districts from the very consequences which resulted here; namely, an expenditure predicated upon an assumption of state reimbursement which ultimately proves not to be available and the need to adjust a future budget to accommodate the "loss."

While the Board argues that the statute is not clear on its face in regard to the need for prior approval of the county superintendent for purposes of state aid reimbursement, the Commissioner, who is charged with the obligation to hear and determine controversies and disputes which arise under school law, has held quite to the contrary. That being so, this judge is obligated to follow such prior administrative decisions until and unless those decisions are reversed on appeal.

In this case, the Board carries the burden of persuasion to establish by a preponderance of credible evidence to establish its entitlement to state aid reimbursement. The Board presented no evidence whatsoever which would suggest that at any time prior to the May and June 1987 purchases that it sought prior approval from the Somerset County Superintendent of Schools. For the Board to now suggest that such forms were filed but lost by the county superintendent's office is wholly rejected for it amounts to nothing other than the Board seeking to place blame for its error elsewhere. The Board, by virtue of its past conduct between 1981 through 1985, had knowledge of the necessity for seeking prior approval in regard to pupil transportation vehicles because it had done so consistently at least between those five years.

The review of the Board's 1987-88 school budget by Frank Arch fails to constitute knowing approval by the county superintendent with respect to pupil transportation vehicles. The Board submitted no supporting documentation with respect

to the anticipated expenditure of \$114,000 in account 530 and, indeed, that projected expenditure was not an obligated amount at the time Mr. Arch reviewed the proposed budget. Furthermore, the Board itself at the time it submitted its proposed 1987-88 school budget for review by the county superintendent more likely than not had not yet settled on the nature of the purchases, if any, to be made with those funds should the budget, and the amount in that account, meet with voter approval. Consequently, the review by Mr. Arch of the Board's 1987-88 school budget was not undertaken, nor was it intended, for purposes of the statutorily required prior approval for state aid reimbursement. Furthermore, while the Board makes much of the fact its business office was in some turmoil prior to December 1987 that turmoil was all the more reason for the Board as a whole, through its superintendent, to be very sensitive to the day-to-day operations of that office and to have created some system of oversight so that that office did not operate independent of the larger enterprise.

Moreover, the record in this case suggest that it was not the school business administrator who would have submitted the necessary prior approval papers to the county superintendent for review. Recall that it was the transportation coordinator, Dominick Sassano, who filed the prior approval requests with the county superintendent between 1981 and 1985. It was not the school business administrator.

It is acknowledged that prior approval by a county superintendent for the purchase of pupil transportation vehicles does not automatically result in state reimbursement aid being provided a district and, conversely, it is reasonable to conclude that in certain situations the absence of prior approval by a county superintendent would not forever foreclose state aid reimbursement. In this case, the Department determined not to grant state aid reimbursement for failure of the Board to have secured prior approval which, as we have seen, it is a predicate for the declaration that the Board expenditure is now eligible for state aid reimbursement. Furthermore, that there is no showing in this case that the absence of prior approval from the county superintendent was due in any manner to a failure to perform a duty by that office. In short, the Board has only produced evidence which tends to show it failed to follow the law with respect to its May and June 1987 school vehicle purchases.

In the absence of any evidence that the Somerset County Superintendent of Schools or the Department of Education, its officers, agents and/or employees were remiss in the performance of their duties which, in turn, caused a detriment to the Board, equitable estoppel simply does not lie in this action against the Department. The Board may find no comfort in the fact Frank Arch did not advise Mr. Venanzi in December 1988 of the absence of prior approval. The act of purchase was already completed of which Arch had no knowledge. Nor is the Board comforted by Marlene Gayle and Superintendent Van Sant "approving" the DWCR in August 1988 for forwarding to the Department. The fact is the Board produced no evidence of prior approval to support its claim for reimbursement. The plain, simple fact is the Board, having knowledge of its obligation to secure prior approval before the purchase of school transportation vehicles in order to be eligible to have such purchases reimbursed, failed in its obligation and, as a result, must now suffer the consequences.

I **FIND** that the facts established in this case provide no basis for the Board to be awarded relief in any manner. The petition of appeal is **DISMISSED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 12, 1991
DATE

Daniel B. McKeown
DANIEL B. McKEOWN, ALJ

12 March 1991
DATE

Receipt Acknowledged:
Seamus Lewis
DEPARTMENT OF EDUCATION

MAR 18 1991
DATE

Mailed To Parties:
Jayne L. Laska
OFFICE OF ADMINISTRATIVE LAW

tmp

DOCUMENTS IN EVIDENCE

P-1 Letter February 26, 1988
P-1 Letter June 5, 1989
P-3 Letter August 25, 1989
P-4 Letter September 11, 1989
P-5 Proposed Budget 1987-88
P-6 Memorandum September 26, 1988
P-7 Identification only
P-8 Memorandum April 28, 1989
P-9 District-Wide Program Cost Report
P-10 Minutes of Meeting, May 18, 1987
P-11 Minutes of Meeting, June 15, 1987
P-12 State School Chart
P-13 Pupil Transportation Manual
P-14 Letter June 3, 1985
P-15 Identification only
P-16 Memorandum June 22, 1989
P-17 Various memoranda
P-18 Letter December 15, 1988
P-19 Memorandum May 10, 1989

R-1 Identification only
R-2 Identification only
R-3 Letter July 20, 1981
R-4 Letter June 24, 1982, with attachments
R-5 Memorandum April 17, 1984, with attachments
R-6 Letter April 16, 1985, with attachments

HILLSBOROUGH TOWNSHIP BOARD OF :
 EDUCATION, SOMERSET COUNTY, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 SAUL COOPERMAN, COMMISSIONER OF : DECISION
 EDUCATION AND NEW JERSEY STATE :
 DEPARTMENT OF EDUCATION, :
 RESPONDENTS. :
 _____ :

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

Upon review of the record, the Commissioner agrees with and adopts the findings and conclusions of the Administrative Law Judge. The Petition of Appeal is, therefore, dismissed for the reasons well-stated in the initial decision.


 COMMISSIONER OF EDUCATION

APRIL 19, 1991

DATE OF MAILING - APRIL 19, 1991

HILLSBOROUGH TOWNSHIP BOARD OF :
OF EDUCATION, SOMERSET COUNTY, :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
SAUL COOPERMAN, COMMISSIONER OF : DECISION
EDUCATION AND NEW JERSEY STATE :
DEPARTMENT OF EDUCATION, :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, April 19, 1991

For the Petitioner-Appellant, Paul E. Griggs, Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy
Attorney General (Robert J. Del Tufo, Attorney
General)

This is an appeal from a decision of the Commissioner of Education which, adopting the Administrative Law Judge's (ALJ) Initial Decision, dismissed the petition of the Hillsborough Board of Education (hereinafter "Board") contesting denial of State aid for transportation by the Department of Education (hereinafter "Department"). The Department had found that the Board's expenditures in the amount of \$95,911 for the purchase of vehicles for the 1987-88 school year were not eligible for State aid for 1988-89 under N.J.S.A. 18A:58-7¹ because the purchase had not been

¹ We note that in enacting the Quality Education Act of 1990, N.J.S.A. 18A:7D-1 et seq., the Legislature repealed N.J.S.A. 18A:58-7 and that the new statutory scheme provides for a different formula for the distribution of State transportation aid. However, repeal of N.J.S.A. 18A:58-7 was not effective until July 1, 1990, and consequently that statute governs the distribution of aid at issue in this case.

approved by the County Superintendent.

The Board challenged that determination by Petition of Appeal to the Commissioner filed on September 11, 1989. In so doing, the Board alleged that the Department's denial of State aid was arbitrary and capricious and that the State was estopped from denying payment because the Board had relied upon the actions of representatives of the Office of the County Superintendent. In March 1990, the Board moved to amend its petition to allege that approval of the Board's proposed budget for 1987-88 by the County Superintendent constituted approval for the purchase of the vehicles at issue and that the Department's denial of State aid constituted improper rule making. Additionally, in April, the Board moved to depose certain representatives of the Department of Education. By letter ruling dated May 8, 1990, the ALJ denied both motions and, following hearing on the matter, issued his Initial Decision on March 12, 1991.

Rejecting the Board's arguments to the contrary, the ALJ found that N.J.S.A. 18A:58-7 required prior approval of transportation by the County Superintendent, in order for the amounts expended for such purposes to be eligible for State aid reimbursement under that statute. In that the Board had presented no evidence to suggest that it had sought prior approval and given that the Board knew of the requirement as demonstrated by the fact that it had consistently met it between 1981 and 1985, the ALJ found that there was no basis for awarding relief to the Board. He therefore recommended that the Commissioner dismiss the petition. In so recommending, the ALJ found that review of the Board's proposed education budget for 1987-88 by the County Superintendent

did not constitute knowing approval of the vehicle purchases involved here and that there was no evidence that the County Superintendent or any employees of the Department of Education had been remiss in the performance of their duties so as to make the doctrine of equitable estoppel applicable.

As previously stated, the Commissioner adopted the ALJ's Initial Decision and, for the reasons stated in the Initial Decision, we affirm. In affirming that decision, we emphasize that although approval by the County Superintendent is not an absolute guarantee of State aid reimbursement, see Board of Education of the Borough of Fairfield v. Bureau of Pupil Transportation, decided by the State Board, December 5, 1984, prior approval by the County Superintendent is a prerequisite to eligibility for State aid under N.J.S.A. 18A:58-7. Consequently, notwithstanding the Board's arguments to the contrary, it was entirely appropriate for the Department to deny State aid for transportation under N.J.S.A. 18A:58-7 where, as here, a district board failed to seek approval of the necessity and cost and method of the transportation prior to expending funds.

October 2, 1991

Date of mailing _____

Pending Superior Court

FRANK A. BUONO, BOARD SECRETARY, :
BOARD OF EDUCATION OF THE TOWN- :
SHIP OF COMMERCIAL, CUMBERLAND :
COUNTY, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
TERRENCE E. COURSEY, SR., : DECISION
RESPONDENT. :

For Petitioner, Richard H. Daniels, Esq.

For Respondent, Terrence E. Coursey, Sr., Pro Se

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on April 11, 1991. Therein, petitioning Board Secretary sought to have respondent's name removed from candidacy for the Board of Education because three of the twelve signatures on his nominating petition were found to have been invalid and respondent had refused to withdraw from consideration notwithstanding that his petition now lacked the ten signatures required for acceptance pursuant to N.J.S.A. 18A:14-9.

The facts of this matter as ascertained from the Petition of Appeal and supporting documentation are as follows:

1. On March 7, 1991, the last day for filing of nominating petitions pursuant to directive of the Commissioner in accord with P.L. 1991, c.21, at approximately 2:43 p.m., respondent presented a nominating petition for the annual school election to the Board Secretary.

2. The Board Secretary reviewed the petition shortly thereafter and found that full addresses did not appear next to several signatures; that the verification was incorrectly executed; and that some signators did not appear to be on the district's voter registration list. The Secretary then instructed the Board Attorney to advise respondent of the first two problems and the need to correct them, while he investigated the third.
3. On March 8, 1991, the Board Attorney so advised respondent by letter. On that same date, the Board Secretary also phoned respondent with this information, whereupon respondent came to the Board office to retrieve his petition and correct the errors. Respondent's corrections were timely made and the petition timely returned to the Board Secretary.
4. Sometime between March 8 and March 12, 1991, the Board Secretary went to the Cumberland County Board of Elections for assistance and there found that five of the petition's twelve signatures appeared not to be valid due to illegibility or the non-registered status of the signator.
5. On March 12, 1991, the Board Attorney wrote to respondent by certified mail, advising him of the Board Secretary's findings and informing him that his nominating petition could not be accepted because it lacked the requisite number of signatures. This letter was incorrectly addressed and respondent did not receive it until March 28, 1991.
6. On March 28, 1991, not having received any reply to his March 12, 1991 letter, the Board Attorney wrote to respondent to inquire as to whether he would be withdrawing his petition based on the problems identified in the earlier letter. This second letter also informed respondent that, should he not notify the Board Secretary of his intention to withdraw, appropriate action would be commenced to nullify his petition.

7. On April 10, 1991, respondent contacted the Board Attorney by telephone to indicate that he had no intention of withdrawing his petition.
8. On April 11, 1991, just subsequent to the Petition of Appeal in this matter having been filed with the Commissioner, the Board Secretary was informed by the Cumberland County Board of Elections that its final determination as to the signatures on respondent's nominating petition was that three (not five as previously indicated) of the twelve signatures were invalid, leaving a total of nine valid signatures on the petition.

On April 18, 1991, respondent submitted an Answer to the Petition of Appeal, arguing that he did not timely reply to the district's March 12, 1991 letter because he did not receive it until March 28, 1991; that "several" of the signatures originally questioned were subsequently verified by the Board of Elections; and that the best interest of the community dictated that his name be kept on the ballot. Respondent's Answer did not dispute or otherwise address the material facts set forth in the Petition of Appeal, nor did it deny the invalidity of the signatures finally contested.

Upon careful review of this matter, the Commissioner finds that the nature of the dispute necessitates prompt disposition and that the uncontested facts at hand permit decision on a summary basis.

With respect to the number of signatures required for a nominating petition to be acceptable, the law is clear on its face:

Each candidate to be voted upon at a school election shall be nominated directly by petition, signed by at least 10 persons***. N.J.S.A.
18A:14-9

[T]he signers of the petition [shall] all [be] qualified voters of the school district.
N.J.S.A. 18A:14-10

The petition is [to be] signed in their own proper handwriting by each of the signers thereof [who are to be] legally qualified to vote at the election at which the candidate shall be voted for***. N.J.S.A. 18A:14-11

The law is likewise clear that petitions discovered to be defective by reason of insufficient signatures cannot be rectified by addition of further signatures. N.J.S.A. 18A:14-12 This dictate applies regardless of whether there is simply a shortage of actual signatures or the signatures provided are voided for failure to meet the requirements for signators cited above.

In the present instance, a challenge was raised to the validity of several of respondent's signatures on or before the date (March 12, 1991) upon which unchallenged nominating petitions were presumed to be valid for purposes of conduct of the school election pursuant to N.J.S.A. 18A:14-12. That challenge having been borne out by the findings of the county Board of Elections and the date (March 7, 1991) for possible submission of additional nominating petitions having passed, there is no way that respondent can, or indeed could have, given the lateness of his initial submission to the Board Secretary, obtain the minimum number of signatures required for formal candidacy in the upcoming election. That nine of his signatures ultimately proved to be valid and that he views his continued candidacy as being in the best interest of the community cannot serve as a basis to set aside the clear statutory mandate in this matter.

Accordingly, for the reasons set forth herein, the Commissioner determines that the nominating petition of Terrence E. Coursey, Sr. is null and void by reason of insufficient signatures and that Mr. Coursey's name shall therefore be removed from consideration as a formal candidate for a seat on the Commercial Township Board of Education.

IT IS SO ORDERED.

APRIL 23, 1991

DATE OF MAILING - APRIL 23, 1991


COMMISSIONER OF EDUCATION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING EMERGENT
RELIEF AND DENYING STAY
OF ORDER

OAL DKT. NO. EDU 4037-91

AGENCY DKT. NO. 86-4/91

KAREN FENTON, ANN H. PREWETT,
PETER ROWE, AND WARREN R. SCHUELER,
Petitioners,

v.

JOHN L. SULLIVAN, INDIVIDUALLY AND IN
HIS CAPACITY AS PRESIDENT OF THE
BOARD OF EDUCATION OF THE TOWNSHIP
OF MIDDLETOWN, MONMOUTH COUNTY;
RICHARD B. HOLZMAN, INDIVIDUALLY AND
IN HIS CAPACITY AS SUPERINTENDENT
OF SCHOOLS OF THE MIDDLETOWN
TOWNSHIP SCHOOL DISTRICT; AND THE
BOARD OF EDUCATION OF THE TOWNSHIP
OF MIDDLETOWN, MONMOUTH COUNTY,
Respondents.

BEFORE JEFF S. MASIN, ALAJ:

This matter having been open to the Office of Administrative Law following transmittal from the Commissioner of Education, and the petitioners having moved for emergent relief pursuant to *N.J.A.C. 1:1-12.6*, and the Administrative Law Judge having considered the presentations of counsel and the briefs, affidavits and other documents submitted, and for good cause shown;

It is on this 22nd day of April, 1991 ORDERED that the Board of Education of the Township of Middletown, its employees, agents and other representatives be and

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the same are hereby enjoined from distributing the document known as School Scene, April 1991, Exhibit P-9 and expending any public funds in connection with the distribution, publication or dissemination of said document;

In connection with the above, I have determined that the petitioners have meant the standards for emergency relief contained at *N.J.A.C. 1:1-12.6*; specifically, that:

- (1) There is no adequate remedy at law available to them should such distribution occur;
- (2) That they have a reasonable likelihood of success on the merits and;
- (3) That the equities are in favor of their position.

An application to stay this order having been made by respondents, it is hereby **DENIED**.

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

April 22, 1991
Date _____
/ct

Jeff S. Masin
JEFF S. MASIN, ALAJ

KAREN FENTON, ANN H. PREWETT, :
 PETER ROWE AND WARREN R. SCHUELER, :
 :
 PETITIONERS, :
 :
 V. : COMMISSIONER OF EDUCATION
 :
 JOHN L. SULLIVAN, RICHARD HOLZMAN : DECISION ON MOTION
 AND THE BOARD OF EDUCATION OF THE :
 TOWNSHIP OF MIDDLETOWN, MONMOUTH :
 COUNTY, :
 :
 RESPONDENTS. :
 :
 _____ :

For the Petitioners, Kenney, Gross & McDonough (Malachi J. Kenney, Esq., of Counsel)

For Respondent Sullivan and the Board, Kalac, Newman, Lavender and Campbell (Peter Kalac, Esq., of Counsel)

For Respondent Holzman, Margaret C. Murphy, Esq.

This matter was opened before the Commissioner by way of a Petition of Appeal seeking restraints against John Sullivan, President of the Middletown Township Board of Education, Richard Holzman, Superintendent of the Middletown Township Board of Education and the Middletown Township Board of Education itself from distributing a budget brochure entitled "School Scene" dated April 1991. (Ex. 9) Petitioners seek such restraints based upon their contention that a letter from John Sullivan, Board President, appearing on the face of the publication constituted an impermissible use of public funds for the purpose of promoting the passage of the 1991-92 school budget in contravention of law as interpreted by the New Jersey Supreme Court in Citizens to Protect

Public Funds v. Board of Education of Parsippany-Troy Hills, 13 N.J. 172 (1953). Petitioners also argue that the aforesaid letter of Mr. Sullivan goes beyond advocacy of the budget to promote the candidacy for reelection of Mr. Sullivan in that his name is prominently displayed in three separate and prominent places in the newsletter and there are invidious comparisons drawn between the Board under Mr. Sullivan's leadership and previous boards of education. (See Petition of Appeal, Second Count, paragraph 5.)

In addition to the issue which petitioners take in reference to the alleged advocacy and political motivation of the President's letter, petitioners challenge the accuracy of the letter of Superintendent Holzman in that said letter allegedly falsely and incorrectly represents that the proposed budget includes allocations for initiatives which are in fact not included in the budget program. (See Petition of Appeal, Third Count, paragraphs 3 through 7.)

By way of responsive pleadings Respondent Sullivan in his sworn affidavit urges the Commissioner to consider two budget newsletters omitted by petitioners from presentation as exhibits which belie respondent's assertion that the April 1991 "School Scene" newsletter in question herein is completely without precedent. (See Exhibits A and B of Respondent's Papers.) Respondent contends that both of the attached newsletters for the years 1987-88 constituting Exhibits A and B not only request support for the budget but have the name of Ann H. Prewett affixed to them as the then President of the Board of Education. Mr. Sullivan's affidavit further denies that the newsletter in question represents

an attempt on his part to promote his candidacy but merely represents true and factually sound statements.

Respondent Holzman by way of defense argues that he at all times acted pursuant to his duties as Superintendent and at the direction of the Board of Education and therefore denies that any actions taken relative to the matter controverted herein were taken in his individual capacity. Respondent Holzman by way of his sworn affidavit denies that his column in the newsletter constituted a misrepresentation of what items were contained within the budget. He contends that the promoters listed in his column which were not directly included in the budget were clearly known by all board members to be funded through an anticipated unappropriated free balance.

In defense of the Respondent Board's position, the Board argues that petitioners have failed to meet the requirements for injunction relief set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) in that it has failed to demonstrate that they will be irreparably harmed and without a remedy in law if injunctive relief is not granted; failed to demonstrate that there are no controverted facts; failed to show a reasonable probability of prevailing on the merits; and failed to demonstrate that a balancing of the equities in this matter is in their favor.

In defense of its position, the Respondent Board makes great moment of the fact that previous Board budget newsletters, specifically those previously referred to by Mr. Sullivan in his affidavit, made blatant appeals for direct support of the budget during the 1987-88 school year.

Finally, Respondent Board argues that the newsletter which is at issue in this matter does not constitute the overt and blatant type of advocacy decried by the New Jersey Supreme Court in Citizens, supra. Contrary to the document in the Citizens matter, the Middletown Board's document does "...include all consequences, good and bad..." as required by the New Jersey Supreme Court's decision. Nowhere does the document in this case resemble the open and specific admonition to vote yes on the budget as was the case in Citizens, supra.

The Respondent Board concludes by arguing that since its actions were neither arbitrary nor capricious, they are entitled to a presumption of correctness and therefore injunctive relief should be denied.

Upon independent review of the record in this matter of injunctive relief, including the audiotapes of the proceedings before the Administrative Law Judge, the Commissioner concurs with and adopts as his own the recommended decision of the ALJ to enjoin respondents from the distribution of the newsletter disputed herein relative to the 1991-92 school budget for the Middletown Township essentially for the reasons set forth in the second audiotape but as modified below.

The Commissioner is in agreement with the ALJ's determination that petitioners have met the four-prong standard for the granting of the extraordinary remedy of injunctive relief as set forth by the New Jersey Supreme Court in Crowe, supra; namely, that irreparable harm will result if the injunction is denied; petitioners have demonstrated a likelihood of prevailing on the

merits of their claim that the newsletter violates the prohibition against a board of education expending public funds to advocate passage of a public question which has been placed before the voters; greater harm will accrue to petitioners than respondents if injunctive relief were to be denied; and the public interest compels the granting of the motion for injunctive relief.

A reading of the disputed newsletter (Ex. 9) as a whole does, as determined by the ALJ, go beyond a straightforward presentation of factual information to advocate passage of the budget. The document is not as blatant and explicit as that found in the Parsippany-Troy Hills decision in exhorting a "yes" vote on the budget question and it does not contain a litany of dire consequences if the budget is defeated. It does, nonetheless, clearly convey to the reader the judgment that the Board of Education is doing a terrific job in contrast to its predecessors and since the Board of Education has been able to say "yes" to various specified expenditures in the budget so, too, should the reader because the budget is "good news" for the district's taxpayers, students, teachers, staff and parents. (Ex. 9, pp. 1 and 4) In the Commissioner's judgment, the ALJ is correct in concluding that such value judgments do constitute advocacy rather than a presentation of relevant facts to enable the electorate to make an informed decision when voting upon a proposal before them as discussed by the State's Supreme Court in the Parsippany-Troy Hills decision.

The Commissioner does not, however, agree with the ALJ's conclusion that the newsletter constitutes advocacy of Respondent

Sullivan's candidacy for Board membership. There are certain privileges which are afforded to a board president, one of which would be to write a newsletter piece on the proposed budget on behalf of the board as a whole. For better or worse, it is not inappropriate for a board president to explain the proposed budget. If the letter in the instant matter were more neutral in tone, the issue would not have arisen but, because of the clear advocacy espoused by the newsletter, the issue has arisen in this matter. In the Commissioner's judgment, though, the congratulatory elements of Sullivan's comments are directed to the Board as a whole, as well as its Finance Committee and the Board's key administrators involved in the budget process - the superintendent and school business administrator.

Having determined that the newsletter as a whole is tantamount to advocacy in favor of passage of the budget rather than being a presentation restricted to relevant facts necessary to make an informed decision, the Commissioner finds it unnecessary to examine that portion of the newsletter written by the superintendent in order to reach a determination on the request for injunctive relief.

Finally, the Commissioner agrees with the ALJ's conclusion that even if indiscretions by the Middletown Board of Education occurred in the past with respect to the prohibition of public funds being spent to advocate passage of a budget question on a ballot, that does not prevent the newsletter in the instant matter from being determined an improper action by the current Board of Education. He likewise agrees with the ALJ that the order in this

matter regarding the controverted newsletter is limited to respondents in their official capacities as a board member or employee of the district.

Accordingly, for the reasons stated by the ALJ and as modified herein, it is ORDERED this 23rd day of April 1991 that injunctive relief be granted to petitioners. Consequently, the newsletter entitled "School Scene" submitted as Exhibit 9 in this matter shall not be distributed to the public in its current format.

If any issues remain to be decided, the parties are not foreclosed from seeking resolution of these matters on the merits through plenary hearing.


ACTING COMMISSIONER OF EDUCATION

APRIL 23, 1991

DATE OF MAILING - APRIL 24, 1991



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION

DISMISSING CONTESTED CASE

OAL DKT. NO. EDU 4037-91

AGENCY DKT. NO. 86-4/91

KAREN FENTON, ET AL.,

Petitioners,

v.

JOHN L. SULLIVAN, ET AL.,

BOARD OF EDUCATION OF THE
TOWNSHIP OF MIDDLETOWN,

Respondents.

Malachi J. Kenney, Esq., for petitioners (Kenney, Gross & McDonough, attorneys)

Peter P. Kalac, Esq., for the Board of Education of the Township of Middletown
(Kalac, Newman & Lavender, attorneys)

Margaret Murphy, Esq., for Richard B. Holzman

Thomas W. Cavanaugh, Esq., for John L. Sullivan

Record Closed: April 22, 1991

Decided: June 6, 1991

BEFORE JEFF S. MASIN, ALAJ:

This matter having been opened to the Office of Administrative Law and Administrative Law Judge Jeff S. Masin having granted an Order granting emergent relief and denying a stay of the Order on April 22, 1991, and it appearing that said Order disposed of the sole issue in the contested emergency proceeding, that is, whether or not a document known as the School Scene, April 1991, Exhibit P-9, could be distributed, and it appearing that there are no other issues which were raised in the emergency application or which remain to be decided, I **CONCLUDE** that the issues in dispute have been resolved and that the contested case should be **DISMISSED**.

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I hereby FILE this initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 6, 1991
DATE

Jeff S. Masin
JEFF S. MASIN, ALAJ

6/7/91
DATE

Receipt Acknowledged:
[Signature]
DEPARTMENT OF EDUCATION

JUN 12 1991
DATE

Mailed To Parties:
Joyce LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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KAREN FENTON ET AL., :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
JOHN L. SULLIVAN ET AL. AND THE : DECISION
BOARD OF EDUCATION OF THE TOWN- :
SHIP OF MIDDLETOWN, MONMOUTH :
COUNTY, :
RESPONDENTS. :
:

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

The Commissioner adopts as his own the recommendation of the Administrative Law Judge dismissing the Petition of Appeal in view of the fact that the emergent relief order of April 24, 1991 disposed of the controverted issues in the matter.

Accordingly, the Petition of Appeal is hereby dismissed.


COMMISSIONER OF EDUCATION

JULY 16, 1991

DATE OF MAILING - JULY 16, 1991

IN THE MATTER OF THE MIDDLESEX :
COUNTY BOARD OF ELECTIONS : COMMISSIONER OF EDUCATION
APPLICATION FOR RELEASE OF : ORDER
VOTING MACHINES. :
_____ :

Whereas, the New Jersey State Legislature did by enactment of P.L. 1991, c.21 establish Tuesday, April 30, 1991 as the annual school election for this year; and

Whereas, N.J.S.A. 18A:14-63.2 and N.J.S.A. 14-63.3 authorize the Commissioner of Education to conduct a recount upon application of a defeated candidate and to conduct a recount on a public question upon application of 10 voters or the board of education; and

Whereas, N.J.S.A. 18A:14-63.1 requires that the counter compartment of each voting machine be locked upon completion of vote count and remain locked for a minimum of 15 days or a maximum of 30 days if the Commissioner of Education orders a recount; and

Whereas, the Middlesex County Board of Elections owns 614 election machines, 203 of which will be utilized by the 23 elective school boards in Middlesex County on April 30, 1991; and

Whereas, the Primary Election to be held on June 4, 1991 necessitates the use of 556 of the County's election machines; and

Whereas, in order to properly prepare the voting machines for a June 4 Primary Election, each machine must be cleared, examined for workability and made available for inspection by the candidates pursuant to N.J.S.A. 19:48-6, such inspection being scheduled for May 20, 1991; and

Whereas, the Middlesex County Board of Elections has determined that it would have an insufficient period of time to prepare the necessary machines for the June 4 Primary Election should the machines remain locked for the statutorily required 15- or 30-day period; and

Whereas, the representative of the Attorney General has requested on behalf of the Middlesex County Board of Elections that the Commissioner issue an administrative order releasing the aforesaid election machines upon the conducting of a recheck of all election machines utilized in the April 30, 1991 school elections pursuant to a schedule developed by the Middlesex County Board of Elections and attached hereto and incorporated herein by reference; and

The Commissioner being assured that the Middlesex County Superintendent of Schools has been informed of the aforesaid scheduled recheck and that the candidates in each of the 23 school districts, as well as the board secretaries in these districts, have been informed of the scheduled recheck of each machine and have been invited to be present on the scheduled days; and

The Commissioner having been further assured that the Middlesex County Board of Elections personnel will be available to assist the Commissioner's representative in conducting the recheck of the machines; now therefore

The Commissioner directs that the Middlesex County Board of Elections be authorized to clear the election machines in preparation for the June 4, 1991 Primary Election upon completion of the recheck of all machines utilized in the April 30, 1991 school elections.

IT IS SO ORDERED this 23rd day of April 1991.


COMMISSIONER OF EDUCATION

APRIL 23, 1991

DATE OF MAILING - APRIL 24, 1991

IN THE MATTER OF THE SOMERSET :
COUNTY BOARD OF ELECTIONS : COMMISSIONER OF EDUCATION
APPLICATION FOR RELEASE OF : ORDER
VOTING MACHINES. :
_____ :

Whereas, the New Jersey State Legislature did by enactment of P.L. 1991, c.21 establish Tuesday, April 30, 1991 as the annual school election for this year; and

Whereas, N.J.S.A. 18A:14-63.2 and N.J.S.A. 14-63.3 authorize the Commissioner of Education to conduct a recount upon application of a defeated candidate and to conduct a recount on a public question upon application of 10 voters or the board of education; and

Whereas, N.J.S.A. 18A:14-63.1 requires that the counter compartment of each voting machine be locked upon completion of vote count and remain locked for a minimum of 15 days or a maximum of 30 days if the Commissioner of Education orders a recount; and

Whereas, the Somerset County Board of Elections owns 260 election machines, 96 of which will be utilized by the elective school boards in Somerset County on April 30, 1991; and

Whereas, the Primary Election to be held on June 4, 1991 necessitates the use of 243 of the County's election machines and a May municipal election in Franklin Township will further require the use of 41 machines; and

Whereas, the Somerset County Board of Elections has determined that it must be able to convert the 41 machines utilized for the Franklin Township school election for use in the May 14 Franklin Township municipal election; and

Whereas, the representative of the Attorney General has requested on behalf of the Somerset County Board of Elections that the Commissioner issue an administrative order releasing the 41 election machines utilized by the Franklin Township Board of Education in the April 30, 1991 school election upon completion of a recheck by a representative of the Commissioner at a time to be mutually agreed upon between the Somerset County Board of Elections and the Somerset County Superintendent of Schools; and

Whereas the Commissioner recognizes the necessity for such early release of the machines utilized by the Franklin Township Board of Education; now therefore

The Commissioner directs that the Somerset County Board of Elections be authorized to clear the election machines utilized by the Franklin Township Board of Education upon completion of the recheck of all machines utilized by the Board in the April 30, 1991 school elections.

IT IS SO ORDERED this 29th day of April 1991.



ACTING COMMISSIONER OF EDUCATION

APRIL 29, 1991

DATE OF MAILING - APRIL 29, 1991

IN THE MATTER OF THE PASSAIC :
COUNTY BOARD OF ELECTIONS : COMMISSIONER OF EDUCATION
APPLICATION FOR RELEASE OF : ORDER
VOTING MACHINES. :
_____ :

Whereas, the New Jersey State Legislature did by enactment of P.L. 1991, c.21 establish Tuesday, April 30, 1991 as the annual school election for this year; and

Whereas, N.J.S.A. 18A:14-63.2 and N.J.S.A. 14-63.3 authorize the Commissioner of Education to conduct a recount upon application of a defeated candidate and to conduct a recount on a public question upon application of 10 voters or the board of education; and

Whereas, N.J.S.A. 18A:14-63.1 requires that the counter compartment of each voting machine be locked upon completion of vote count and remain locked for a minimum of 15 days or a maximum of 30 days if the Commissioner of Education orders a recount; and

Whereas, the Passaic County Board of Elections owns 350 election machines, 56 of which will be utilized by the 7 elective school boards in Passaic County on April 30, 1991; and

Whereas, municipal elections to be held on May 14, 1991 in two communities and the Primary Election to be held on June 4, 1991 necessitates the use of the County's election machines; and

Whereas, in order to properly prepare the voting machines for such municipal and Primary Elections each machine must be cleared, examined for workability and made available for inspection by the candidates pursuant to N.J.S.A. 19:48-6; and

Whereas, the Passaic County Board of Elections has determined that it would have an insufficient period of time to prepare the necessary machines for the May 14th municipal elections and the June 4 Primary Election should the machines remain locked for the statutorily required 15- or 30-day period; and

Whereas, the representative of the Attorney General has requested on behalf of the Passaic County Board of Elections that the Commissioner issue an administrative order releasing the aforesaid election machines upon the conducting of a recheck of all election machines utilized in the April 30, 1991 school elections commencing on Thursday, May 2, 1991 at 10:00 a.m. and concluding on Friday, May 3, 1991; and

The Commissioner being assured that the Passaic County Superintendent of Schools has been informed of the aforesaid scheduled recheck and that the candidates in each of the school districts, as well as the board secretaries in these districts, have been informed of the scheduled recheck of each machine and have been invited to be present on the scheduled days; and

The Commissioner having been further assured that the Passaic County Board of Elections personnel will be available to assist the Commissioner's representative in conducting the recheck of the machines; now therefore

The Commissioner directs that the Passaic County Board of Elections be authorized to clear the election machines in preparation for the May 14th municipal elections and the June 4, 1991 Primary Election upon completion of the recheck of all machines utilized in the April 30, 1991 school elections.

IT IS SO ORDERED this 30th day of April 1991.



ACTING COMMISSIONER OF EDUCATION

APRIL 30, 1991

DATE OF MAILING - APRIL 30, 1991

- 3 -

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IN THE MATTER OF THE OCEAN :
COUNTY BOARD OF ELECTIONS : COMMISSIONER OF EDUCATION
APPLICATION FOR RELEASE OF : ORDER
VOTING MACHINES. :
_____ :

Whereas, the New Jersey State Legislature did by enactment of P.L. 1991, c.21 establish Tuesday, April 30, 1991 as the annual school election for this year; and

Whereas, N.J.S.A. 18A:14-63.2 and N.J.S.A. 14-63.3 authorize the Commissioner of Education to conduct a recount upon application of a defeated candidate and to conduct a recount on a public question upon application of 10 voters or the board of education; and

Whereas, N.J.S.A. 18A:14-63.1 requires that the counter compartment of each voting machine be locked upon completion of vote count and remain locked for a minimum of 15 days or a maximum of 30 days if the Commissioner of Education orders a recount; and

Whereas, the Ocean County Board of Elections owns 424 election machines, 230 of which will be utilized by the 24 elective school boards in Ocean County on April 30, 1991; and

Whereas, the Primary Election to be held on June 4, 1991 necessitates the use of 393 of the County's election machines; and

Whereas, in order to properly prepare the voting machines for a June 4 Primary Election, each machine must be cleared, examined for workability and made available for inspection by the candidates pursuant to N.J.S.A. 19:48-6, such inspection being scheduled for May 20, 1991; and

Whereas, the Ocean County Board of Elections has determined that it would have an insufficient period of time to prepare the necessary machines for the June 4 Primary Election should the machines remain locked for the statutorily required 15- or 30-day period; and

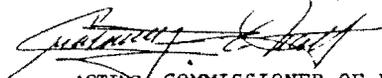
Whereas, the representative of the Attorney General has requested on behalf of the Ocean County Board of Elections that the Commissioner issue an administrative order releasing the aforesaid election machines upon the conducting of a recheck of all election machines utilized in the April 30, 1991 school elections commencing on Tuesday, May 7 at 9:00 a.m. and concluding on Wednesday, May 8, 1991; and

The Commissioner being assured that the Ocean County Superintendent of Schools has been informed of the aforesaid scheduled recheck and that the candidates in each of the 24 school districts, as well as the board secretaries in these districts, have been informed of the scheduled recheck of each machine and have been invited to be present on the scheduled days; and

The Commissioner having been further assured that the Ocean County Board of Elections personnel will be available to assist the Commissioner's representative in conducting the recheck of the machines; now therefore

The Commissioner directs that the Ocean County Board of Elections be authorized to clear the election machines in preparation for the June 4, 1991 Primary Election upon completion of the recheck of all machines utilized in the April 30, 1991 school elections.

IT IS SO ORDERED this 30th day of April 1991.


ACTING COMMISSIONER OF EDUCATION

APRIL 30, 1991

DATE OF MAILING - APRIL 30, 1991

IN THE MATTER OF THE MONMOUTH :
COUNTY BOARD OF ELECTIONS : COMMISSIONER OF EDUCATION
APPLICATION FOR RELEASE OF : ORDER
VOTING MACHINES. :
_____ :

Whereas, the New Jersey State Legislature did by enactment of P.L. 1991, c.21 establish Tuesday, April 30, 1991 as the annual school election for this year; and

Whereas, N.J.S.A. 18A:14-63.2 and N.J.S.A. 14-63.3 authorize the Commissioner of Education to conduct a recount upon application of a defeated candidate and to conduct a recount on a public question upon application of 10 voters or the board of education; and

Whereas, N.J.S.A. 18A:14-63.1 requires that the counter compartment of each voting machine be locked upon completion of vote count and remain locked for a minimum of 15 days or a maximum of 30 days if the Commissioner of Education orders a recount; and

Whereas, the Monmouth County Board of Elections owns 610 election machines, 278 of which will be utilized by the elective school boards in Monmouth County on April 30, 1991; and

Whereas, the Primary Election to be held on June 4, 1991 necessitates the use of 435 of the County's election machines; and

Whereas, in order to properly prepare the voting machines for a June 4 Primary Election, each machine must be cleared, examined for workability and made available for inspection by the candidates pursuant to N.J.S.A. 19:48-6, such inspection being scheduled for May 22, 1991; and

Whereas, the Monmouth County Board of Elections has determined that it would have an insufficient period of time to prepare the necessary machines for the June 4 Primary Election should the machines remain locked for the statutorily required 15- or 30-day period; and

Whereas, the representative of the Attorney General has requested on behalf of the Monmouth County Board of Elections that the Commissioner issue an administrative order releasing the aforesaid election machines upon the conducting of a recheck of all election machines utilized in the April 30, 1991 school elections beginning on Tuesday, May 7, 1991; and

The Commissioner being assured that the Monmouth County Superintendent of Schools has been informed of the aforesaid scheduled recheck and that the candidates in each of the school districts, as well as the board secretaries in these districts, have been informed of the scheduled recheck of each machine and have been invited to be present on the scheduled days; and

The Commissioner having been further assured that the Monmouth County Board of Elections personnel will be available to assist the Commissioner's representative in conducting the recheck of the machines; now therefore

The Commissioner directs that the Monmouth County Board of Elections be authorized to clear the election machines in preparation for the June 4, 1991 Primary Election upon completion of the recheck of all machines utilized in the April 30, 1991 school elections.

IT IS SO ORDERED this 30th day of April 1991.


ACTING COMMISSIONER OF EDUCATION

APRIL 30, 1991

DATE OF MAILING - APRIL 30, 1991

- 3 -

702



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON REMAND

OAL Dkt. No. EDU 8833-90

Agency Dkt. No. 266-7/90

Linda DiMare, Pat Santora, Frank
Bacchus and Frances Wilson,

Petitioners,

v.

The Board of Education of the Town-
ship of Holmdel, Monmouth County

Respondent.

Pat Santora, *Pro Se*

Frank Bacchus, *Pro Se*

Frances Wilson, *Pro se*

Charles F. Shaw, III, Esq. appearing on behalf of petitioner, Linda DiMare,
(Fay, Pandolfe, Shaw & Rubino, attorneys),

Malachi J. Kenney, Esq., appearing on behalf of respondent, (Kenney,
Gross & McDonough, attorneys)

Record Closed: March 6, 1991

Decided: March 25, 1991

BEFORE JAYNEE LaVECCHIA, CHIEF ADMINISTRATIVE LAW JUDGE:

STATEMENT OF THE CASE

On October 22, 1990, the Commissioner of Education remanded this matter for a plenary hearing on petitioners' claims that the action of the Board of Education of the Township of Holmdel (Board) taken on the evening of July 11, 1990 violated Robert's Rules of Order, the Board's Bylaws and the Open Public Meeting

NEW JERSEY IS AN EQUAL OPPORTUNITY EMPLOYER

Act. The specific Board action challenged was the seating of Ms. Bresler to fill a vacancy caused upon an earlier resignation of another Board member.

Emergent relief was sought by petitioners and denied by Initial Decision dated August 28, 1990. That Initial Decision also recommended dismissal of the claims. Upon review, the Commissioner of Education on October 22, 1990 affirmed the denial of emergent relief, but remanded the matter for a plenary hearing.

On December 3, 1990, a telephone prehearing conference was conducted and the following issues identified for purposes of this remand:

1. Whether Robert's Rules of Order apply to the Board of Education's activities which occurred the evening of July 11, 1990 and into the early morning hours of July 12, 1990 and, if so, were the rules violated.
2. Were any Board of Education bylaws which pertain to Board procedures violated at the above-mentioned session of the Board.
3. Was a quorum present at said meeting of the Board.
4. Was the Open Public Meetings Act violated at said meeting of the Board and particularly with regard to the seating of Ms. Bresler of the Board.
5. Related to the above enumerated issues, and in accordance with the direction of the Commissioner at page 12 of his decision remanding this matter to the Office of Administrative Law, factual findings shall be made delineating "step by step, the actions or inactions on the part of the Board which immediately succeeded the Board's coming out of executive session..." and whether those actions or inactions were in contravention of law or Board policy.
6. Whether this action has become moot as a result of the resignation of certain members of the Board of Education who were members of the Board at the time of the Board's meeting on the evening of July 11 and July 12, 1990.

A plenary hearing in this matter was conducted on January 9 and 10, 1991 and February 26, 1991. Upon the receipt of post-hearing memoranda on March 6, 1991, the record was closed.

FACTUAL DISCUSSION AND FINDINGS

Certain of the facts in this matter were stipulated and others were not the subject of any dispute between the parties, notwithstanding the fact that formal stipulations were not entered. Based on these stipulations and credible undisputed factual testimony, the following is found as fact.

As of July 11, 1990, the Board of Education of the Township of Holmdel was comprised of eight members. They were Ms. DiMare, Ms. Santora, Ms. Wilson, Ms. Mann, Dr. Blumenthal, Mr. Merces, Mr. Roche and Dr. Henry. All eight were present for the commencement of the regular public session of the Board's meeting on July 11, 1990. The July meeting was a combined workshop and regular Board session. This meant that there was a workshop meeting, followed by an executive session, and then the public session of the regularly scheduled public meeting. It is undisputed that at the executive session conducted at the latter portion of the evening, shortly after midnight, no tape recording was made of the executive session. It is also admitted that the tape recorder was not turned back on when the Board members returned to public session following the latter executive session held in the early morning hours on July 12, 1990.

In this remand, the Commissioner specifically seeks factual determinations as to what transpired at the Board's meeting on July 11-12, 1990. These facts were disputed. Accordingly, the factual presentation will initially address the order of events which transpired that evening and further factual analysis will be related to the specific charges relating to the alleged violations of Roberts Rules of Order and the Open Public Meetings Act.

The Board meeting scheduled for the evening of July 11, 1990 was noticed as a Board workshop session and a regularly scheduled meeting of the Board. The Board conducted combined sessions like this typically in the months of July and August in each year. Earlier that week, on July 9 and July 10, special Board meetings had been called and conducted to review potential candidates for the Board vacancy. On each of those days, the Board was stalemated on votes taken.

During the public session of the regular meeting of the Board on July 11, 1990, votes were taken on three candidates for the Board vacancy. These candidates were Richard Darby, Jean Lucciani and Renee Bresler. On the votes taken for each of the aforementioned candidates, the tally was four - four. Therefore, the motions did not carry. Several of the witnesses who testified noted that following the stalemated votes, Ms. DiMare attempted to start a discussion regarding other candidates during the public session, but was stopped in this discussion by counsel for the Board, Mr. Barger. Several witnesses testified that Mr. Barger interrupted Ms. DiMare and advised that discussion of potential candidates for the Board vacancy must be conducted in private session and not in public. This was also admitted to by Ms. DiMare.

It was also apparent from hearing numerous witnesses that there was a difference of opinion among the Board members as to how to proceed regarding the vacancy. Ms. Mann and Ms. Wilson were both interested in pursuing County Superintendent involvement to fill the vacancy. Other Board members, including Mr. Mercus and Mr. Roche, stated strong views that this was an issue that should be resolved by the Board internally and that they wanted to continue with the issue that evening. Ms. Santora also stated that she agreed with Ms. Wilson when Ms. Wilson asked Board Counsel to look into how to refer the issue to the County Superintendent. This request by Ms. Wilson was not done by motion. It was merely an inquiry by a single Board member. Indeed, Ms. Santora testified that Dr. Blumenthal, Dr. Henry and Mr. Roche opposed involving the County Superintendent with this issue.

Other witnesses testified that Dr. Blumenthal stated during the public session that other names could be discussed during the executive session to follow the public session. This was related in reliable testimony by Dr. Fernandez, the Board Secretary, and Mr. Mercus. Indeed, Mr. Richard Darby, a member of the public present at the time and one of the candidates who was voted upon during the public session of the Board meeting, testified that after the votes were stalemated and there was an aborted discussion of additional candidates because of Mr. Barger's stopping of the public discussion, he heard Dr. Blumenthal say that the Board can go into executive session to discuss personnel and negotiations.

The minutes reveal that further public activities were conducted by the Board, and this was not disputed by the oral testimony of the witnesses. Agenda items for the public session of the Board were discussed and at 12:15 a.m. on the morning of July 12, 1990, on motion of Dr. Henry and seconded by Ms. Wilson, the Board went into executive session.

Much testimony was given at hearing concerning the stated reason for going into public session. I FIND, based on that the overwhelming weight of the evidence submitted and from listening to a tape of the Board's meeting that the stated reason for going into executive session was to discuss "personnel and negotiations". It is apparent from the testimony that various individuals attached differing meanings to the use of those words, as will be discussed further.

After approximately a half hour in executive session, but before the conclusion of the discussion of negotiations regarding an employee administrator (Mr. L) who was not part of the bargaining unit discussed during the earlier executive session held that night, Ms. Wilson and Ms. Mann left executive session. This was at approximately 12:45 a.m. Although Ms. Mann testified that she would not have left the meeting had she known more business was to be completed, I FIND that Dr. Blumenthal told Ms. Mann and Ms. Wilson as they stood to leave "We're not done". This was stated by Dr. Blumenthal twice as Ms. Mann and Ms. Wilson walked past his table to leave. Several witnesses, including Dr. Brennan, Superintendent of Schools, Dr. Henry, and Dr. Fernandez the Board Secretary, heard Dr. Blumenthal make this statement twice and remarked upon Ms. Wilson and Ms. Mann not responding or reacting to this comment, but leaving anyway.

Ms. Wilson pointedly testified that both she and Ms. Mann stood with their coats on while Dr. Blumenthal "went on and on" regarding Mr. L. She further testified that at the conclusion of Dr. Blumenthal's comments regarding Mr. L. which in her opinion were lengthy, she asked him "Are you through" and that he replied "yes". At that time she stated that she and Ms. Mann left. I am convinced, based upon the totality of the evidence presented that Ms. Wilson and Ms. Mann were anxious to leave at the late hour. While it may be possible that Ms. Wilson and Ms. Mann did not hear Dr. Blumenthal, I am convinced that possibility is unlikely since numerous other persons in the room, including a person seated two tables away (Dr. Henry), heard Dr. Blumenthal utter these statements. I find it more likely that Dr.

Blumenthal's comments were ignored. In either event, I **FIND** those statements by Dr. Blumenthal to have been made, and I **FIND** that neither Ms. Mann nor Ms. Wilson can claim to have been misled in choosing not to be present for Board activities which ensued following their departure.

Following Ms. Mann's and Ms. Wilson's departure, discussion on Mr. L was completed. Thereupon, discussion by the remaining Board members became more informal. Several members revisited the issue of alternative compromise candidates. It is admitted by Ms. DiMare that she suggested Mr. Morano as a possible alternative candidate for the Board vacancy. This was corroborated by Dr. Brennan's testimony, who also stated that Ms. Santora suggested Mr. Bacchus as an alternative candidate to fill the vacancy. Mr. Henry also was involved in discussion with Ms. Santora regarding an alternative candidate. During this same time, Mr. Mercus suggested revisiting the issue of getting Ms. Bresler on the Board.

Mr. Fishon aptly described the course of events during the last minutes of the Board's meeting early that morning as "pandemonium". This was corroborated by Ms. Tobians, Assistant to Dr. Fernandez who testified that there was much noise in the room while the following actions ensued. Several witnesses testified to not being able to hear certain things which other witnesses stated took place. All support the conclusory but appropriate descriptor used by Mr. Fishon of the manner in which the Board conducted its business at this point in time.

The minutes reflect, and there is no substantial credible evidence in the record to refute the fact that a motion was made by Mr. Mercus to return to public session, seconded by Mr. Roche, and a voice vote taken in which no dissents were recorded by any member present. Dr. Blumenthal then announced that the Board had returned to public session.

Differing versions of Ms. Santora's and Ms. DiMare's actions were provided in the testimony. After having considered the demeanor and forthrightness of the various witnesses who testified as to what they observed at this point in time, I **FIND** the following. A motion was made and seconded to appoint Renee Bresler to the vacant position on the Board. This motion was not framed as a motion to reconsider the earlier motion to appoint Ms. Bresler to fill the Board vacancy. Dr. Blumenthal instructed Dr. Fernandez to take the roll call. In fact, Dr.

Blumenthal stated "roll call" twice before Dr. Fernandez began to alphabetically read off the names of the members of the Board.

Ms. DiMare admitted to stating "I'm not here" when her name was called. She testified that she stated this while in the adjacent "computer" room by which Board members leave the meeting room. She stated that Ms. Santora was also in that room, ahead of her, departing at the time she made this statement. I **FIND** Ms. DiMare's testimony on this point to be substantially undercut by the testimony of other witnesses at the hearing. Several of the Board members testified to hearing Ms. DiMare say the words "I'm not here" while standing next to her chair at the table. This was testified to by people who had an unobstructed view of Ms. DiMare. These same witnesses heard Ms. DiMare condemn the motion as being "unethical" and that the Board "can't do this". I **FIND** this testimony persuasive and credible. Among the individuals who testified to hearing Ms. DiMare utter the statement "I'm not here" while standing at her chair, were Dr. Fernandez and Dr. Brennan and some Board members. Petitioners attempted to impeach the credibility of Dr. Brennan and Dr. Fernandez, however, I found both gentlemen to be fair and honest in their responses to questioning. Their testimony was forthright, consistent and neither individual exhibited any hostility toward petitioners, although it was suggested that such might be the case since petitioners were alleged to have been critical of the job performance of each of them. Accordingly, having observed these witnesses, I found their testimony reliable and persuasive, particularly with regard to this fundamental issue. The testimony of Mr. Roche and Mr. Mercus corroborates their testimony regarding Ms. DiMare's actions at this time. I **FIND** Ms. DiMare to have been present and in the Board room by her chair while the Board was acting on the pending motion to vote Ms. Bresler for appointment to the vacancy, and that her statement "I'm not here" cannot effectively convert her presence into an absence.

I also **FIND** that the testimony is unclear as to whether Ms. Santora was standing in the doorway of the computer room at the time this motion was taking place, or if she was physically in the computer room on her way out. However, the testimony is clear that Ms. Santora knew the Board was taking action, made comments to the effect "Can you believe they're doing this; let's get out of here" to Ms. DiMare, and that her actions were apparently designed to break the quorum of the Board's membership at the time the Board was taking action on the pending motion. Since the minutes reflect Ms. Santora being absent for the vote on the

motion to appoint Ms. Bresler, I need not make any separate finding on this factual issue. The vote was taken with four in the affirmative, one not voting. The motion carried, successfully appointing Ms. Bresler for the Board vacancy. Almost immediately thereafter, Ms. DiMare departed from the library room and out of the "computer" room, and it was declared that a quorum was lacking. The meeting closed at approximately 12:51 a.m.

LEGAL ANALYSIS

Open Public Meetings Act

It is alleged that the Board violated the Open Public Meetings Act, *N.J.S.A. 10:4-6 et seq.* (OPMA) when it discussed Board candidates during the executive session conducted in the early morning hours of July 12, 1991. The OPMA was designed to foster public involvement in all aspects of government. This tradition is evidenced in the declaration section of the statute, *N.J.S.A. 10:4-7*, and in the legislative history of the act wherein it is stated that the act "requires that the public and the press have advance notice of and the opportunity to attend most meetings, including executive sessions of public bodies, except for when the public interest or individual rights would be jeopardized." Statement, Assembly Bill No. 1030 enacted as L. 1975, c. 231. Nine exceptions exist to the OPMA pursuant to which a public body may exclude the public from that portion of the meeting at which a public body discusses items that might affect the public interest or individual rights. *N.J.S.A. 10:4-12(b)(8)* includes the appointment of, among other things, "prospective public officer(s)" among the topics which may be excluded from public discussion.

I **FIND** that Dr. Blumenthal, the President of the Board on the evening of July 11, 1990, gave sufficient notice under the Open Public Meeting Act when he called for a motion "For executive session to have discussions of personnel and negotiations." Tape of Board meeting July 11, 1991. In *Gannett Satellite Information Network v. Board of Education*, 201 *N.J. Super.* 65 (Law Div. 1984), it was recognized that the personnel exemption includes Board exclusion of the public from its deliberations when considering the qualifications of potential candidates. Petitioners suggest that the words "Board candidate" should have been used by Dr. Blumenthal when announcing that the Board was going into private session, instead of simply referring to discussions of personnel. I am not persuaded by this argument.

It is clear from the testimony in this case and from listening to the tape of the public session of the Board's meeting held July 11, 1991 that Dr. Blumenthal, during the earlier public portion of the meeting, specifically referred to the Board returning to executive session to discuss personnel as well as negotiations in the context of discussing the Board's obligation to cease discussing potential candidates during the public session. The context of this comment by Dr. Blumenthal in the earlier portion of the meeting was clear. Moreover, indeed at several times during the public session, Dr. Blumenthal suggested holding further discussion of Board candidates until the Board went into executive session. These comments were made at a time when even more members of the public were present than at the time when the Board actually convened executive session shortly after midnight.

While the petitioners and members of the public who testified in this proceeding may argue the use of the word "personnel" is not specific enough and they took that to mean to refer to employees of the Board and nothing more, I FIND such an interpretation of the Board's notice in the context of the entire meeting to be strained and unnecessarily formalistic. Accordingly, I FIND that the Board properly moved into executive session and was permitted to discuss potential Board candidates during that session without being in violation of the Open Public Meetings Act.

Petitioners also maintain that the Open Public Meetings Act was violated because the Board failed to direct any member or agent to leave the room in which it was conducting its meeting and look for members of the public to advise them that it had returned to public session. I FIND that neither the Board nor its agents conducted such a search for the public in the outer corridors of the library room wherein the Board was meeting. However, I am persuaded that the failure to do so is not fatal to the Board's action on that evening.

It was undisputed on this record that at the time the Board went into executive session at approximately 12:15 a.m., there were only five or six members of the public still present. Dr. Fernandez testified that he emerged from the library room to obtain a soda from a vending machine in the corridor prior to the executive sessions starting and he witnessed Mr. Darby and the other members of the public, who had been in the library room, departing from the same door by which Mr. Darby was departing. This door led out of the building into a parking lot. In light of

Dr. Fernandez's observations coupled with the undisputed testimony that the doors to the library meeting room contained glass windows which permitted members of the Board to see members of the public who may be waiting outside the doors to return to the public session of the Board, it was apparent that no one saw any members of the public waiting to come back in. Accordingly, I **FIND** no violation of the OPMA arising as the result of the Board's failure to send a member or agent into the hall to look for members of the public to invite back in. I would note that the Board has since July 1990, amended its practice and now requires a member or agent to go into the hallway whenever the Board finishes executive session, if the executive session is being held in the same room in which it had conducted the public portion of its meeting.

Robert's Rules of Order

Petitioner's also contend that the Board acted in violation of Robert's Rules of Order, specifically Rule 36 governing motions to reconsider, when it voted upon the motion to appoint Ms. Bresler. Among the powers which inure to local boards of education is the authority to adopt rules and regulations governing the way in which it conducts its business. *N.J.S.A. 18A:11-1(c)*. See also *Rall v. Board of Education of the City of Bayonne*, 104 *N.J. Super.* 236 (App. Div. 1969), reversed 54 *N.J.* 373 (1969). It is undisputed on this record, that the Board had annually acted to adopt Robert's Rules of Order for the governing of its Board procedures. It is consistent with public policy that a board adopt rules by which it will conduct its business in order to bring orderliness and fairness to the discussion and voting upon which the board acts. However, it is equally clear that a Board is not strictly bound by its own policies, and nowhere is this more true than on procedural policies which are intended to promote Board business, not thwart it. See *Blessing v. Board of Education of the Borough of Palisades Park and Frank Pallotta*, 1974 SLD 1133, 1136.

In the instant matter, the petitioners have rather belatedly asserted a violation of the motion to reconsider, Rule 36, contained in Robert's Rules. No such objection was framed on the evening of July 11, 1990. In essence, Rule 36 maintains that a motion to reconsider can only be made by a voting member who had voted against the previously defeated motion. Petitioners allege that the motion to seat Ms. Bresler which carried successfully was not brought by any voting member who

had initially voted against her appointment during the earlier public session of the Board. I reject this contention.

The record in this matter contains evidence that in the past motions to reconsider previously considered issues, while not phrased formally in such manner but which in essence were revisiting motions or issues which had not passed in a previous vote, were permitted to be brought by any member of the Board, including members who had voted in favor of the previously defeated motion. Such an instance occurred on June 14, 1989, pursuant to a motion involving by one of the petitioners, Ms. Wilson. In light of this past practice of the Board, indeed the past practice of one of the petitioners in this matter and the fact that no Rule 36 objection was raised the evening of the Board's meeting, I FIND petitioners estopped from raising this argument now. This argument belatedly elevates minute parliamentary procedures to a level where the rules become an impediment to Board action and invoked simply because petitioners disagree with the outcome of the vote on the motion to appoint Ms. Bresler. The Board argues that Robert's Rules of Order, as practiced by the Board, were followed the night of July 11, 1990. I FIND this to be substantially supported by the credible evidence in this record. The Board's actions on the night of July 11, 1990 were not inconsistent with prior Board practice and its good faith efforts to comply reasonably with Robert's Rules.

Board Policy/Bylaws

To the extent that petitioners mounted an argument that Robert's Rules, or Board policy governing voting generally, somehow required a greater majority for a vote to seat a Board member than that required by *N.J.S.A. 18A:12-15*, I FIND that the statute governs. *N.J.S.A. 18A:12-15* requires merely a majority of the Board members present in order to vote to fill a vacancy on the Board. That number was present on the evening of the Board's meeting in July and a majority of those present did vote in favor of seating Ms. Bresler for the vacant Board position.

Mootness

As part of its defense, the Board asserts that this matter is moot on two grounds. First, it contends the matter is moot because petitioners are no longer members of the Board. This argument ignores the plain language of *N.J.S.A. 10:4-15 b.*, which permits any member of the public to bring an action in lieu of

prerogative writ to challenge any action of a public body under the Open Public Meetings Act. This standing to bring an OPMA challenge conferred on members of the public is not restricted to prerogative writ actions brought in the Superior Court. It is beyond cavil that OPMA challenges may also be brought before the Commissioner pursuant to his authority to hear disputes arising under the school laws, *N.J.S.A. 18A:6-9*, which may relate to OPMA violations. *Sukin v. Board of Education of Northfield*, 171 *N.J. Super.* 184 (App. Div. 1979). Thus, petitioners have standing to bring this action and it is not moot by reason of the petitioners' resignation from the Board.

Secondly, the Board argues that the matter is moot because of the imminence of the next school Board election in April 1991. Because I believe the public in Holmdel needed to know that the actions of the Holmdel Board after the seating of Ms. Bresler taken this past year had not been invalid, I have determined to provide the Commissioner with a decision on the merits on all issues raised. Moreover, since a new Board has not yet been voted in and its members qualified pursuant to *N.J.S.A. 18A:12-2.1*, I **FIND** that technically the matter is not moot.

DISPOSITION

Petitioners have failed to carry their burden of proving by a preponderance of the evidence that the Board's action was in violation of either Board policy or bylaws, Robert's Rules of Order, or the Open Public Meetings Act. I **ORDER** the the petition of appeal in this matter be **DISMISSED** and that seating of Ms. Bresler which occurred on the early morning hours of July 12, 1990 be declared valid. All subsequent Board activity which took place following July 12, 1990 similarly should be declared lawful and valid.

OAL DKT NO. EDU 8833-90

I hereby FILE my initial decision with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION for consideration.

This recommended decision may be adopted, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 25, 1991
Date

Jaynee Lavecchia
JAYNEE LAVECCHIA, CHIEF ALJ

Receipt Acknowledged:

March 25, 1991
Date

Sydney [Signature]
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 27 1991
Date

Jaynee Lavecchia
OFFICE OF ADMINISTRATIVE LAW

ahk

WITNESSES

PETITIONERS

1. Dr. Ralph Blumenthal
2. Ms. Sigurda Tobians
3. Mr. Stan Fishon
4. Ms. Frances Wilson
5. Ms. Pat Santora
6. Ms. Susan Man
7. Ms. Linda DiMare
8. Mr. Richard Darby

RESPONDENT

1. Dr. Ralph Blumenthal
2. Dr. Manuel Fernandez
3. Dr. Timothy Brennan
4. Mr. William Roche
5. Dr. Paul Henry
6. Mr. Arthur Merces

EXHIBITS

- P-1 August 20 Certification of Ms. Tobians dated August 20, 1990
- P-3 Roll call sheet from July 11, 1990
- P-4 Parliamentary Procedure at a Glance
- P-5 Robert's Rules Revised
- P-6 Agenda for July 11, 1990 meeting

- J-1A Minutes of July 11, 1990 meeting
- J-1B First correction of Minutes of July 11, 1990 meeting
- J-1C Second correction of Minutes of July 11, 1990 meeting

- R-1 Holmdel Board of Education Policy #9325.4 Voting Procedure
- R-2 Holmdel Board of Education Policy #9325.3
- R-3 Original Tape of Board meeting of July 11, 1990 - Sides 1 and 2
- R-4 Original Tape of Board meeting of July 11, 1990 - Side 3
- R-5 Board minutes February 15, 1989
- R-6 Board minutes June 14, 1989
- R-7 Board minutes June 28, 1989
- R-8 Board minutes August 2, 1989
- R-9 Board minutes December 13, 1989
- R-10 Board minutes December 20, 1989
- R-11 Board minutes February 14, 1990
- R-12 Board minutes August 15, 1990
- R-13 Board minutes August 30, 1990
- R-14 Board minutes September 26, 1990
- R-15 Report of Robert Brady, Dynatronic Laboratories, Inc. regarding tapes of Board meeting of July 11, 1990

- C-1 Stipulated diagram of seating arrangement of Board members for July 11, 1990 meeting.

LINDA DI MARE ET AL. , :
PETITIONERS, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION ON REMAND
SHIP OF HOLMDEL, MONMOUTH :
COUNTY, :
RESPONDENT. :
_____ :

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

Petitioner DiMare excepts to the conclusion of the ALJ that because the Board had not strictly adhered to some of Robert's Rules of Order in the past, and because there was no objection to Rule #36 on the morning in question, petitioners are estopped from raising such argument at hearing. While conceding that she did not specifically invoke Rule #36 on the morning in question, she did indicate that she felt the Board's action was "unethical" and that the Board "can't do this." (Exceptions, at p. 2) Petitioner DiMare considers such language indicated her objection to the voting taking place, and that it is unfair and unrealistic to expect a lay board member to quote line and verse of Robert's Rules when a violation takes place. She considers such responsibility to be the Board attorney's.

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Further, Petitioner DiMare disagrees with the ALJ's conclusion that a violation of Robert's Rule #36 "elevates minute parliamentary procedures to a level where the rules become an impediment to Board action" (Exceptions, at p. 2, quoting the Initial Decision at p. 11). Rather, petitioner contends Rule #36 prevents the actions that the Board took on the night in question. Petitioner suggests that the policy behind the rule is that if a vote is taken on a particular issue and voted down, it cannot again be considered at that meeting unless a member who voted against the motion moves to reconsider. Petitioner submits that there is no way that the Board could have voted in its candidate without the cooperation of one of the petitioners, which the Board knew would not be forthcoming. Petitioner avers that the Board chose to ignore the rule because it allowed the Board to vote in its candidate. Thus, Petitioner DiMare contends there was no good faith effort to comply with Robert's Rules as the ALJ suggested in the initial decision at page 11 on the morning in question.

Petitioner DiMare further states "[i]t is disappointing that evidently the testimony of Sigrida Tobians and Stan Fishon, the only two witnesses that could be characterized as impartial, was evidently completely ignored in the decision." (Exceptions, at p. 1)

Petitioner DiMare would have the initial decision reversed and the seating of Renee Bresler by the Board declared invalid and null and void.

The Board's reply exceptions note that it is undisputed by all witnesses, including petitioners' own that on the night in question no one on the Board was familiar with the Motion to Reconsider, and that it is only recently that the departed members

even expressed any awareness of it. The Board claims the superintendent of schools, who knew of its existence but not of its terms, was informed by the Board attorney that the rule was superseded by statute. It further states it did what it had done in the past, and that petitioners' argument that no one objected in the past is not inconsistent with the ALJ's findings that in practice Robert's Rules of Order had been observed without that provision. "Moreover, the next finding that the rule is inconsistent with the statute permitting a simple majority, which is consistent with the Board Attorney's advice as testified to by the Superintendent, would make the Board's actual practice consistent with statutory requirements." (Reply Exceptions, at p. 1)

By way of rebuttal to Petitioner DiMare's contention that the Board's failure to observe Rule #36 constituted other than "an elevation of minute parliamentary procedures to a level where the rules become an impediment to Board action" (Reply Exceptions, at p. 2), the Board submits that the undisputed testimony is clear that Petitioner Wilson's similar motion on June 14, 1989 was not challenged by anyone as a violation of the rule. In fact, the Board avers, it was the past practice of the Board to vote on motions made by any member notwithstanding the tally in a previous vote on the same matter.

If strict observance of the rule were not minutia, failure of its observance would have prevented the seating of Ms. Bresler. Minutia can have enormous consequences and still be minutia. What the Administrative Law Judge is really saying is that a highly technical and very obscure rule, the terms and implications of which were unknown to all participants, may properly be characterized as minutia and should not be permitted in these circumstances to have such enormous outcome determinative power.

(Reply Exceptions, at p. 2)

In reply to Petitioner DiMare's contention that there was no good faith effort by the Board to comply with Robert's Rules in voting in Ms. Bresler without the cooperation of any petitioner, the Board submits that the statute is unambiguous in its requirement of a simple majority vote to fill a vacancy without any elaboration on the composition of the members voting or reference to their past voting record. The Board finds it "an untenable position" (Id.) for Petitioner DiMare to argue that the Board's conformance with the statute somehow constitutes a bad faith failure to comply reasonably with Robert's Rules.

The Board submits the decision of the ALJ should be affirmed.

Upon a careful and independent review of the record of this matter, the Commissioner adopts the findings and conclusions of the Office of Administrative Law as his own with the following clarification as pertains to the ALJ's conclusions concerning the application of Rule #36 of Robert's Rules of Order.

Recent case law has to some extent eroded the holding cited by the ALJ below in Blessing, supra, wherein the Commissioner stated that a Board is not strictly bound by its own policies. In the matter captioned Matawan Teachers Ass'n v. Board of Education of the Matawan-Aberdeen Regional School District, 223 N.J. Super. 504 (App. Div. 1988) the Appellate Division considered whether a local school board may lawfully adopt a plan to reorganize the school district, which included the closing and sale of a school building, by a majority vote of its full membership after consideration at a single public meeting even though its bylaws require adoption by a two-thirds vote of its full membership after consideration at two

public meetings. Therein the Appellate Division held that the board is not bound by the bylaw requiring a two-thirds vote of the full board because a statute, N.J.S.A. 18A:20-5, preempts the bylaw. However, the Appellate Division decided the Board was bound by the bylaw that requires two public meetings for adoption of such a plan because no statute superseded the bylaw and an important public policy providing public notice before taking official action was at stake. The Court clarified its position concerning the latter bylaw dealing with two public meetings, by stressing that said bylaw does not conflict directly or indirectly with any statute. It further emphasized:

Its purpose is not to remove the responsibility and authority to act from those members of a local board who are authorized by state law to act. Rather, its purpose is to assure that those having that responsibility and authority act only upon due deliberation after notice to the public and interested third parties. Our courts have long compelled public bodies to adhere to such bylaws. (Matawan, at 509)

Rule #36 of Robert's Rules of Order is distinguishable from that exception carved out by the Appellate Division in Matawan, supra. In that instant matter, no question arises as to whether a bylaw designed to give the public notice before official action is taken was at issue. Rather, the rule in question is not a bylaw of the Board at all, but is rather an obscure procedural rule of order governing motions to reconsider. Thus, the Commissioner agrees with the ALJ that the Board's failure to adhere to this rule of order should not serve to overturn an otherwise legal board action particularly where its own past practice indicates past noncompliance with Rule #36 and, further, that failure to follow Rule #36 results in no harm to the public or the rights of a

particular individual. The Commissioner agrees with the ALJ's conclusion that petitioners' argument in this regard "elevates minute parliamentary procedures to a level where the rules become an impediment to Board action and invoked simply because petitioners disagree with the outcome of the vote on the motion to appoint Ms. Bresler." (Initial Decision on Remand, at p. 11) He so finds.

A review of the Matawan case is also dispositive of petitioners' argument concerning whether a greater majority than that set forth by N.J.S.A. 18A:12-15 was required on a vote to seat a Board member. The Commissioner agrees with the Chief Administrative Law Judge and the Court in Matawan that the statute governs, thus, requiring a majority of the Board members present -- and no more -- in order to vote to fill a vacancy on the Board. He so finds.

Accordingly, for the reasons expressed in the initial decision, as clarified above, the recommendations contained in the initial decision rendered by the Office of Administrative Law are adopted as the Commissioner's own in this matter. The Petition of Appeal is therefore dismissed, with prejudice.

MAY 1, 1991

DATE OF MAILING - MAY 1, 1991

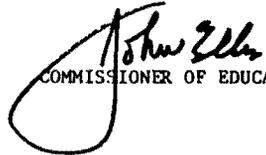

COMMISSIONER OF EDUCATION

R.R. ON BEHALF OF HIS MINOR :
CHILD J.R., : COMMISSIONER OF EDUCATION
PETITIONER, : DECISION ON MOTION
V. :
BOARD OF EDUCATION OF THE CITY :
OF VINELAND, CUMBERLAND COUNTY, :
RESPONDENT. :

This matter having come before the Commissioner of Education by way of a Motion for Emergent Relief seeking restoration of J.R. to full membership and all privileges attendant thereto in the Key Club of the Vineland Public Schools; and the Commissioner having transmitted this matter to OAL for emergent relief hearing and the ALJ having determined that the expulsion of J.R. from the Vineland Public Schools Key Club was in derogation of his due process rights; and the Commissioner having reviewed the proceedings before the ALJ and the oral decision of the aforesaid ALJ affirms the findings of the ALJ for the reasons set forth in his oral opinion rendered on April 19, 1991. Therefore, the Commissioner directs that J.R. be restored to full membership in the Vineland Public Schools Key Club and that he be permitted to attend the New Jersey District convention of said organization to be held commencing Friday evening April 19, 1991 and April 20-21, 1991. The Commissioner further directs that any subsequent action which the Vineland Key Club may seek to take relative to disciplining J.R. must be conducted in a manner consistent with the directives of the ALJ as affirmed by the Commissioner.

IT IS SO ORDERED.

APRIL 19, 1991


COMMISSIONER OF EDUCATION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5687-90

AGENCY DKT. NO. 202-6/90

(ON REMAND EDU 7689-87)

JOSEPH KHOURY,

Petitioner,

v.

BOARD OF EDUCATION

OF THE BOROUGH OF

SOUTH PLAINFIELD,

MIDDLESEX COUNTY,

Respondent.

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

Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: February 22, 1991

Decided: March 25, 1991

BEFORE RICHARD J. MURPHY, ALJ:

Statement of the Case,
Procedural History and Issue

Petitioner Joseph Khoury, a tenured teaching staff member employed by the respondent Board of Education of South Plainfield appeals to the Commissioner of Education under *N.J.S.A. 18A:6-9* from the action of Board in April of 1990 in withholding his increment for the 1990-91 school year. Khoury contends that the Board's withholding of his increment was illegal, arbitrary, capricious, and not based on any evidence presented. The Board claims its withholding was in accordance with a Stipulation of Settlement filed by the petitioner and respondent in an earlier

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tenure proceeding decided on November 14, 1988. See OAL Dkt. No. EDU 7689-87. At issue is whether the prior stipulation provided for withholding of petitioner's 1990-91 increment and, if not, whether the Board of Education had other good cause under *N.J.S.A. 18A:29-14* for withholding his increment. I FIND in favor of the petitioner.

A prehearing conference was held on November 16, 1990 and the record was closed on February 22, 1991, after submission of briefs and all responses on summary decision.

Factual Discussion and Findings

This case is a dispute over award of a 1990-1991 salary increment. The dispute derives from the fact that petitioner, a school teacher, has been employed by respondent, a board of education, on the basis of a tenure charge settlement finalized on December 21, 1988. Paragraph 4 of the initial Stipulation of Settlement of February 20, 1988, OAL Dkt. No. EDU 7689-88, had provided:

Upon his return to the district in the 1989/1990 school year, [petitioner] will be assigned to duties in the South Plainfield High School. His salary for the 1989/1990 and 1990/1991 school years and through September 30, 1991 shall be frozen at the salary he would have earned for the 1987/1988 school year, namely \$42,000 per year.

The Commissioner specifically rejected this paragraph, in a decision dated May 25, 1988, OAL Dkt. No. EDU 7689-88:

The latter part of [Paragraph] four calls for [petitioner's] salary to be frozen at the 1987-88 level until the effective date of his registration in October 1991 which is tantamount to increment withholding. While the Board in this matter may act pursuant to *N.J.S.A. 18A:29-14* to withhold [petitioner's] increment for the 1988-89 school year and while pursuant to that statute [petitioner] has no entitlement to restoration of that withheld increment, the Board in this matter does not have the right to bind future boards. Whether [petitioner] receives an increment in future years, should he resume his teaching duties, is dependent on the evaluation of his teaching performance during that time as decided by the Board seated at that time. Thus, that portion of term four calling for a salary freeze until 1991 is rejected.

The parties entered into a new stipulation, Paragraph 4 having been revised in accordance with the Commissioner's decision:

OAL DKT. NO. EDU 5687-90

Upon his return to the district in the 1989/1990 school year, [petitioner] will be assigned to teaching staff duties by the Board within the scope of his certification. Upon approval of this settlement, the Board shall take action to withhold [petitioner's] salary increment and adjust for the 1989/1990 school year, which action [petitioner] will not challenge. Should [petitioner] resume his teaching duties, any salary increment or adjustment otherwise due [petitioner] for the 1990/1991 school year will be reviewed by the Board at that time. It is intended that the salary increment and adjustment withheld for 1989/1990 will not be restored.

The Commissioner approved this second Stipulation of Settlement on December 27, 1988.

The language of the settlement with respect to the 1990-1991 salary increment is clear: "[S]hould [petitioner] resume his teaching duties, any salary increment or adjustment otherwise due [petitioner] for the 1990-91 school year will be reviewed by the Board at that time." As both parties agree, the terms of the settlement, are in the nature of a contract and must be enforced. Pascarella v. Bruck, 190 N.J. Super. 118, 124-125 (App. Div. 1988), certif. den., 94 N.J. 600. The language and history of Paragraph 4 clearly show that that paragraph is no basis for withholding petitioner's 1990-1991 salary increment. Instead, the future Board was to review salary increment at the time and according to the criteria normally used. I so FIND.

Both parties agree that the Board based its decision to withhold petitioner's salary increment solely and explicitly on the terms of the settlement, as evidenced in the Board's April 25, 1990 resolution:

(3) RESOLVED, upon the recommendation of the Superintendent of Schools and the Principal of the High School, appoint and continue to withhold the salary increment and adjustment of Joseph Khoury for the 1990/1991 school year in accordance with [the] resolution of Commissioner's case in 1988. [Petitioner's] salary set at \$42,000 for 1990/1991 school year and through his retirement on September 30, 1991.

Both parties agree that the record reveals no evidence of inefficiency or other good cause for withholding the salary increment

Legal Discussion and Conclusions

The issues on these cross-motions for summary decision as to the withholding of petitioner's increment are, first, whether summary decision is appropriate and, second, if so, which party should prevail. I **CONCLUDE**, for the reasons discussed below, that summary decision is entirely appropriate on this record and that petitioner Joseph Khoury should prevail.

According to *N.J.A.C. 1:1-12.5(b)*, a summary decision is appropriate:

if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue to any material fact challenged and that the moving party is entitled to prevail as a matter of law.

Case law has affirmed the ALJ's summary decision power:

A contested matter can be summarily disposed of before an ALJ without a plenary hearing in instances where the undisputed material facts, as developed on motion or otherwise, indicate that a particular disposition is required as a matter of law. [*Matter of Robros Recycling Corp.*, 226 *N.J. Super.* 343, 350 (App. Div. 1988), certif. den., 113 *N.J.* 638.]

Summary decision in administrative proceedings parallels summary judgment in the courts, which is:

designed to provide a prompt, business-like and inexpensive method of disposing of any cause which a discriminating search of the merits in the pleadings, depositions and admissions on file, together with the affidavits submitted on the motion, clearly shows not to present any genuine issue of material fact regarding disposition at a trial. [*Judson v. Peoples Bank and Trust Company of Westfield*, 17 *N.J.* 67, 74 (1954)].

Here, petitioner and respondent agree that there is also no genuine issue as to material fact. Thus, the matter is ripe for summary decision. As the following discussion will show, petitioner is entitled to prevail as a matter of law. Thus, petitioner's cross-motion for summary decision should be granted.

Petitioner correctly noted in his Brief in Support of the Plaintiff's Cross-Motion for Summary Decision, at page 4, that:

OAL DKT. NO. EDU 5687-90

N.J.S.A. 18A:29-14 provides that a Board of Education may withhold, for inefficiency or other good cause, the employment or adjustment increment, or both, by recorded roll-call majority vote of the full Board. Appeals from such action may be taken to the Commissioner of Education, who may either affirm or direct that the increments be paid. A decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to the local Board. Bernards Township Board of Education vs. Bernards Township Education Association, 79 *N.J.* 311, 321 (1979); Clifton Teachers Association, Inc. v. Clifton Board of Education, 136 *N.J. Super.* 336 (App. Div. 1975). When reviewing such determinations, the Commissioner of Education is prohibited from substituting his own judgment for that of the local Board. His scope of review is limited to assuring that there exists a reasonable basis for the decision. Exercise of the discretionary powers of the local Board may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera vs. West Orange Board of Education, 60 *N.J. Super.*, 288 (App. Div. 1960). The burden of proving unreasonableness rests upon the party challenging the Board's action. 60 *N.J. Super.* at 297.

The Commissioner transmitted this case to the OAL pursuant to *N.J.S.A. 52:14F-1 et seq.* Thus, the ALJ is in the Commissioner's shoes and must similarly defer to a local board's decision unless it is found arbitrary and capricious.

Petitioner has proved the arbitrary and capricious nature of the Board's action

Respondent's argument that the "intention of the final settlement was to deny petitioner a salary increment in 1990-1991, unless petitioner's "extraordinary performance" merited otherwise, Respondent's Brief in Support of its Motion for Summary Decision, p. 8, finds no basis in the record.

Respondent's argument that the settlement, as a contract, ought to be adhered to is sound. But, respondent clearly misinterpreted the settlement and the effect of the Commissioner's decision in the following argument:

The fact that the Commissioner raised a technical legal point that the 1988 Board could not bind a future Board on the question of the continued denial of the increment should not change anything. The Commissioner himself acknowledged that Petitioner would have "no entitlement to restoration of the withheld increment" (See Commissioner's Decision of May 25, 1988, Exhibit "F") and he later affirmed Judge Murphy's approval of a revised Stipulation of Settlement which explicitly stated the intention of the [Board] not to restore the increment in 1990/1991. All that has happened here is that the current Board reviewed the question of Petitioner's salary and simply found no reason not to carry forward with the original intent. [*id.* at p. 11]. (Emphasis added).

The change the Commissioner made to Paragraph 4 was adopted in the final settlement, and, thus, did change the 1990-1991 salary increment provision to provide for operation of the normal salary increment review in that year. Restoration of "withheld" increment is a matter entirely distinct from the withholding of future increments by future boards. The final settlement contains no explicit statement of intent not to restore the increment in 1990-1991. Since the settlement's "original intent" was not summarily to withhold the 1990-1991 increment, the Board's decision to base its summary withholding of the increment entirely on its desire to "carry forward" the "original intent" is absurd.

It was patently unreasonable to have based a decision to withhold the salary increment solely on an interpretation of terms which, deliberately or not substantially distorted and misconstrued the terms' plain meaning.

Petitioner, therefore, should prevail in its cross-motion for summary decision as a matter of law. Petitioner seeks nothing more than the enforcement of the plain meaning of his stipulated settlement through reversal of a Board decision explicitly grounded on an arbitrary and capricious interpretation of plain meaning.

Disposition

This case is ripe for summary decision. No genuine issue of material fact exists, and petitioner cross-movant for summary decision is entitled to prevail as a matter of law. So **ORDERED**. Petitioner's cross-motion for summary decision must prevail as a matter of law because withholding a salary increment requires a reasonable basis, and respondent has failed to provide one. I **ORDER** that petitioner's increment be restored.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

OAL DKT. NO. EDU 5687-90

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties

OAL DKT. NO. EDU 5687-90

March 25, 1991
Date

Richard J. Murphy
RICHARD J. MURPHY, ALL

Receipt Acknowledged:

March 25, 1991
Date

Jayne L. Luchessa
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 1 1991
Date

Jayne L. Luchessa
OFFICE OF ADMINISTRATIVE LAW

/ct

List of Exhibits

Briefs submitted by petitioner Joseph Khoury

**Briefs submitted by respondent Board of Education for the Borough of South
Plainfield, Middlesex County**

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

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

Upon review of the record, the Commissioner is in full agreement with the findings and conclusions of the Administrative Law Judge. The record amply supports that the withholding of petitioner's salary increment for the 1990-91 school year was not based upon the evaluation of his teaching performance which is in contravention of the specific directive articulated by the Commissioner when he rejected the initial stipulation of settlement entered into by the parties in the spring of 1988. See In the Matter of the Tenure Hearing of Joseph Khoury, School District of the Borough of South Plainfield, Middlesex County, Slip Opinion at page 4, decided May 25, 1988 wherein the Commissioner directed that if petitioner resumed his teaching duties, the decision as to any future salary increments must be made by the board of education seated at that time based upon an evaluation of his teaching performance. The freezing of petitioner's salary from 1987 until

his retirement on October 1, 1991 was specifically prohibited by the Commissioner when he rejected the initial settlement because the board of education may not bind future boards of education.

It is undisputed by the parties that "the record reveals no evidence of inefficiency or other good cause for withholding [petitioner's] salary increment [for the 1990-91 school year]." (Initial Decision, at p. 3) Hence, no legal basis existed for the withholding of petitioner's salary increment for the 1990-91 school year under N.J.S.A. 18A:29-14 as correctly determined by the ALJ. The Board's arguments to the contrary are entirely without merit.

Moreover, the granting of a salary increment to petitioner for the 1990-91 school year is not tantamount to restoration of previously withheld increments as the Board would have us believe. Decisions such as Dowling v. Board of Education of Middletown Twp., Monmouth County, decided June 30, 1987 and Lulewicz v. Board of Education of Livingston, decided June 1, 1989, aff'd State Board November 8, 1989 provide very explicit explanation as to the permanent effect of prior increment withholding action on future salary determinations and the calculation of post-withholding salaries which do not involve the restoration of previously withheld increment(s). See also the State Board of Education's decision of April 4, 1990 in Probst v. Board of Education of Haddonfield, Camden County.

Accordingly, the Board is directed to pay to petitioner the salary increment improperly withheld from him for the 1990-91 school year.

MAY 7, 1991

DATE OF MAILING - MAY 9, 1991


COMMISSIONER OF EDUCATION

- 11 -



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2429-90

AGENCY DKT. NO. 15-1/90

ROBERT N. KORNBERG,

Petitioner,

v.

BOARD OF EDUCATION OF THE

TOWNSHIP OF NORTH BERGEN,

Respondent.

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

Joseph J. Ryglicki, Esq., for respondent

Record Closed: February 14, 1991

Decided: April 1, 1991

BEFORE KEN R. SPRINGER, ALJ:

Statement of the Case

This is a suit by a school administrator challenging a change in his job title from "principal-special services" to "director of special services." Impetus for the change

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came not from the local school board but from a directive issued by the Hudson County Superintendent of Schools. The sole issue is whether the change in job title violated petitioner's tenure or seniority rights.

Procedural History

Petitioner Robert N. Kornberg filed his petition with the Commissioner of Education ("Commissioner") on March 23, 1990.¹ Respondent Board of Education of the Township of North Bergen ("Board") filed its answer on February 22, 1990. Subsequently, on March 29, 1990, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. On May 16, 1990, the Board served written notice of the pendency of this matter on the Hudson County Superintendent of Schools and filed proof of service with the OAL. However, the County Superintendent did not move to intervene or participate in this proceeding. Both parties filed a joint stipulation of fact on July 12, 1990. Additionally, the OAL held a hearing on February 14, 1991 to develop a more complete factual record. Witnesses and exhibits are listed in the appendix.

Findings of Fact

Most of the material facts are undisputed. I FIND:

Robert N. Kornberg has worked for the North Bergen school district in various capacities since the 1971-72 school year, first as a classroom teacher at the elementary level and later as a special education teacher, speech correctionist, coordinator of special education and school administrator. He holds a variety of relevant certifications, including elementary school teacher, teacher of the handicapped, principal and supervisor, and chief school administrator. In 1977-78

¹Originally petitioner purported to be acting "individually and on behalf of all others similarly situated." Prior to the hearing, however, petitioner acknowledged that this matter is brought for himself individually and not as a class action.

and 1978-79, he served as "administrative assistant to the superintendent" with responsibilities for coordinating the district's special service programs. By resolution adopted on August 29, 1979, the Board appointed him as a "principal" assigned to "special services." At the same time, the board appointed four other principals who were assigned specifically to the high school or to one of the district's four elementary school buildings. Kornberg remained as a principal for special services until the Board took the action complained of. On October 12, 1989, the County Superintendent of Schools notified the district that certifications for the title of principal and vice principal are "school based endorsements" and cannot be used for persons having "responsibility for a district-wide program." Instead, the County Superintendent suggested the alternative title of "supervisor" or "director." In compliance with the County Superintendent's directive, the Board voted on November 15, 1989 to change Kornberg's title to "director of special services." Despite the name change, the Board resolution expressly provided that Kornberg's "duties, responsibilities and salary . . . shall remain the same." Kornberg continued performing the same job for the remainder of the 1989-90 school year and is currently performing the identical duties for 1990-91.

Unlike a building-based principal, Kornberg has district-wide responsibilities. His duties involve management and supervision of the special education program and "pull out" programs, including supplementary instruction, resource room and enrichment activities. Children serviced by these programs are characterized by special needs. While Kornberg takes part in the evaluation of tenured and nontenured staff, his involvement is limited to child study team members, special education teachers and others who supply special services. Similarly, his curriculum development responsibilities are focused on children with learning problems, his financial planning duties relate solely to the budget for special services, and his relationship with parents and students deal primarily with special education. Significantly, he lacks any responsibility for the management of a school building. Nor does he have across-the-board responsibilities for the general educational program or teaching staff. He has his own job description, which is separate from that of the other building principals. Admittedly, Kornberg has no experience as a building principal at either the elementary or secondary level.

As early as 1982, the County Superintendent had informal notice of Kornberg's job title in connection with an application for a teaching certification. However, the

OAL DKT. NO. EDU 2429-90

Board never applied to the County Superintendent for approval of "principal-special services" as an unrecognized title.²

Conclusions of Law

Based on the foregoing facts and the applicable law, I CONCLUDE that the appropriate job title for petitioner's duties is director of special services.

At the outset, it must be noted that the parties are not in a true adversarial relationship. Basically, both parties agree on the facts and the law. They are allied against the ruling of the County Superintendent, who is not directly involved in these proceedings. There has been no reduction in force which might affect petitioner, and the record does not suggest that abolition of petitioner's job is imminent or even presently contemplated. None of the other district employees who conceivably might be affected have received notice of this litigation. As a result, both sides of the issue have not been adequately presented. No one has come forward to argue the opposing view.

Nevertheless, the issue raised will be considered on its merits. Administrative agencies play an important role in helping persons understand and meet their legal responsibilities. *N.J.S.A. 52:14B-8* authorizes an agency to "make a declaratory ruling with respect to the applicability to any person, property or state of facts of any statute or rule enforced or administered by that agency." See *S. Lefelt, Administrative Law & Practice, 37 N.J. Practice Series §83* (1988 & Supp. 1991). See also, *N.J.S.A. 18A:28-11*, which establishes a procedure for local school districts (but not an individual, as here) to apply to the State for a nonbinding advisory opinion

²*N.J.A.C. 6:11-3.3* requires the use of recognized titles, unless the local district "shall submit a written request for permission to use the proposed title to the county superintendent, prior to making such appointment." The county superintendent "shall exercise his or her discretion regarding approval of such request, and make a determination of the appropriate certification and title for the position." This was never done by the Board on the theory that "principal" is a recognized title. But see *George v. Old Bridge Bd. of Ed.*, 1984 S.L.D. ___ (Comm'r Nov. 5, 1984), where the Commissioner declared that "principal of pupil services" is an unrecognized title.

with respect to "the applicability of the [seniority] standards to particular situations."

Historically, what has been called the common law of public schools recognizes the position of "principal" of a school building. "One person in each school is recognized as being in authority of the administration of the educational program." *Kelly v. Lawnside Bd. of Ed.*, 38 S.L.D. 320, 321 (St. Bd. 1933). Certain duties are assigned to principals, thereby implying that "each school must have a principal." (Emphasis added). *Kelly*, at 323. The term "principal" is "commonly applied to the head of a school, and it has been held to apply equally to elementary and high schools." (Emphasis added). 78 C.J.S., *Schools and School Districts*, §154 (1952 & Supp. 1990).

Further indication that a principalship is a building-level assignment is scattered throughout the school law. In *Page v. Trenton Bd. of Ed.*, 1975 S.L.D. 644, 648 (Comm'r 1975), the Commissioner based his determination that a particular individual served as a principal on the absence of any responsibility "for district-wide functions." (Emphasis in the original). In *Goodman v. South Orange-Maplewood Bd. of Ed.*, 1969 S.L.D. 88, 89 (Comm'r 1969), appeal dismissed as moot *sub nom. Oxfeld v. N.J. State Bd. of Ed.*, 68 N.J. 301 (1975), the Commissioner acknowledged the power of a principal "to enact rules and regulations for the proper conduct of the schools in his charge." (Emphasis added).

Although Title 18 contains no precise definition of "principal," the statutes and regulations are consistent with its usage to designate the top manager at the building-level. Principals are included within the definition of "teaching staff member" and are expressly mentioned as eligible for tenure. N.J.S.A. 18A:28-5. *Viemeister v. Prospect Park Bd. of Ed.*, 5 N.J. Super. 214 (App Div. 1949). Under the regulations relating to a thorough and efficient school system, each school must be assigned the services of a full-time principal "to be responsible for administration and supervision of the school." N.J.A.C. 6:8-3.3(b). Recent clarification of the different varieties of administrative certificates draws a clear-cut distinction between a "school administrator" endorsement, "required for any position that involves services as a district-level administrative officer," as opposed to a "principal" endorsement, "required for any position that involves service as an

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administrative officer of a school or other comparable unit within a school or district." (Emphasis added). Compare N.J.A.C. 6:11-9.3(a) with -9.3(b).

Certainly Kornberg's duties more closely resemble those of school administrator who, among other duties, is "authorized to direct district operations and programs." (Emphasis added).³ N.J.A.C. 6:11-9.3(a). Accordingly, the County Superintendent was properly performing his monitoring function when he directed the district to change the job title to conform to the actual duties associated with the position. Cf., *George v. Old Bridge Bd. of Ed.*, 1984 S.L.D. ___ (Comm'r 1984), slip. op. at 30, where the Commissioner directed a school board to revise the job description for principal of pupil services "to properly reflect all of the duties assigned" to that title.

In any event, Kornberg will not suffer any loss of legitimate tenure and seniority rights as a result of the change in his title. When deciding competing tenure and seniority claims, courts "look to the substance rather than the form." *Viemeister*, 5 N.J. Super. at 218. Thus, the nature of the work done, not the title, is "the crucial factor." *Quinlan v. North Bergen Bd. of Ed.*, 73 N.J. Super. 40, 48 (App. Div. 1962). "[T]he duties performed, rather than the title of the position or job description, are controlling." *Christie v. East Orange Bd. of Ed.*, 1985 S.L.D. ___ (Comm'r 1985), slip op. at 14. Accord, *Beaute v. North Arlington Bd. of Ed.*, 1981 S.L.D. ___ (Comm'r Sept. 14, 1981), aff'd 1982 S.L.D. ___ (St. Bd. Feb. 3, 1982); *Boeshore v. North Bergen Bd. of Ed.*, 1974 S.L.D. 805, 814 (Comm'r 1984); *Page v. Trenton Bd. of Ed.*, *supra* at 650. Seniority regulations codify this approach by clarifying that "[w]here the title of any employment is not properly descriptive of the duties

³North Bergen's own job description for "principal-special services" is not particularly informative, merely requiring possession of a "New Jersey State Certification." Apparently Kornberg lacks the one certificate which best fits the actual job duties he performs, namely an educational services endorsement as "director of pupil personnel services," which allows its holder to act "as a director, administrator or supervisor of guidance and student personnel services of a school system[.]" N.J.A.C. 6:11-11.10(a). Student personnel services is not just guidance counseling, but extends to the "study and assessment of individual pupils with respect to their status, abilities, and needs." N.J.A.C. 6:11-11.11. He does, however, possess both a school administrator's endorsement and a principal's endorsement. For the limited purposes of this case, it is unnecessary to resolve which certificate he was working under or, indeed, whether he is appropriately certified for the job.

performed, the holder thereof shall be placed in a category in accordance with the duties performed and not by title." *N.J.A.C.6:3-1.10(g)*.

Luppino v. Bayonne Bd. of Ed., 1980 S.L.D. 1028 (Comm'r 1980), cited by petitioner as the case "most directly on point," is merely another example of the same general rule. Although that case has a cursory discussion about the validity of conflicting advice on whether a principal must be attached to a physical building, the outcome turns not on job title but on the actual duties performed. *Luppino*, at 1036-37.

Cases in which districts have abolished certain titles as the result of an administrative reorganization do not lend any support to petitioner's contentions. Kornberg retains his same job, his same duties and his tenure and seniority rights. All that he has lost is his old job title. Indeed, *Sandri v. Bergen Cty. Vocational Sch. Dist.*, 1986 S.L.D. __ (Comm'r June 11, 1986) supports the action taken here, insofar as the Commissioner regarded supervision over child study team functions as "bespeaking a 'district-wide' approach to providing student services and a broader range of responsibility" than supervision at a building-level. Slip op. at 20. Moreover, in *Walldov. v. East Brunswick Bd. of Ed.*, 1985 S.L.D. __ (Comm'r 1985), the Commissioner found that positions which relate to two levels of schooling (both junior and senior high school) constitute a distinct seniority category from those restricted to a single level. One of the major reasons for comprehensive amendments to the seniority standards was "to prevent individuals who do not possess training and expertise/experience in a given subject area from asserting seniority claims by way of general supervisory certification." *Walldov*, slip op at 21.

Here Kornberg has supervised all special education and related pull-out programs on a district-wide level for more than a decade. It would violate the seniority rights of the building principals if Kornberg were to enjoy bumping rights as a "principal," even though he personally has never been in charge of any school building. Similarly, it would violate Kornberg's seniority rights as the head of the district's special services programs if a building principal with no background or experience in special education could claim greater entitlement to his job.

Order

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

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 1, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/2/91
Date

Seamus Weis
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 4 1991
Date
al

Jaymie LaVecchia
OFFICE OF ADMINISTRATIVE LAW

APPENDIX
List of Witnesses

- 1 Robert N. Kornberg, director of special services, North Bergen school district
- 2 Peter J. Fischbach, assistant superintendent for personnel and curriculum, North Bergen school district

List of Exhibits

- | No. | Description |
|------------|--|
| J-1 | Joint stipulation of facts, filed July 12, 1990 |
| A | Copy of a letter to Dr. Nolan from Peter J. Fischbach, dated January 11, 1978 |
| B | Copy of a memorandum to all principles from Peter J. Fischbach, dated January 17, 1979 |
| C | Copy of a letter to Peter J. Fischbach from Robert N. Kornberg, dated January 30, 1979 |
| D | Copy of a resolution of the North Bergen Board of Education, adopted August 29, 1979 |
| E | Copy of a resolution of the North Bergen Board of Education, adopted August 29, 1979 |
| F | Copy of a job description for "principal - special services" |
| G | Copy of a job description for principal |
| H | Copy of a letter to Mr. Kornberg from Herman G. Klein, dated April 15, 1981 |

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- I-1 Copy of a memorandum to all principals from Dr. Herman G. Klein, dated June 12, 1980**
- I-2 Copy of a letter to Dr. Herman G. Klein from Robert N. Kornberg, dated June 18, 1980**
- J-1 Copy of a memorandum to all principals from Dr. Herman G. Klein, dated May 6, 1981**
- J-2 Copy of a letter to Dr. Herman G. Klein from Robert N. Kornberg, dated April 13, 1981**
- K Copy of a letter to Leo Gattoni, Jr. from Louis A. Acocella, dated October 12, 1989**
- L Copy of a resolution of the North Bergen Board of Education, adopted November 15, 1989**
- M Copy of a letter to Robert Kornberg from John J. Duffy, dated November 20, 1989**
- N Copy of a letter to Louis C. Acocella from Leo C. Gattoni, Jr., dated October 25, 1982**
- P-1 Copy of a letter to Louis C. Acocella from Sanford R. Oxfeld, Esq., dated May 31, 1990**
- P-2 Copy of a letter to Louis C. Acocella from Sanford R. Oxfeld, dated November 8, 1989**
- P-3 Copy of the special education curriculum course guide for grades K to 12**
- P-4 id. Sample weekly lesson book for school year 1988-89**

- P-5 id. **Materials relating to the special services budget for the school year 1988-89**
- P-6 id. **Sample requisition form for materials and supplies for the school year 1988-89**
- P-7 **Sample permission forms for field trips for 1980 to 1990**
- P-8 **Sample planning documents**
- P-9 **Excerpt from the Hudson County director of schools for 1989-90**
- R-1 (a) **Copy of a letter to Louis Acocella from Joseph J. Ryglicki, Esq., dated May 16, 1990**
- (b) **Proof of mailing, dated May 16, 1990**

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ROBERT N. KORNBERG,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF NORTH BERGEN, HUDSON	:	
COUNTY,	:	
	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were untimely filed pursuant to the dictates of N.J.A.C. 1:1-18.4.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the appropriate job title for petitioner's duties in respondent's district is director of special services. The Commissioner further agrees with the ALJ that petitioner will suffer no loss of tenure and seniority rights as a result of the change in his title, although such tenure and seniority will accrue as a director, not as a principal, and that, consequently, the relief requested by petitioner should be denied.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

MAY 9, 1991

DATE OF MAILING - MAY 9, 1991


 COMMISSIONER OF EDUCATION

- 12 -

ROBERT N. KORNBERG, :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWN- : DECISION
SHIP OF NORTH BERGEN, HUDSON :
COUNTY, :
RESPONDENT-RESPONDENT. :
_____ :

Decided by the Commissioner of Education, May 9, 1991

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Joseph J. Ryglicki, Esq.

Robert N. Kornberg (hereinafter "Petitioner") challenged the action of the Board of Education of the Township of North Bergen (hereinafter "Board") in changing his position title from "principal-special services," an unrecognized title, to "director of special services," claiming violation of his tenure and seniority rights.¹ Such change was in response to a directive from the Hudson County Superintendent of Schools, who, noting that the district was using the title of "principal" in assignments not covered by that endorsement, advised the Board that such title was not appropriate for teaching staff members responsible for district-wide programs. Petitioner's duties, responsibilities and

¹ We note that Petitioner holds a variety of certifications, including principal, supervisor and chief school administrator.

salary remained the same following the change in his title, and he was not subject to a reduction in force.

On May 9, 1991, the Commissioner of Education dismissed the petition, adopting the findings and conclusions of the Administrative Law Judge ("ALJ"), who determined that Petitioner would suffer no loss of tenure or seniority rights as the result of the change in his job title. The ALJ stressed that the nature of the work performed, and not the title, was the crucial factor in deciding competing tenure and seniority claims. Upon review of the Petitioner's duties, the ALJ found that he had district-wide responsibilities and that his "duties more closely resembled those of school administrator." Initial Decision, at 6.

After a thorough review of the record, we affirm the decision of the Commissioner to dismiss the petition. The County Superintendent, who is granted the express authority to determine the appropriate certification and title for unrecognized positions, N.J.A.C. 6:11-3.3(b), concluded that Petitioner's assignment was not within the purview of the principal endorsement and directed use of a position title appropriate to the assignment. In reviewing Petitioner's challenge to the Board's action in reliance upon the County Superintendent's directive, the ALJ analyzed Petitioner's duties and responsibilities in the district and found that they more closely resembled those of school administrator than principal. Such finding was adopted by the Commissioner. Although Petitioner argues that the title of "principal" was appropriate for the assignment and that the County Superintendent improperly directed a change in his title, we find that he has not demonstrated that the duties attending the assignment are of such character as to require

that he possess certification as a principal in order to perform such functions, and we concur with the Commissioner's determination denying the relief sought.²

September 4, 1991

Date of mailing 6 SEP 1991

² We note that our decision herein is based upon the particular facts in the instant controversy, and we do not determine the appropriateness of the position title of "principal" in other assignments not currently before us.



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

PARTIAL SUMMARY DECISION

OAL DKT. NO. EDU 10823-90

AGENCY DKT. NO. 365-11-90

MARY ROBERTS,

Petitioner,

v.

CLINTON TOWNSHIP BOARD OF EDUCATION,

Respondent.

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

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: March 18, 1991

Decided: March 26, 1991

BEFORE DANIEL B. McKEOWN, ALJ:

Mary Roberts (petitioner), a teacher with a tenure status in the employ of the Clinton Township Board of Education (Board), seeks relief in her favor that the Board improperly placed her on involuntary sick leave at the commencement of the 1990-91 academic year and that when her accumulated sick leave expired she was improperly placed on an indefinite leave of absence without pay. Petitioner seeks the restoration of her salary and employment benefits on the basis that the Board is without legal authority to suspend her without pay absent the certification of tenure charges against her. The Board claims that the Office of Administrative Law does not have subject jurisdiction regarding the instant motion because petitioner failed to file the motion with the Commissioner of Education pursuant to N.J.A.C. 1:1-12.6(b) and, while claiming that petitioner seeks emergent relief as opposed to summary decision, it maintains petitioner

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failed to meet the standards for such relief as established in Crowe v. DeGioia, 90 N.J. 126 (1982). The Board also contends that the Commissioner of Education already determined in a written decision that petitioner failed to succeed on a motion for emergency relief and that as a matter of law the instant motion should now be denied in reliance upon the law of the case doctrine.

Oral argument on petitioner's motion was heard March 15, 1991 at the Clinton Township Municipal building, Annadale.

Conclusions are reached in this initial decision that what petitioner seeks is partial summary decision; that the uncontroverted facts compel granting petitioner's application for partial summary decision on the legal issue presented; and, as a result, the Board is required to resume petitioner's salary payments and retroactive to September 1, 1990, all of which is subject to mitigation.

FACTS

For purposes of the instant motion, the characterization of which shall be presently addressed, the facts over which there is no meaningful dispute and as established by the record are as follows. It is noted that the record consists of the pleadings, exhibits, certifications in lieu of affidavits, letter memoranda in support of the respective positions of the parties, and oral argument.

Petitioner has been employed by the Board a sufficient number of years to have acquired a tenure status pursuant to N.J.S.A. 18A:28-5. According to petitioner's own exhibits attached to her certification, letters of complaint were filed against her from at least 1983 through December 1989 with school authorities by various parents who had children in her classroom. There is no evidence of any major or minor disciplinary action having been taken against petitioner because of those letters from either the Board, the then superintendent of schools, the school principal, or anyone else in authority.

Robert M. Harrington, who began employment as superintendent on June 1, 1990 but who had been " * * * engaged [earlier] as a consultant in order to aide the transition * * *", filed a certification dated November 6, 1990 before the Commissioner

on a motion earlier made to and denied by him. While that motion will be discussed later, the Board relies on that filed certification in this matter, and as supplemented by Harrington under date of March 13, 1991. The Superintendent certifies that he had been made aware by Board members, interested members of the community, administrators and parents that petitioner assertedly presented a serious risk to her students. The certification continues as follows:

* * *

3. I can say at this point that the concerns that were brought to me were not denied by the Association representatives available to Mary Roberts and a series of meetings were held on the subject of Mary Roberts' status in the District.
4. There were, during the month of June, 1990, a series of negotiation meetings during which a transfer out of the classroom and an ultimate termination of employment arrangement were discussed with Mary Roberts and her representatives. To our understanding, we were very close to finalizing an agreement when, at the last minute at the end of June 1990, Mrs. Roberts changed her mind and proceeded to raise the stakes and no agreement resulted.
5. It became clear during the summer months that the potential arrangements for a transfer and ultimate buy-out were unworkable, the Board asked for its options in this situation. Since my review and that of my administrative team of the numerous records and anecdotal reports concerning Mary Roberts convinced me that clearly this woman had shown more than a substantial evidence of deviation from normal mental health and that the Board was within its rights to order a psychiatric examination.

6. As a result of that process, Mary Roberts was notified on or about July 23, 1990 that the Board would be meeting in private session on August 20, 1990 at 7:00 p.m. She was further offered the right to appear and make a presentation at that meeting to convince the Board that a psychiatric exam was not appropriate. Although given until August 6, 1990 to respond, no response was forthcoming.
7. Ultimately the hearing date was adjourned to August 27, 1990. Some time during August, we were advised by John Thornton, the N.J.E.A. representative that we could address our concerns concerning Mary Roberts to Stephen Klausner who would be acting as Mary Roberts attorney. Accordingly, on August 23, 1990 extensive documentation was made available to Mrs. Roberts' attorney. My recollection is that our attorney advised us that Mr. Klausner would not be attending the hearing on August 27th and that the materials were "too voluminous to review." However, no request for adjournment was ever made.
8. Thereafter on August 27th the Board of Education met in executive session and determined that based upon the evidence available, the Board was within its rights to order a psychiatric examination. An appropriate resolution was entered at that meeting. See Exhibit A.
9. As a result of the action of the Board taken on August 27, 1990 Mary Roberts was placed on medical leave until she completed the required psychiatric exam. Although I have had no such formal response from her counsel, it has been conveyed to me informally that Mary Roberts has had no intention of complying with the Board's legitimate and lawful Order. When I received the Petition I was quite shocked

since her counsel and Mary Roberts have known of the Board's lawful order since at least, by their account, September 4, 1990. Even though it is quite clear they knew before September 4, 1990, there is absolutely no justification for a request for interim relief to be filed 60 days after clear notice of the Board's requirement. Dilatory behavior on the part of Mary Roberts does not warrant an extraordinary relief from the Commissioner. It is our belief that this application is inappropriate and should be treated as such by the Commissioner's office. Upon receipt of the Board's Answer, or a motion directed to the Petition, the Commissioner of Education should then determine whether this matter should be transferred for hearing or dismissed as without merit.

10. Obviously as outlined above, it is the Board of Education's intention to file a comprehensive motion to dismiss this Petition. Accordingly, it is requested that the Commissioner's office provide us with a schedule in which to file our motion and brief in response to this Petition so that the matter can be considered on motion.

* * *

Exhibit A, referenced in paragraph eight of the above certification, has four "WHEREAS" paragraphs which recite that the Board made a preliminary determination on July 16, 1990 that petitioner be required to undergo a psychiatric examination; that thereafter the Board advised petitioner of an opportunity to attend a nonadversarial Board private meeting; that petitioner determined not to attend the scheduled Board meeting; and that the Board believes ample evidence exists to require petitioner to undergo a psychiatric exam. These paragraphs are followed by three paragraphs of "THEREFORE" which direct petitioner to report to a Board selected psychiatrist as soon as possible for the examination; that from that date forward petitioner was "excused" from her duties as

a professional staff member and placed on involuntary sick leave and that if an extension of the sick leave is necessary it, the Board, will consider a request for an extension; and, that the superintendent is authorized to take all steps necessary to effectuate the purposes of the resolution. It is noted that no medical justification exists to support the Board's action of placing petitioner on involuntary sick leave, and it is also noted petitioner is not the subject of any tenure charge proceeding nor is she indicted.

While the Board acknowledges petitioner " * * * was requested to leave school on September 4, 1990, [because] she had failed to comply with the request of the Board of Education to undergo a psychiatric examination" (Answer, para. 15), and its resolution 'excuses' her from professional duties, and it is not disputed that petitioner was charged with sick day use for her absences from that day forward until her accumulated sick leave expired after which her salary stopped, the Board specifically denies that it ever suspended petitioner. (Answer, para. 13) At oral argument it was agreed between the parties that petitioner's accumulated sick leave expired in late October 1990 after which the Board ceased salary payments to her.

Procedurally, petitioner filed a Petition of Appeal to the Commissioner on November 5, 1990, along with a proposed form of order requesting interim relief and a stay, along with a memorandum in support thereof. The points argued in the memorandum upon which petitioner sought relief were that she would suffer irreparable harm unless the Board was restrained from requiring her to undergo a psychological examination and that she was constitutionally entitled to a statement of specific reasons for the Board's request for her to submit to a 'psychological' examination. No mention is made in either the Petition, the proposed form of order, or the memorandum regarding relief by petitioner from the Board's cessation of her salary. Nor did the Board, in its filed letter response of November 7, 1990 opposing petitioner's application for emergency relief, mention resumption of salary as the requested relief. The Commissioner, without making mention of any argument by petitioner or the Board with respect to resumption of salary payments, denied petitioner's motion on November 16, 1990 for emergency relief. The Commissioner concludes his decision in the following manner:

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[U]pon the Commissioner's receipt of the Board's Answer to the Petition of Appeal to be filed pursuant to N.J.A.C. 6:24-1.4, this matter shall be transmitted for a prompt hearing before the Office of Administrative Law to determine whether or not the Board has followed appropriate procedures in requiring petitioner to undergo psychiatric examination and, if so, whether or not the Board's proffered reasons were a proper basis for such requirement.

The Board filed its Answer with the Department of Education on December 10, 1990. The matter was transmitted on December 31, 1990 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq.

On March 4, 1991 counsel for petitioner moved before the Chief Judge of Administrative Law to dispense with a pretrial conference and to immediately set a hearing date on the merits of the Petition, and she moved for the immediate restoration of her salary and employment benefits, retroactive to September 1, 1990 and for the restoration of sick leave days she claims she was improperly obligated by the Board to use in September and October 1990. Petitioner filed a letter memorandum in support of the motion. The Board filed its letter memorandum in response to the motion on March 13, 1991 and oral argument on the motion was assigned this judge and heard March 15, 1991.

ARGUMENTS OF THE PARTIES

Only those arguments which address the substantive relief of salary, benefits, and sick days shall be presented here. A plenary hearing on the merits of the main case shall be scheduled expeditiously during a telephone conference call to be conducted among counsel to the parties and whichever judge is assigned the matter.

In regard to the argument presented in the letter memorandum in support of petitioner's motion for resumption of salary, employment benefits, and restoration of sick days used, petitioner cites Johnson v. Piscataway Board of Education, 1983 S.L.D. 616, *aff'd.* State Board of Education, 1984 S.L.D. 1949, for the proposition that she may not be suspended, without pay, absent evidence she presents a clear and present danger to her

students. At oral argument, however, petitioner argues for what she says is partial summary decision that a board of education is without authority to suspend, without pay, a tenure teacher for any reason except upon its certification of tenure charges to the Commissioner for determination. Petitioner notes that the Board did not file tenure charges against her; consequently, she concludes that as a matter of law the Board is without authority to have suspended, or 'excused' her from her duties, without pay, on August 27, 1990; that it was without authority to place her on involuntary sick leave, without medical justification, and to obligate her to use accumulated sick leave days; and, finally, that it was without authority to cease salary payments to her in early November 1990 when her sick leave expired.

Several points are argued by the Board in opposition to this proceeding. Initially, the Board says that under N.J.A.C. 1:1-12.6(b) applications for interim relief must be made directly to the agency, not to the Office of Administrative Law as occurred here, and that therefore the present motion must be dismissed. The Board also argues that because the Commissioner of Education has already denied petitioner emergency relief, the law of the case doctrine prohibits petitioner from successfully arguing for the very same relief before this judge. The Board also contends that even if the motion is properly before this judge, petitioner failed to establish she is entitled to emergency relief in the form of salary resumption under the standards of Crowe v. DeGioia, 90 N.J. 126, (1982) and that it has sufficient evidence by way of parental complaints to establish that petitioner presents a clear and present danger to her students which, so argues the Board, justified its exclusion of petitioner from the classroom and cites Johnson v. Piscataway Board of Education, supra. Finally, the Board reasons that because petitioner allegedly refused to submit to a psychiatric examination it properly excluded her from school and charged her sick days.

ANALYSIS

The issue in this proceeding is whether a board of education may suspend from employment, without pay, a tenure teacher on the basis that it perceives that teacher as having refused an otherwise legitimate request from it to submit to a psychiatric examination and/or because it perceives that teacher to present a clear and present

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danger to her students, though without medical justification.

While the motion filed before the Chief Judge is not labeled as a motion for summary decision, the facts known to each side long before the motion was made demonstrates petitioner seeks partial summary decision on the issue of salary resumption. The referenced facts are that petitioner is a tenured teacher in the Board's employ; the Board suspended petitioner without pay by placing her on involuntary sick leave without medical justification; and, petitioner is not the subject of an indictment nor did the Board certify charges against her under N.J.S.A. 18A:6-10, et seq. These facts are not disputed. Therefore, a motion for partial summary decision in the circumstance where there is no genuine issue of material fact is appropriate under the standards of Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954). The administrative rule, N.J.A.C. 1:1-12.5, allows a party to move for summary decision upon all or any of the substantive issues at any time after a case is determined to be contested.

In regard to the Board's argument that the law of the case doctrine applies, it is noted that the issue presented here was neither argued before nor decided by the Commissioner in his earlier ruling. Consequently, the law of the case doctrine does not apply. Equally unpersuasive is the Board's argument that because the emergency relief has already been denied petitioner by the Commissioner that this application must, therefore, be denied. Petitioner seeks summary decision in this proceeding; she does not seek emergency relief.

The law is straightforward on the issue. In Slater v. Board of Educ., 237 N.J. super 424, 426 (App. Div. 1989) the following was said:

A tenured local school employee may be suspended pending disposition of an indictment or of tenure charges that may lead to dismissal. See Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. super 38 (App. Div. 1965). If a tenure charge is preferred and filed with the school board, the board reviews and the accompanying statement of supporting evidence, and any written statement submitted by the employee. The Board then determines if there is probable cause for the charge. If there is, the board's certification to that effect is forwarded to the Commissioner of Education. N.J.S.A. 18A:6-11.

After certification of the charge, the board may suspend the employee with or without pay. If it is without pay, salary must resume after 120 days if the Commissioner has not made a "determination of the charge." N.J.S.A. 18A:6-14. A local school board employee may also be suspended if he is indicted, and N.J.S.A. 18A:6-8.3 provides that the suspension may be without pay.

Thus, a tenured employee may be suspended without pay only if indicted or if tenure charges have been preferred and certified to the Commissioner of Education. In all other circumstances, a suspension must be with pay.

Petitioner is not indicted; petitioner is not the subject of tenure charges that may lead to dismissal. Consequently, petitioner's suspension which is authorized at N.J.S.A. 18A:6-8.3 must be with pay.

That portion of the Board's Answer which denies it suspended petitioner is rejected. The Board acknowledges that its school authorities 'requested' petitioner to leave the premises on the very first day of the 1990-91 year pursuant to its own resolution adopted August 27, 1990 by which it 'excused' her from teaching duties and placed her on involuntary sick leave. The Board's own conduct, together with the conduct of its school authorities, constitutes a suspension of petitioner's tenure right to continued employment as a teaching staff member. The Board's effort to characterize the deprivation of the employment right it visited upon petitioner as an 'excusal' is rejected. The Board suspended petitioner, without pay, because it obligated her to use accumulated sick leave without medical justification and then stopped her salary when her sick leave expired. It is recognized that a board of education may place a tenure teacher on involuntary sick leave under N.J.S.A. 18A:16-4. However, such leave may be ordered only after a physical or psychiatric examination is performed and the results thereof " * * * indicate mental abnormalities or communicable disease." In the absence of medical justification for placing petitioner on involuntary sick leave, the action of the Board becomes more apparent that what it did was to suspend petitioner, without pay, from her teaching duties.

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In regard to the case cited by petitioner, Johnson v. Piscataway Board of Education, supra, Johnson was a tenure teacher who was removed from the classroom and assigned duties in the central administrative office on the grounds he presented a clear and present danger to his students. Note that Johnson was neither suspended from employment nor was he placed on involuntary sick leave nor was his salary stopped. Nevertheless, petitioner argues through counsel there is no evidence that she presents

* * * a clear and present danger to students that might (sic) exclude [her] from the classroom. This [her suspension?] is clearly not an extraordinary, emergent matter [for her or for the Board?] Petitioner's salary must be restored.

The Board, of course, reacted to the letter memorandum and argues that petitioner does, in fact, present a clear and present danger to her students which justifies its suspension of her on that basis.

In the absence of an indictment or charges certified to the Commissioner, there is no acknowledged standard as 'clear and present danger' which would justify the suspension of a tenured teacher from employment through placement on involuntary sick leave without medical justification and to suspend the teacher's salary when accumulated sick leave expires.

For all the foregoing reasons, I **CONCLUDE** that the Board violated petitioner's tenure right to continued salary while she is suspended and I **FURTHER CONCLUDE** that it improperly obligated petitioner to use accumulated sick leave during September and October, 1990. Therefore, partial summary decision on the stated issue above must be entered on behalf of petitioner Mary Roberts. The Clinton Township Board of Education is directed to immediately restore petitioner's salary payments to her, retroactive to September 1, 1990, less mitigation, pending disposition on the merits of the case, and it is further directed to restore to petitioner's credit sick leave it otherwise improperly obligated her to use during September and October, 1990.

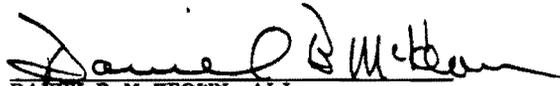
It is so **ORDERED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

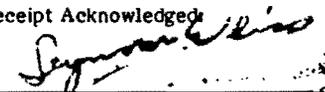
This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 26, 1991
DATE


DANIEL B. McKEOWN, ALJ

3/28/91
DATE

Receipt Acknowledged

DEPARTMENT OF EDUCATION

APR 4 1991
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

tmp

OAL DKT. NO. EDU 10823-90

MARY ROBERTS,	:	
	:	
PETITIONER,	:	
	:	
V.	:	COMMISSIONER OF EDUCATION
	:	
BOARD OF EDUCATION OF THE TOWN-	:	DECISION
SHIP OF CLINTON, HUNTERDON	:	
COUNTY,	:	
	:	
RESPONDENT.	:	
	:	

The record of this matter and the initial partial summary decision of the Office of Administrative Law have been reviewed. Exceptions by respondent Board of Education and replies thereto by petitioner were timely filed pursuant to N.J.A.C. 1:1-18.4.

In its exceptions, the Board initially argues that the ALJ erred in considering the motion underlying this decision as a motion for partial summary judgment. Instead, the Board contends, it should have been considered a motion for emergent relief, as it sought an order restoring salary, benefit and sick leave entitlements. Moreover, the Board was not notified that partial summary judgment was being considered and had no opportunity to brief the issue of petitioner's entitlement to such judgment. (Exceptions, Point I, at pp. 1-3)

The Board next contends that the ALJ erred in failing to dismiss petitioner's motion under the "law of the case" doctrine, as the Commissioner had denied her previous motion for emergent

relief. That decision, by virtue of its finding that petitioner had failed to demonstrate irreparable harm because she could be made whole upon prevailing on the merits, should have precluded the ALJ's course of action herein. (Exceptions, Point II, at pp. 3-4)

Finally, the Board avers that, even assuming arguendo that petitioner's motion was properly considered as an application for partial summary judgment, the ALJ erred in determining that the matter at hand was ripe for summary decision. This is so because underlying the matter is a genuine issue of material fact which must be determined by evidentiary hearing, namely whether the Board was justified in ordering petitioner to undergo a psychiatric exam and placing her on involuntary sick leave when she refused. Further, the ALJ's legal conclusion that an employee may not be placed on sick leave without a medical practitioner's report--notwithstanding that the employee refuses to submit to medical examination and collects salary while so refusing--is contrary to both logic and sound public policy. (Exceptions, Point III, at pp. 5-7)

In reply, petitioner argues that the ALJ's decision to treat her motion as one for partial summary judgment rather than for emergent relief in no way prejudiced the Board or caused it to be surprised or unprepared. That decision, petitioner contends, was an appropriate act of judiciary discretion, since the only "emergent" request she made was for an immediate hearing in accord with the Commissioner's directive in his prior decision on her application for emergent relief. Further, she argues, the ALJ in his partial summary decision reached correct conclusions of law based on the facts relevant to the issue of salary entitlement, which issue was

neither argued before nor decided by the Commissioner in his decision on emergent relief. Finally, in response to the Board's third exception, reaching to the substantive legal issue of salary entitlement, petitioner cites at length and adopts as her own the ALJ's discussion at pages 9-10 of the initial decision.

Upon a careful review of this matter, the Commissioner initially finds no reason to fault the manner in which the ALJ handled petitioner's motion. To the contrary, the Commissioner concurs that, the issue of restoration to employment and salary entitlement not having been argued or substantively addressed in his (the Commissioner's) prior decision on emergent relief, there was no basis on which the ALJ should have concluded that this issue had already been decided against petitioner and so have been guided by the "law of the case." Neither is there any basis for necessarily construing, as the Board evidently did, petitioner's unlabeled motion before the ALJ as a request for emergent relief. Rather, in an entirely appropriate and reasonable act of judicial discretion, the ALJ viewed this motion as seeking to resolve a threshold question of law prior to a hearing on the matter's more fact-sensitive aspects.

With respect to conclusions of law, the Commissioner fully concurs with and adopts as his own the ALJ's analysis and recommended order, wherein he holds that absent an indictment or certification of tenure charges to the Commissioner, there is no basis on which a Board can suspend, directly or indirectly as herein, a tenured teacher without pay. Moreover, he adds that, while the ALJ's discussion does not specifically cite them, there have been prior decisions clearly addressing this very question in

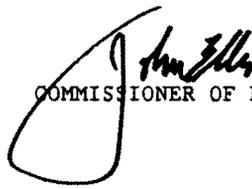
the context of psychiatric exams. In Emil Scachetti v. Board of Education of the Township of Rockaway, 1977 S.L.D. 142, affirmed State Board 153, appeal dismissed Superior Court 1978 (Ibidem), the Commissioner, employing the same reasoning as the ALJ herein, specifically held that Scachetti's suspension without pay pending administration and results of a disputed psychiatric exam was improper and ordered Scachetti restored to employment with mitigated back pay until such time as a medical exam properly led to invocation of N.J.S.A. 18A:16-4 or filing of tenure charges. John W. Griggs v. Board of Education of the Borough of Somerville, 1979 S.L.D. 340, involved similar circumstances and led the Commissioner to the same result as a matter of law. In both cases the Board was reminded that petitioners were merely exercising the right of appeal provided by law and that the Board had the right to assign them to duties outside the classroom while their appeals were pending.

Accordingly, the initial partial summary decision of the Office of Administrative Law is affirmed for the reasons expressed therein and the Board is directed to comply with the clear orders of the ALJ during the pendency of the instant appeal.

IT IS SO ORDERED.

MAY 13, 1991

DATE OF MAILING - MAY 14, 1991


COMMISSIONER OF EDUCATION

MARY ROBERTS, :
 PETITIONER-RESPONDENT, :
 V. : STATE BOARD OF EDUCATION
 BOARD OF EDUCATION OF THE TOWN- : DECISION
 SHIP OF CLINTON, HUNTERDON :
 COUNTY, :
 RESPONDENT-APPELLANT. :

Decision on motion by the Commissioner of Education,
November 14, 1990

Decided by the Commissioner of Education, May 13, 1991

For the Petitioner-Respondent, Klausner & Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, Rand, Algeier, Tosti &
Woodruff (Robert M. Tosti, Esq., of Counsel)

The decision of the Commissioner of Education on the merits
of the instant appeal is affirmed for the reasons expressed
therein.¹

Petitioner's motion to dismiss this appeal for the Board's
alleged failure to serve her with a copy of the notice of appeal is
denied. Such deficiency did not affect the filing of the appeal,
and the record indicates that the Board promptly provided Petitioner
with a copy of the notice when advised that service had not
initially been made.

September 4, 1991

Date of mailing 6 SEP 1991

¹ We note that our decision herein should not be construed as
precluding action by the Board against Petitioner pursuant to the
provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10
et seq.

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP : DECISION
OF LIBERTY, WARREN COUNTY. :
_____ :

The announced results of the balloting for three members of the Board of Education for full terms of three years each at the annual election held on April 30, 1991, in the School District of Liberty Township, Warren County, were as follows:

	<u>At Polls</u>	<u>Absentee</u>	<u>Total</u>
Jane Dashine	103	2	105
Thomas Rogers	145	3	148
Linda Coates	105		105
Patrick Brady	93	1	94
Heather Dunham	109	1	110

Pursuant to N.J.S.A. 18A:12-15(c) a recount was conducted by a representative of the Commissioner of Education on May 3, 1991 because of a tie in the annual school election. There were 209 signatures on the poll list and 209 ballots were counted.

At the conclusion of the recount, the tally stood as follows:

	<u>At Polls</u>	<u>Absentee</u>	<u>Total</u>
Jane Dashine	103	2	105
Thomas Rogers	145	3	148
Linda Coates	105		105
Patrick Brady	93	1	94
Heather Dunham	111	1	112

Upon review of the report of the Commissioner's representative, the Commissioner finds and determines that a tie for one three-year term exists between Jane Dashine and Linda Coates. Therefore, it is directed that a special run-off election be held within sixty days of the date of the annual school election pursuant to the requirements of N.J.S.A. 18A:12-15(c).


COMMISSIONER OF EDUCATION

MAY 14, 1991

DATE OF MAILING - MAY 14, 1991

IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE : COMMISSIONER OF EDUCATION
BORDENTOWN REGIONAL SCHOOL : DECISION
DISTRICT, BURLINGTON COUNTY. :
_____ :

The announced results of the balloting for one member of the Board of Education for a full term of three years at the annual school election held April 30, 1991 in the School District of Bordentown Regional (Bordentown Township), Burlington County, were as follows:

	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Nicholas G. Binder	164	0	164
Maureen D'Angelo	162	2	164
Heather Sue Slack	139	0	139
Michael Lovero	6	0	6
Nancy Lieberman	1	0	1
Joseph Rubnicki	1	0	1

Comment: Maureen D'Angelo was a write-in candidate with 162 write-in votes with 2 absentee ballots. Michael Lovero received 6 write-in votes while Nancy Lieberman and Joseph Rubnicki each received one vote.

Pursuant to a letter request from Dr. James F. Black dated May 1, 1991, an authorized representative of the Commissioner of Education from the office of the Burlington County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on May 7, 1991 at the Superintendent of Elections Office on Eayrestown Road in Lumberton.

At the conclusion of the recount, the tally stood as follows:

	<u>AT POLLS</u>	<u>ABSENTEE</u>	<u>TOTAL</u>
Nicholas G. Binder	164	0	164
*Maureen D'Angelo	137	2	139
Heather Sue Slack	139	0	139
*Joseph Rubnicki	1	0	1
*Nancy Lieberman	0	0	0

*There were three write-in names; Maureen D'Angelo with 137 votes which were counted. Nancy Lieberman received one vote, which could not be counted. The voter voted for two candidates -- Lieberman and Rubnicki. Joseph Rubnicki received one vote.

Other votes were cast for Maureen D'Angelo but could not be counted because the name was not written or pasted in the slot corresponding or opposite the office being sought. There were 25 such votes. In two other cases a voter wrote Mrs. D'Angelo's name in twice in the same column. The name was recorded once each time.

If the 25 votes were to be counted, Maureen D'Angelo would have received 164 votes and a tie would continue to exist. There exists the question as to whether the votes cast for D'Angelo which were written or pasted outside the slots corresponding to the office being voted for should be counted.

At the recount, the following questions were asked for clarification by the Commissioner's representative of Mr. Jack Boldizar, the voting machine custodian.

1. Which lines in the machine were designated for the vacant 3 year term?

J. Boldizar: Lines 1 and 2.

2. What other lines were to be used on these (Bordentown Regional) machines and for what purposes?

J. Boldizar: Line 3 was vacant, line 4 was for the current expense vote.

3. According to the instruction located on the machines, what lines should have been used to cast write-in votes?

J. Boldizar: The vote should be cast in lines 1 or 2.

4. Were all other lines locked?

J. Boldizar: No.

5. If one voted for a candidate printed on the ballot for the full three year term, can one also write or paste in names on lines 3 through 50?

J. Boldizar: Yes.

6. Can one write in a person's name in the slot by the question on current expense in the "YES or NO" slot if one did not vote "YES" or "NO" on the current expense question?

J. Boldizar: Yes.

7. Could one vote for one candidate listed on the ballot, press the write-in release lever and write in 1 or more candidates' names on lines 3-50?

J. Boldizar: Yes.

8. Is this normal procedure in all other elections, that those slots are not locked: (lines 3-50)

J. Boldizar: Yes.

9. What you are saying then is that, with these machines, one could vote for the candidate printed on the ballot and also write in a 3rd, 4th, or 5th person's name on the remaining lines?

J. Boldizar: Yes.

In view of the above information, the Commissioner's representative makes the following findings of fact:

1. The training that election workers [received] from the county board of elections is to count only the write-in votes corresponding [to] or opposite the office being sought.
2. The instructions on the card posted on the machines (Exhibit 1) states that the write-in vote should be cast "in line with the corresponding office for which you desire to write-in."
3. The New Jersey Statutes Annotated (19:49-5) states that an "irregular ballot (any person whose name does not appear on the machine as nominated candidate for office) must be cast in appropriate place on the machine, or it shall be void and not counted."
4. Title 18A:14-42 states "The voting machines shall be prepared and used for use and shall be used at such school elections in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections of the Revised Statutes...."
5. The voter could vote for a candidate for the full three-year term and also write in the same name or other names from line 3 to line 50 making it possible to inflate the count for one specific person or vote for more candidates than allowed.

The Commissioner's representative therefore concludes the following:

1. The voting machine officials and the election workers are trained and instructed not to count any votes other than those cast on the assigned lines.
2. The directions (Exhibit 1) posted on the voting machines instruct the voters to cast their write-in votes in the slot corresponding to the number by the office for which they desire to write-in.
3. Title 19:49-5 states that the irregular votes are not to be counted in municipal elections if they are not cast in the appropriate slot.
4. Title 18A:14-42 states that the machines used in school elections will be operated in the same manner as in the general election.
5. The write-in windows were not locked below line 4 therefore making it possible to vote for more than 2 candidates by voting for persons on the ballot and casting write-in votes.

The Commissioner's representative therefore recommends that any write-in votes inappropriately cast on lines 3 through 50 should not be counted.

This concludes the report of the Commissioner's representative.

* * *

The Commissioner has reviewed the report of his authorized representative. In the Commissioner's judgment, the findings set forth in the report of the instant matter support those conclusions of law which rely upon the controlling statutory provisions of N.J.S.A. 18A:14-42 and N.J.S.A. 19:49-5 as amended. The expressed

- 5 -

legislative mandate contained in these statutes is clear and unambiguous.

N.J.S.A. 18A:14-42 reads in pertinent part as follows:

The voting machines shall be prepared for use and shall be used at such election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19. Elections, of the Revised Statutes***.

The controlling provisions of N.J.S.A. 19:49-5 as amended, read:

Ballots voted for any person whose name does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office or for a delegate or alternate to a national party convention; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted. (emphasis added)

Any other reading or interpretation given to these statutes by the Commissioner in order to validate the 25 irregular ballots in question would be contrary to the expressed intent of their legislative enactment. It is determined therefore that the 25 write-in ballots in question may not be counted. Accordingly, the Commissioner finds and determines that Nicholas G. Binder was elected to a full term of three years on the Board of Education of the School District of Bordentown Regional, Burlington County.

MAY 16, 1991

DATE OF MAILING - MAY 16, 1991


COMMISSIONER OF EDUCATION

- 6 -



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 7427-90
AGENCY DKT. NO. 305-8/90

CYNTHIA SORACE,
Petitioner,

v.

BOARD OF EDUCATION OF THE
MORRIS SCHOOL DISTRICT,
MORRIS COUNTY,
Respondent.

Michael T. Barrett, Esq., for petitioner (Bergman & Barrett, attorneys)

Fredric J. Sirota, Esq., for respondent (Wiley, Malehorn & Sirota, attorneys)

Record Closed: April 1, 1991

Decided: April 8, 1991

BEFORE CHRISTOPHER DIETZ, ALJ:

STATEMENT OF THE CASE

The petitioner filed an appeal from a determination by the Board of Education of the Morris School District, not to renew her contract for the 1990-91 school year. The district moved for dismissal, submitting the notice of appeal was filed out-of-time, as required by N.J.A.C. 6:24-1.2(b), and petitioner had not invoked the provisions embodied in N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.20.

New Jersey Is An Equal Opportunity Employer

PROCEDURAL HISTORY

The notice for this appeal was filed August 23, 1990 with the New Jersey Department of Education's Bureau of Controversies and Disputes and later transmitted to the Office of Administrative Law (OAL) on September 18, 1990, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On February 20, 1991, a prehearing order was issued, scheduling the hearing for April 9, 1991. Respondent's Motion for Summary Decision was argued April 1, 1991.

FINDINGS OF FACT

After carefully considering the submissions and certifications, I find the following facts to be undisputed:

- (1) Petitioner, Cynthia Sorace, was first hired by the Morris School District, as a full-time employee in December, 1987 effective January 1, 1988 to June 30, 1988 (P-1 and P-6).
- (2) On April 25, 1988, Ms. Sorace received a letter from the Board Secretary, advising that her contract would not be renewed for the following year (see P-2). One month later, she submitted to an interview by the Morris School District for reemployment whereupon she was advised by letter in June 1988 she would be appointed for the 1988-89 school year.
- (3) The following year, Ms. Sorace received a letter from the Board Secretary, dated April 25, 1989, advising that her contract would not be renewed for the 1989-90 school year (see P-3). In May, 1989, Ms. Sorace was interviewed and notified by letter dated June 12, 1989, of her reappointment for the 1989-90 school year (see P-4).

- (4) On April 24, 1990, Ms. Sorace received a letter, the subject of this appeal, from the Personnel Department, advising her contract would again not be renewed (see J-1). As she had done on previous occasions, the petitioner submitted to another interview; but, this time was notified by letter dated June 27, 1990 that someone else had been selected and had accepted employment. (see P-5).
- (5) At no time during the term of her employment since 1988, did petitioner dispute the Notices of Non-Renewal and/or take advantage of rights secured for her under N.J.S.A. 18A:27-3.2 for a statement of reasons for non-employment or request an informal appearance before the District Board of Education pursuant to N.J.A.C. 6:3-1.20(a).
- (6) She waited until August 22, 1990 before filing a verified Petition with New Jersey Department of Education, Bureau of Controversies and Disputes alleging for the first time that her non-reemployment was a retaliation for pursuing a workmen's compensation action against the school district.

LEGAL DISCUSSION AND CONCLUSIONS

The petitioner, Cynthia Sorace, was a non-tenured employee of the Morris School District under contract for the school year 1989-90. She had been employed each school year under separate contracts since January 1988. On August 24, 1990, the Board of Education of the Morris School District communicated its determination not to rehire her for the succeeding school year (1990-91). The petitioner's appeal of this determination was filed on August 22, 1990.

N.J.A.C. 6:24-1.2(b) succinctly states that:

- (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, which is the subject of the request contested case hearing.

OAL DKT. NO. EDU 7427-90

The parties do not dispute the facts that respondent's notice advising petitioner of her contract's non-renewal was received by her on or about April 24, 1990, and that her appeal from this determination was filed August 22, 1990. The August 22, 1990 filing is not within the requisite ninety days.

N.J.A.C. 6:24-1.2(b) is intended to extinguish the right to administrative review when an appeal is not filed in a timely manner. Case law has upheld this stringent consequence.

In Sara Riely v. The Board of Education of Hunterdon Central High School, Hunterdon County, 173 N.J. Super. 109 (March 4, 1980). The Appellate Division dismissed an appeal challenging the non-renewal of a contract by an untenured teacher because it was filed out-of-time. In that case, Sara Riely waited until the resolution of arbitration before filing her appeal with the Commissioner of Education. The Court held that this was insufficient to toll the rule bar. See also, Polaha v. Buena Regional School District, 212 N.J. Super. 628 (App. Div. 1986).

Likewise, in the matter before this tribunal, petitioner's reliance on a re-interview to circumvent a pending non-renewal determination does not rise to that extenuating circumstance which could justify tolling the 90-day limitation.

Petitioner argues that respondent's previous action in 1988-89 and again in 1989-90 advising non-renewal, followed by re-interview and reemployment establishes a pattern of behavior upon which she relied. She maintains that it was only after receipt of respondent's letter of June 27, 1990, advising that her position had been offered to and accepted by another candidate (see J-1), that her non-renewal became a reality. The inference that she was lulled into slumbering on her administrative review rights on the non-renewal determination of June 24, 1990, is unsupported by additional independent evidence.

The statutory and regulatory scheme applicable here does not provide for such speculation. Respondent's notice of April 24, 1990, triggered the commencement of the 90 days which tolled July 24, 1990.

It is unnecessary to comment on respondent's claim that petitioner failed to seek reasons for her non-renewal or an appearance before the Board. Such opportunities are established to assist a petitioner in the prosecution and early resolution of a dispute and not intended to be a condition precedent to perfect the right to administrative review.

Given the above, I must **FIND** and **CONCLUDE** that the petitioner has not timely filed her notice of appeal and that the Department of Education and the Office of Administrative Law lack jurisdiction to entertain the same.

ORDER

I **ORDER** that this appeal be **DISMISSED WITH PREJUDICE**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

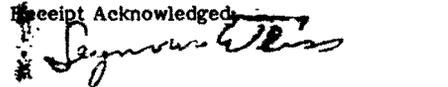
OAL DKT. NO. EDU 7427-90

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 8, 1991
DATE


CHRISTOPHER DIRTZ, ALJ

4/11/91
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 16 1991
DATE

Mailed To Parties:

OFFICE OF ADMINISTRATIVE LAW

ij

DOCUMENTS IN EVIDENCE

Joint Exhibits:

J-1 Letter from Morris School District to Sorace, dated April 24, 1990

Petitioner's Exhibits:

P-1 Letter from Morris School District to Sorace, dated December 16, 1987

P-2 Letter from Morris School District to Sorace, dated April 25, 1988

P-3 Letter from Morris School District to Sorace, dated April 25, 1989

P-4 Letter from Morris School District to Sorace, dated June 12, 1989

P-5 Letter from Morris School District to Sorace, dated June 27, 1990

P-6 Certification of Cynthia Sorace, dated March 22, 1991

Respondent's Exhibits:

R-1 Certification of Janet Jones, Director of Personnel, dated March 13, 1991

WITNESSES

None

CYNTHIA SORACE, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS : DECISION
SCHOOL DISTRICT, MORRIS COUNTY, :
RESPONDENT. :

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

Petitioner submits two exceptions to the initial decision which are summarized, in pertinent part below.

First, petitioner claims the ALJ below failed to consider the proper burden of a movant in a summary decision matter. She contends that under the law, all facts and all reasonable inferences drawn therefrom should be considered in a light most favorable to the non-moving party. Petitioner suggests that the ALJ should have considered her evidence that she relied on a pattern of behavior by the Board by which she should not have been compelled to act nor found to have acted at her peril in response to the April 24, 1990 letter. She avers that because of such pattern she did not know what the final position of the Board would be. Petitioner further advanced the argument that "[t]o ask her to file legal action

against the Board in April, 1990, would be to compel her to originate adversarial proceedings where there might be no need." (Exceptions, at p. 2) Petitioner submits that even if the Court did not adopt and accept this argument after hearing all of the evidence, disposing of the case by summary judgment was inappropriate.

Petitioner's second exception posits the concept that cases should proceed to judgment on the merits whenever possible. Petitioner claims that said policy pertains to limitation of action issues and that, accordingly, the decision of the ALJ in this case is inconsistent with that policy. She claims a summary dismissal of a claim is appropriate in only very limited circumstances. Petitioner advances the position that "there are certainly factors existing that call into question the issue of when this claim actually arose." (Id., at p. 3) Petitioner thus contends that summary decision was inappropriate in this matter.

The Board's reply exceptions recite its version of the facts, then reiterate those arguments raised at hearing in rebuttal to petitioner's claims. It contends petitioner's nonrenewal notice was received by her on or about April 24, 1990, and that by filing a petition on August 22, 1990 she failed to meet the 90-day rule. Citing the ALJ at page 4 of the initial decision, the Board concurs with the Office of Administrative Law that subsequent hiring in preceding years does not toll the 90-day limit. The Board also relies on such case law as Migliaccio v. Board of Education of the City of Paterson, decided by the Commissioner April 4, 1990 and Sara Riely v. Board of Education of Hunterdon Central High School, 173 N.J. Super. 109 (App. Div. 1980) for the proposition that failure to

rehire is a circumstance with respect to which the 90-day rule is applicable and has been applied.

In reply to petitioner's distinguishing Riely, supra, on the grounds that an adversarial proceeding had been undertaken in that case but not in this matter, the Board counters that there was an adversarial case in process in this matter, a Worker's Compensation claim. Further, the Board suggests that after the notice of nonrenewal, the 90-day period had approximately 30 days to run, when on June 27, 1990, petitioner was notified that she had not received the Morris District position for which she had interviewed. The Board notes in this regard that the Court in Riely, supra, stated that the fact that petitioners submitted the case to arbitration would not toll the 90-day statute of limitation.

The Board concludes that it correctly gave notice of nonrenewal and at that point had no obligation to hire petitioner for any position. It claims that the nonrenewal notice is the very purpose of the statute, and the action taken by the Morris School District is consistent with the statute.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the ALJ that petitioner's 90 days for filing a petition of appeal commenced on April 24, 1990. He concurs with the ALJ that such date represents "****notice of a final order, ruling or other action by the district board of education***." (N.J.A.C. 6:24-1.2(b), now 1.2 (c)) and that the parties are in accord that petitioner received her notice of nonrenewal on such date. (See Initial Decision at p. 3, citing Exhibit J-1)

Moreover, the Commissioner concurs that petitioner's reliance on a re-interview of each of the three years of her employment in respondent's district as justifying her later filing is misplaced. The law does not provide a tolling period for board reconsideration of a final determination. See Marvin J. Markman and Susan M. Markman v. Board of Education of the Township of Teaneck et al., decided by the Commissioner August 22, 1986.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal as untimely filed and adopts it as the final decision in this matter for the reasons expressed in the initial decision.


COMMISSIONER OF EDUCATION

MAY 20, 1991

DATE OF MAILING - MAY 20, 1991

HARRY CARAVELLO, :
PETITIONER, :
V. : COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE : DECISION ON MOTION
BOROUGH OF SOUTH PLAINFIELD,
MIDDLESEX COUNTY, :
RESPONDENT. :
_____ :

Stephen Klausner, Esq., for petitioner (Klausner & Hunter)
Robert J. Cirafesi, Esq., for respondent (Wilentz, Goldman
& Spitzer)

This matter was opened before the Commissioner of Education by way of a Petition of Appeal filed on February 8, 1991 in which petitioner seeks reinstatement to his tenured position as a custodian in the South Plainfield School District and salary and benefits retroactive to November 9, 1990 when he was placed in a pretrial intervention (PTI) program.

The South Plainfield Board of Education submitted its answer to the petition on February 28, 1991 together with a Notice of Motion to Dismiss and a Petition for Declaratory Judgment interpreting N.J.S.A. 18A:6-30 to mean that petitioner is not entitled to back pay since enrollment in PTI does not dismiss an indictment but, rather, places it in an inactive status.

The following Joint Stipulation of Facts and Documents was submitted by the parties on April 4, 1991:

1. Harry Caravello, an employee of South Plainfield Board of Education ("SPBE") was arrested on May 10, 1990 on an active arrest warrant charging conspiracy to distribute cocaine and marijuana. (Exhibit A)
2. On or about May 11, 1990, Mr. Caravello was advised by certified mail that he was suspended with pay because of his arrest. (Exhibit B)
3. On or about August 20, 1990, Mr. Caravello was indicted by the Somerset County Grand Jury charging him with conspiracy to possess a controlled dangerous substance (cocaine) in violation of N.J.S.A. 2C:5-2 and 2C:35-10; and conspiracy to distribute a controlled dangerous substance (marijuana) in violation of N.J.S.A. 2C:5-2 and 2C:35-5a(1).
4. On or about August 21, 1990, by Resolution of SPBE, Mr. Caravello was suspended without pay pending the resolution of his indictment. (Exhibit C)
5. On or about November 9, 1990, Mr. Caravello was placed in the Somerset County Pretrial Intervention Program.
6. By letter dated February 6, 1991, Mr. Caravello's counsel requested that Mr. Caravello be reinstated with full back pay. (Exhibit D)
7. By letter dated February 21, 1991, counsel for SPBE responded to the letter of February 6, 1991. (Exhibit E)

The Board argues that its action to suspend petitioner without pay upon his being indicted in August 1990 is proper under the provisions of N.J.S.A. 18A:6-8.3 which reads

Any employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement. (emphasis added by Board)

The Board contends that it is well-established in law in New Jersey that a tenured employee may be suspended pending disposition of an indictment, Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38 (App. Div. 1965), and that the above-cited statute provides that the employee may be suspended without pay if he/she is indicted, Slater v. Board of Education of Ramapo-Indian Hills, 237 N.J. Super. 424 (App. Div. 1989). It further contends that since petitioner was suspended with pay at the time of his arrest and then suspended without pay only after he was indicted, its actions are in compliance with N.J.S.A. 18A:6-8.3 and the court's ruling in Slater.

In addition to the above, the Board argues that petitioner's request for reinstatement and back pay should be denied because under the provisions of N.J.S.A. 18A:6-30 his suspension without pay is not illegal in that N.J.S.A. 18A:6-8.3 permits suspension without pay as set forth above. N.J.S.A. 18A:6-30 reads

Any person holding office, position or employment in the public school system of the state, who shall be illegally dismissed or suspended therefrom, shall be entitled to compensation for the period covered by the illegal dismissal or suspension, if such dismissal or suspension shall be finally determined to have been without good cause, upon making written application therefor with the board or body by whom he was employed, within 30 days after such determination. (emphasis added by Board)

The Board further contends that it has been held that when an employee has been arrested for an offense which exposes him/her to automatic forfeiture under N.J.S.A. 2C:51-2, a board of education may suspend a tenured employee without pay and without filing tenure charges. In the Matter of the Tenure Hearing of James Fridy, decided December 22, 1980, aff'd with modification State Board May 6

and June 3, 1981, aff'd N.J. Superior Court, Appellate Division
January 26, 1983)

As to this the Board states:

As emphasized in Fridy, the Petitioner herein was arrested for offenses which raised serious questions about his fitness as a custodian in the public schools. The charges involved offenses which were crimes of the third degree and/or "involving or touching such office, position or employment." Clearly the Board has good reason to continue the suspension without pay for such serious charges. It would be unjust to designate the suspension illegal in light of the charges and the language of the applicable forfeiture statute. Not only did the charges against the Petitioner expose him to the risk of forfeiture under N.J.S.A. 2C:51-2, but his alleged connection with drug possession may reasonably be considered extremely dangerous to the public schools. Therefore, it was proper for the Board to suspend the Petitioner without pay pending the outcome of the indictment, and such suspension could not be determined to have been "without good cause." (Board's Brief, at pp. 9-10)

The Board further argues that (1) participation in a PTI program does not necessarily dismiss an indictment and (2) completion of PTI does not determine guilt or innocence. In support of this, the Board cites N.J.S.A. 2C:43-13(b) which provides that during the period of supervisory treatment the charge or charges against the individual participating in the PTI program are held in an inactive status. The Board also avers that while an indictment may be dismissed upon completion of PTI with the consent of the prosecutor, petitioner has not completed the program and it is possible that he may not complete the program successfully, in which case the prosecutor may proceed as though no supervisory treatment had been commenced.

Lastly, in support of its position that reinstatement with back pay should be denied, the Board points to the matter entitled Thomas v. N.J. Inst. of Technology, 178 N.J. Super. 60 (1981) which determined that although admission of guilt is not a requirement for participation in PTI, successful completion of the program cannot be regarded as the equivalent of a judgment of acquittal or an otherwise favorable termination of the criminal proceeding. Further, in a letter filed with the Commissioner on March 5, 1991, the Board urges that the matter entitled Thadeus Pawlak v. Board of Education of the Borough of Hoptacong, Sussex County, decided January 27, 1988, aff'd State Board of Education June 1, 1988, aff'd N.J. Superior Court, Appellate Division A-5083-87T2 July 12, 1989 fully supports its position in this matter.

Petitioner did not submit a response to the Board's Motion for Declaratory Judgment. His petition, however, avers that the Board has violated his tenure rights under N.J.S.A. 18A:17-3 because it has not filed tenure charges against him nor reinstated him since his entry into a PTI program.

* * * *

Upon review of the record in this matter, the Commissioner finds and determines that petitioner is not entitled to reinstatement to his tenured custodial position with back pay because participation in a PTI program does not signify that the indictment has been disposed of as contended in the Petition of Appeal. The indictment against petitioner is being held in an inactive status during the pendency of his participation in a PTI program pursuant to the provisions of N.J.S.A. 2C:43-13 which reads in pertinent part:

b. **Charges.** During a period of supervisory treatment the charge or charges on which the participant is undergoing supervisory treatment shall be held in an inactive status pending termination of the supervisory treatment pursuant to subsection d. or e. of this section.

d. **Dismissal.** Upon completion of supervisory treatment, and with the consent of the prosecutor, the complaint, indictment or accusation against the participant may be dismissed with prejudice.

e. **Violation of conditions.** Upon violation of the conditions of supervisory treatment, the court shall determine, after summary hearing, whether said violation warrants the participant's dismissal from the supervisory treatment program or modification of the conditions of continued participation in that or another supervisory treatment program. Upon dismissal of participant from the supervisory treatment program, the charges against the participant may be reactivated and the prosecutor may proceed as though no supervisory treatment had been commenced.

Furthermore, even if petitioner successfully completes the PTI program and the indictment against him is dismissed pursuant to the above-cited statute, this will not entitle him to back pay from the date of his enrollment in the supervisory treatment program. Pawlak, supra, has established that an employee who has successfully completed a PTI program is not entitled to back pay for the period of suspension pursuant to N.J.S.A. 18A:6-8.3 because the "statute makes no provision for back pay regardless of the disposition of the criminal indictment, and we find no basis under the education laws upon which [Pawlak] would be entitled to back pay." (State Board Slip Opinion, at p. 5) This determination was affirmed by the New Jersey Appellate Court. Also affirmed was the determination

that Pawlak's suspension under N.J.S.A. 18A:6-8.3 was proper even with participation in, and successful completion of, a PTI program and even though the board of education had not filed tenure charges against him. The court ruled

Petitioner suggests that the Board acted improperly when it suspended him pursuant to N.J.S.A. 18A:6-8.3 instead of filing tenure charges against him.

N.J.S.A. 18A:6-8.3 clearly permits the action taken by the Hopatcong Board***.

By its plain terms the statute does not require a board to file tenure charges against an employee suspended under its authority.

(Appellate Division Slip Opinion, at pp. 10-11)

Accordingly, IT IS ORDERED THIS 21st day of May 1991 that the Board's Motion for Declaratory Judgment is granted and the Petition of Appeal is hereby dismissed in that this decision adjudicates all the issues raised therein. Should petitioner successfully complete PTI and the indictment is dismissed, the Board may, nonetheless, choose to file tenure charges against petitioner, whereupon any suspension would be in accordance with the Tenure Employees Hearing Act. If such step is not pursued by the Board, he would be entitled to reinstatement without back pay should the indictment be dismissed.

MAY 21, 1991

DATE OF MAILING- MAY 22, 1991


COMMISSIONER OF EDUCATION



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5970-89

AGENCY DKT. NO. 235-7/89

JOANNE McANENY,

Petitioner,

v.

**BOARD OF EDUCATION
OF THE SCHOOL DISTRICT
OF THE CHATHAMS,**

Respondent.

Sheldon H. Pincus, Esq., for petitioner
(Bucceri & Pincus, attorneys)

David B. Rand, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Sanford R. Oxfeld, Esq., for participants
(Baik, Oxfeld, Mandell & Cohen, attorneys)

Record Closed: December 10, 1990

Decided: April 11, 1991

BEFORE KEN R. SPRINGER, ALJ:

New Jersey is an Equal Opportunity Employer

Statement of the Case

This is an appeal by a teacher dismissed from her employment at the end of the 1988-89 school year as the result of a reduction in force. It raises three difficult questions: (1) whether a teacher who taught in the same or predecessor district for more than 12 years under an inappropriate certificate acquires any tenure rights; (2) whether she can assert superior tenure or seniority rights against other teachers who held proper certificates; and, (3) whether the state education agency must apply the strict law or may balance the equities to reach a just result.

For the reasons which follow, the controlling statutes and regulations preclude petitioner from obtaining tenure or seniority credit based on service performed under the wrong certificate.

Procedural History

Petitioner Joanne McAneny ("McAneny") filed a two-count petition of appeal with the Commissioner of Education ("Commissioner") on July 20, 1989. Count I alleged a violation of her tenure and seniority rights. Count II sought recognition of sick leave benefits from January 1976 to June 1985. Respondent Board of Education of the School District of the Chathams ("Board") filed its answer on August 9, 1989.

Subsequently, on August 11, 1989, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for determination as a contested case. On October 11, 1990, 23 teachers applied for leave to participate in these proceedings as

authorized by *N.J.A.C. 1:1-16*.¹ The OAL held hearings on October 18 and 25, 1990.² Witnesses and exhibits are listed in the appendix. Both sides filed briefs and reply briefs. The record closed on December 10, 1990. Time for preparation of the initial decision has been extended to April 25, 1991.

Findings of Fact

All of the material facts are stipulated or uncontested. I FIND:

Joanne McAneny started working for the Chatham Township School District in January 1976 as a part-time supplemental teacher.³ Supplemental teachers provide remedial instruction in reading, writing and arithmetic to children having academic

¹At the hearing, the OAL granted participation status to the entire group, conditioned on receipt of a written waiver of any objections to the potentially competing interests.

²Originally the OAL had scheduled a hearing for March 12, 1990. However, the original hearing date had to be adjourned due primarily to the Board's failure to answer interrogatories. When the Board failed to comply with an extended discovery deadline, the OAL entered an order on March 28, 1990 striking the Board's defenses and setting the matter down for a limited-proof hearing on April 11, 1990. On that date, an associate from the Board's prior law firm falsely represented that he had authority from his client to enter into a proposed settlement. As soon as the misrepresentation was discovered, the law firm withdrew from the case and substitute counsel quickly moved to set aside the tentative settlement, reinstate the Board's defenses and restore the case to the active calendar. By order dated July 19, 1990, the OAL granted the Board's motion and directed that the Board immediately furnish answers to all outstanding discovery requests. The Commissioner declined to review this interlocutory ruling.

³Chatham Township School District ("Township District") and neighboring Chatham Borough School District ("Borough District") merged in July 1988 to form a new regional district designated the School District of the Chathams ("Regional District"). By virtue of *N.J.S.A. 18A:13-42*, whatever tenure rights McAneny may have accrued in the Township District "shall be recognized and preserved" by the successor Regional District. Thus she has no greater or lesser claim than if the Township District had remained in existence.

OAL DKT. NO. EDU 5970-89

difficulties.⁴ At the time of hire, the only teaching certificate which she held was an instructional certificate endorsed as a teacher of home economics. She had excellent academic credentials, including valedictorian of her college class at Pennsylvania State University. Her only relevant job experience was teaching home economics at Summit Junior High School and in the public school system of Piscataway, New Jersey. The Board acknowledges that McAneny accurately disclosed her complete background and did nothing to deceive her employer. Testimony indicates that McAneny was not actively looking for a job at that time and may actually have been recruited for the position by the Township District.

In hindsight, the parties now realize that petitioner did not possess the proper certification for the job. As the result of a mutual mistake of law, however, both parties "labored under the [erroneous] assumption that Mrs. McAneny was properly certified to perform her assignment" until the truth was discovered in 1987.⁵ Other supplemental teachers in the Township District also taught under certificates unrelated to the subjects they were teaching.

As a supplemental teacher for the Township District, McAneny tutored students in reading and writing skills, basic mathematical concepts such as arithmetic, fractions and decimals, and science. Students were pulled out of their regular classes to see her. She had no general classroom duties, did not give grades and did not fill out report cards. The size of her groups was small, varying from three to five children. Initially she was assigned to the elementary school level for the first

⁴"Supplementary instruction" involves individual or small group tutoring offered as an adjunct "in addition to the regular instructional program" and taught by a teacher "appropriately certified for the subject or level in which instruction is given." *N.J.A.C. 6:28-4.3(a)*. It differs from "resource room," which is offered as a substitute "in place of regular classroom instruction" and taught by a teacher certified to teach handicapped children. *N.J.A.C. 6:28-4.3(b)*.

⁵Historical Note: Prior to *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. 63 (1982), many local school districts were very casual in their dealings with supplemental teachers. *Spiewak* overruled earlier case law which had treated part-time remedial and supplemental teachers as ineligible for tenure. See, *Point Pleasant Beach Teachers Ass'n v. Callam*, 173 N.J. Super. 11 (App. Div. 1980). Traditionally, supplemental teachers had been paid on an hourly basis and were not covered under the terms of the collective negotiating agreement.

three months, but for the rest of the time she served at the high school level. She worked three days per week or .6 of a full-time position. Until 1985 she was paid on an hourly rate and did not receive the usual contractual fringe benefits or statutory sick leave.

For nearly 13 years, McAneny served faithfully and well in her assignment.⁶ Meanwhile, the Township District hired numerous other teachers, who have served for fewer years than petitioner but who possessed the proper certification for their assignments. Ironically, McAneny assisted in the training of many of the teachers who came after her. In July 1988, the Township District merged with the Borough District and a successor board of education took over the Regional District. It was in preparation for the upcoming merger that the concerns about the adequacy of McAneny's certification first arose.

Recently McAneny acquired certification as an elementary school teacher in June 1988 and as a teacher of the handicapped in September 1988. McAneny qualified for the elementary school teacher endorsement merely by passing a national examination, without any need for additional course work. She did have to take extra graduate courses to obtain the endorsement as teacher of the handicapped. McAneny's conscientious efforts to get properly certified are indicative of her good faith and strong desire to keep her job.

After acquiring the two additional certificates, she worked one more year (1988-89) as a supplemental teacher for the Regional District. When offering her continued employment in the newly created district, the Board avowedly recognized her "permanent tenure status." Her job duties remained essentially the same, except that she taught at the eighth-grade level and her class was open only to children classified as having learning disabilities. In April 1989 the Regional District terminated her employment for 1989-90, claiming that she possessed neither tenure nor seniority. Petitioner asserts bumping rights over some 50-plus non-tenured or less senior teachers, grouped into various specific categories. McAneny successfully

⁶In April 1989, the Board assured McAneny that its budgetary action "in no way reflects on your performance as a teacher, or the many fine contributions you have provided for the students of the Chatham."

mitigated her damages by finding employment in another district for last year, but at the time of the hearing she was again unemployed.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that McAneny does not satisfy the statutory conditions for tenure as a teacher and, therefore, has no entitlement to displace any other teacher in the district.

Tenure is a statutory status which "never depends on the contractual agreement between the teachers and the board of education." *Spiewak v. Rutherford Bd. of Ed.*, 90 N.J. 63, 77 (1982). A teacher's right to tenure "cannot be altered by contract." *Wright v. East Orange Bd. of Ed.*, 99 N.J. 112, 122 (1985). To acquire the protections afforded by the tenure law, "a teacher must comply with the precise conditions articulated in the statute." *Zimmerman v. Newark Bd. of Ed.*, 38 N.J. 65, 72 (1962). The focus is on "objective statutory criteria" rather than "subjective intent of the parties." *Spiewak*, at 77.

Teachers must hold a "valid" certificate to be employed by any public school district in this state. N.J.S.A. 18A:26-2. More pertinently, no teaching staff member shall acquire tenure without an "appropriate" certificate for the position in which tenure is claimed. N.J.S.A. 18A:28-4. Employment of teachers who lack an "appropriate" certificate is expressly prohibited. N.J.S.A. 18A:27-2. Teachers are not entitled to salary unless they hold an "appropriate" certificate. N.J.S.A. 18A:29-1.

Undeniably, McAneny held a "valid" instructional certificate at all relevant times. Thus, the narrower issue is whether her endorsement as a home economics teacher constitutes an "appropriate" certificate so that her service counts toward tenure. Ultimately, the "primary responsibility" for obtaining appropriate certification belongs to the teacher. *Ledwitz v. Manalapan-Englishtown Bd. of Ed.*, 1988 S.L.D. ___ (St. Bd. Jan. 6, 1988), slip op. at 4, *aff'd* No. A-2861-87T7 (N.J. App. Div. Feb. 16, 1989). While local school officials share some responsibility for checking that teaching staff members in the district are properly certified, it is the individual's obligation to obtain any necessary certificates. *Sydnor v. Englewood Bd. of Ed.*, 1976 S.L.D. 113, 117 (Comm'r 1976).

Certification standards for supplemental teachers have not changed substantially since McAneny began her employment.⁷ The common thread is that a supplemental teacher must be "appropriately certified." For all but her last year, McAneny held only a home economics endorsement. That endorsement authorizes its holder "to teach home economics in all public schools" and encompasses such subject matter as "[h]omemaking and consumer education, foods and nutrition, family living and parenthood education, child development and guidance, housing and home furnishings, home management, clothing and textiles, and family health and safety." *N.J.A.C. 6:11-6.2(a)(12)*. By no stretch of imagination can such language be extended to cover remedial reading, writing and arithmetic. Any reasonable person ought to have known that a home economics endorsement does not confer authorization to provide supplemental instruction.

Nonetheless, petitioner urges that the harsh impact of the rule be tempered in her particular case and that the judgment be guided by abstract notions of "fundamental fairness, equity and justice." No one has suggested that McAneny is not a good teacher. She has devoted many years of service to the district. Innocent third parties have not suffered any genuine harm, since teachers hired after her could not have reasonably expected to achieve tenure sooner. As soon as the defect was brought to her attention, she promptly took steps to obtain the required elementary endorsement.

The problem with petitioner's reasoning is that it lacks support in the tenure law. Current cases clearly hold that service performed under an inappropriate

⁷In 1976, *N.J.A.C. 6:28-3.19(c)* prescribed that "teachers providing supplemental instruction shall be appropriately certified or approved and shall be employed by the board of education of a public school district." Proposed 2 *N.J.R. 47(d)*; adopted 2 *N.J.R. 72(a)*. Two years later, in 1978, the corresponding regulation, renumbered as *N.J.A.C. 6:28-3.2(b)(5)*, was amended to clarify that supplemental teachers "shall be appropriately certified for the subject or level in which instruction is given." Proposed 10 *N.J.R. 225(b)*; adopted 10 *N.J.R. 383(a)*. Another amendment occurred in 1984, when the same regulation, recodified as *N.J.A.C. 6:28-4.2(b)(iii)*, was readopted without any change in language. Proposed 16 *N.J.R. 611(a)*; adopted 16 *N.J.R. 1970*. In 1989 the regulation, now designated *N.J.A.C. 6:28-4.3(a)(3)*, was updated to cross-reference the code section on types of certifications by adding the phrase "according to the requirements of *N.J.A.C. 6:11*." Proposed 21 *N.J.R. 239(a)*; adopted 21 *N.J.R. 1385(a)*.

certificate cannot be credited toward tenure or seniority. Illustratively, in *Jennings v. Highland Park Bd. of Ed.*, 1989 S.L.D. ___ (St. Bd. Feb. 28, 1989), a physical education teacher who taught health courses without a health education endorsement was denied tenure. Even the fact that the teacher had relied on his employer's false assurances that such certificate was unnecessary did not excuse his failure to acquire a health endorsement. Purported reliance on local board practice cannot be regarded as reasonable "in the face of clear regulations to the contrary." (slip op. at 9). Similarly, in *Morano v. Verona Bd. of Ed.*, 1990 S.L.D. ___ (Comm'r Aug. 10, 1990), a teacher whose certificate did not include bookkeeping and accounting earned no seniority for having taught those subjects.

Jennings overrules a prior line of authority typified by *Saad v. Dumont Bd. of Ed.*, 1982 S.L.D. 440 (Comm'r 1982), which had recognized retroactive seniority credit based on mere eligibility for a certificate, regardless of whether the actual certificate was ever issued. Even if *Saad* were still good law, it is debatable whether *McAneny* would satisfy its eligibility test, since she did not automatically qualify for the elementary endorsement but had to pass a national exam. In any event, the recent trend of case law has retreated from a subjective "balancing of equities" in favor of a more objective analysis. There is a growing appreciation of the unworkability of any system which imposes on school administrators the added burden of having to guess the possible combinations of unissued certifications for which staff members might be eligible.

Increasingly, there is recognition of the desirability for clear-cut, businesslike and predictable standards that are easily understood and apply equally to all. *Morano* spoke of the tendency of past approaches to "erode" confidence in the regulatory system and to create "uncertainty and confusion." (slip op. at 8) Lack of certainty leads to divisiveness among teachers and encourages unnecessary and expensive litigation. In short, the recent cases are completely in harmony with the tenure act itself, which forbids the acquisition of tenure by anyone "who is not the holder of an appropriate certificate . . . in full force and effect." *N.J.S.A. 18A:28-4*. (Emphasis added).

Remaining cases cited by petitioner predate *Jennings* and are distinguishable from the instant matter. In *Comstock v. Summit Bd. of Ed.*, 1983 S.L.D. ___ (Comm'r Sept. 15, 1983), modified 1987 S.L.D. ___ (St. Bd. March 4, 1987) the parties below had

stipulated the certification requirements so that the issue was never raised before the Commissioner or State Board. In *Meli v. Little Ferry Bd. of Ed.*, 1983 S.L.D. ___ (Comm'r Aug. 22, 1983), *aff'd* 1984 S.L.D. ___ (St. Bd. Jan. 4, 1984), the dispute also centered on other issues and not on proper certification. Although the school board had argued unsuccessfully that petitioners were not retroactively entitled to newly created rights, it conceded that they met the statutory criteria for tenure. *Meli*, slip op. at 8. Furthermore, the supplemental teacher in *Meli* possessed a secondary English certificate which authorized him to teach English in all public schools. In contrast, McAneny's home economics endorsement bore no relationship to the subjects she was teaching.

It is recognized that tenure statutes must be liberally construed in favor of employee protection. *Spiewak*, at 74. *Dugan v. Stockton State College*, No. A-3996-89T1 (N.J. App. Div. Feb. 5, 1991). Accordingly, one must not adopt a begrudging or ungenerous approach toward what constitutes "appropriate" certification for tenure purposes. Where, for example, a teacher taught a developmental reading component of a ninth grade English course, she was not deprived of tenure merely because she held a reading endorsement rather than an English endorsement. *Bosco v. Northern Highlands Reg. Bd. of Ed.*, 1990 S.L.D. ___ (Comm'r Aug. 3, 1990). Here, however, even the most indulgent interpretation of the certification regulations cannot condone the teaching of supplemental instruction by a teacher certified in home economics.

Courts will not permit avoidance of tenure by manipulation of job titles. *Dugan*, slip op. at 6. See generally, *Quinlan v. North Bergen Bd. of Ed.*, 73 N.J. Super. 40 (App. Div. 1962); *Viemeister v. Prospect Park Bd. of Ed.*, 5 N.J. Super. 215 (App. Div. 1949). Consistently, the Commissioner has looked to the actual nature of the duties performed rather than to the job title or formal description. Consequently, a local school board cannot defeat otherwise valid tenure rights by assigning a properly certified staff member to an unapproved title, *DeGise v. Jersey City Bd. of Ed.*, No. A-694-87T7 (N.J. App. Div. Dec. 15, 1988); or by changing a job title from "coordinator" to "supervisor," *Pastore v. Jersey City Bd. of Ed.*, 1984 S.L.D. ___ (Comm'r June 22, 1984); or by not giving him a title commensurate with his actual duties, *Smith v. Jersey City Bd. of Ed.*, 1987 S.L.D. ___ (Comm'r Feb. 4, 1987). But McAneny makes no similar claim that the Board gave her a sham or misleading title.

Instead, this case is about a teacher who taught subjects that she was not legally authorized to teach.

Once it is established that McAneny does not have tenure for her service under an inappropriate certificate, the rest falls quickly into place. Absent tenure, McAneny has no greater right of retention than does any other non-tenured teacher in the district. See, *Capodilupo v. West Orange Bd. of Ed.*, 218 N.J. Super. 510 (App. Div. 1987). Accord, *Bednar v. Westwood Bd. of Ed.*, 221 N.J. Super. 239 (App. Div. 1987). Since seniority "provides a mechanism for ranking all tenured teaching staff members," *Capodilupo*, at 514, a non-tenured teacher does not have any seniority against a tenured teacher. In light of this outcome, the sick leave claim is moot.

Order

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

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10*.

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 225 West State Street, CN 500, Trenton, New Jersey 08625, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

April 12, 1991
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

4/5/91
Date

Jaycee LaVecchia
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 18 1991
Date

Jaycee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

al/e

APPENDIX

List of Witnesses

1. Joanne McAneny
2. Joseph Schneider, assistant superintendent of schools, School District of the Chathams

List of Exhibits

No.	Description
J-1	Copy of seniority worksheet, dated February 12, 1987
J-2	Copy of agenda for a regular meeting of the Board of Education of the School District of the Chathams on April 24, 1989
J-3	Copy of a letter to Joanne McAneny from the School District of the Chathams, dated April 26, 1989
J-4	Copy of an instructional certificate endorsed as teacher of the handicapped, issued September 1988
J-5	Copy of an instructional certificate endorsed as teacher of English, issued June 1990
J-6	Copy of an instructional certificate endorsed as elementary school teacher, issued June 1988
J-7	Copy of an instructional certificate endorsed as teacher of home economics, issued July 12, 1963
J-8	Copy of a job description for teacher, undated

- J-9 Copy of an application for professional position, dated September 8, 1975
- J-10 Copy of a memorandum to Dr. Jacoby from Santina T. Wagner, dated January 6, 1976
- J-11 Copy of a letter to Joanne McAneny from the School District of the Township of the Chatham, dated June 11, 1979
- J-12 Copy of a letter to Joanne McAneny from the School District of the Township of Chatham, dated July 17, 1980
- J-13 Copy of an employment contract between Joanne McAneny and the Board of Education of the Township of Chatham, dated November 11, 1985
- J-14 Copy of an employment contract between Joanne McAneny and the Board of Education of the Township of Chatham, dated May 12, 1986
- J-15 Copy of an employment contract between Joanne McAneny and the Board of Education of the Township of Chatham, dated September 14, 1987
- J-16 Copy of an agreement between the Board of Education of the School District of the Chathams and Joanne McAneny, dated April 12, 1988
- J-17 Copy of an agreement between the School District of the Chathams and Joanne McAneny, dated August 22, 1988
- J-18 Copy of a revised contract between Joanne McAneny and the School District of the Chathams, dated October 11, 1988
- J-19 Copy of a letter to Joanne McAneny from the Hanover Park Regional District, dated November 9, 1989

- J-20 Copy of an employment contract between the Hanover Park Regional High School District and Joanne McAneny, dated November 9, 1989
- J-21 Omitted
- J-22 Copy of a professional negotiations agreement between the Board of Education of the School District of the Chathams and the Association of Chatham teachers for the years 1988-89, 1989-90 and 1990-91
- 23 A list of elementary classroom teachers, Chapter I / compensatory education / supplemental teachers, teachers of the handicapped and teachers of home economics, undated
- J-24 A list of non-tenured elementary teachers, teachers of the handicapped and tenured home economic teachers, dated January 21, 1990
- J-25 A list of currently employed supplemental teachers, undated
- J-26 Employment histories of special education teachers (a) Elizabeth Bellingham, (b) Linda Frost, (c) Virginia Hatcher, (d) Margaret Gaughran, (e) Ann Durette, (f) Ina Sue Kamerman, (g) Christine McQueen, (h) Melda Pike, (i) Gail Richman, (j) LeMoyne Robinson and (k) Judith Shapiro
- J-27 Employment histories of various Chapter I and compensatory education teachers (a) Deborah Behling, (b) Carole Bolton, (c) Lyla Lett, (d) Marilyn Reeve, and (e) Mary Ann Everett
- J-28 Employment histories of various supplemental teachers, (a) Paula Della Piazza, (b) Dorothy Johnston, (c) Lucille McGann, (d) Joanne Plany

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- J-29 Copy of a letter to the School District of the Chathams from Joanne McAneny, dated June 18, 1989 with enclosure

- P-1 Joint stipulation of facts, filed on October 18, 1990
 - (a) Supplemental stipulation of facts, filed November 7, 1990

- P-2
 - (a) Copy of a transcript from Pennsylvania State University, dated Fall 1956

 - (b) Copy of a graduate record from Montclair State College, dated Summer Session 1961

 - (c) Copy of transcript from Fairleigh Dickenson University, dated August 14, 1988

 - (d) Copy of transcript from Kean College of New Jersey, dated August 16, 1988

 - (e) Copy of transcript from Kean College of New Jersey, dated August 13, 1990

- P-3 Seniority list for Chatham Township School District, dated December 1986

JOANNE MC ANENY, :
 PETITIONER, :
 V. : COMMISSIONER OF EDUCATION
 BOARD OF EDUCATION OF THE SCHOOL : DECISION
 DISTRICT OF THE CHATHAMS, MORRIS :
 COUNTY, :
 RESPONDENT. :
 _____ :

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

Petitioner's exceptions argue that the initial decision misapplies prior decisions indicating the certifications/endorsements required for supplemental teachers. Petitioner urges, inter alia, that prior to the 1982 New Jersey Supreme Court's decision in Spiewak, supra, any teaching credential was considered appropriate for providing supplemental and remedial instruction and that it was not until that decision was rendered recognizing the status of such teachers as professional staff members that the certification requirements for supplemental and other remedial services became more formalized and resulted in a specification of qualifications such as now found in N.J.A.C. 6:28-4.3(a).

Petitioner also urges that the Administrative Law Judge improperly dismissed reliance upon Comstock, supra, and Meli and Lagerman, supra, which both accorded tenure acquisition and seniority to individuals whom she contends were not certified for the subject or levels they taught. She avers that these two cases which were rejected by the ALJ exemplify well the manner in which the issue of qualifications of supplemental/remedial teachers was handled for many years in New Jersey. (Petitioner's Exceptions, at p. 4)

Petitioner further contends that the ALJ improperly concludes that Jennings, supra, has done away with the balancing of equities and that the Jennings decision does little more than restate prior law. (Id., at p. 7) More specifically, she avers that fundamental fairness, justice and equity dictate that she be able to continue in the service of the School District of the Chathams because, unlike the petitioner in Jennings, she did not know she was improperly certified and when informed of the problem she took immediate steps to obtain appropriate certification.

Upon a thorough and comprehensive review of the record in this matter and due consideration to the exceptions of the parties, the Commissioner concurs with and adopts as his own the findings and conclusions of the Administrative Law Judge that petitioner did not acquire tenure pursuant to the provisions of N.J.S.A. 18A:28-5 because she did not possess the appropriate certificate for service as a supplemental teacher. As correctly pointed out by the ALJ, the New Jersey Supreme Court in 1982 in Spiewak, supra, set forth the precise requirements for tenure acquisition; i.e., that the position require a certificate issued by the New Jersey State Board of

Examiners; that the individual possess the appropriate certificate for the position; and that he/she serve the requisite period of time. An instructional endorsement as a teacher of home economics quite clearly delineates what one is authorized to teach under that endorsement. The precise language of that endorsement is no different in 1991 than it was in 1976. N.J.A.C. 6:11-6.2(a)12 reads:

Home economics: This endorsement authorizes the holder to teach home economics in all public schools. Home economics normally includes: Homemaking and consumer education, foods and nutrition, family living and parenthood education, child development and guidance, housing and home furnishings, home management, clothing and textiles, and family health and safety.

Even accepting as true petitioner's contention that prior to the Supreme Court's 1982 decision in Spiewak, supra, many districts in New Jersey hired individuals to provide supplemental and remedial instruction under any teaching credential, that does not, therefore, provide a basis for now concluding that she obtained tenure while serving under a certificate which did not authorize her to provide instruction in any of the areas of supplemental instruction she provided until 1988; i.e. English,, mathematics, science and social studies.

As to petitioner's arguments relative to Comstock, supra, and Meli and Lagerman, supra, the Commissioner agrees with the ALJ that those cases are distinguishable from the instant matter. In neither of the cases was appropriate certification for the provision of supplemental instruction an issue argued before the Commissioner unlike in the matter entitled Teaneck Education Association v. Teaneck Board of Education, 1983 S.L.D. 1039 which specifically

addressed that issue when interpreting the provisions of N.J.A.C. 6:28-4.3(a)(3) in effect in 1983. That regulation required that supplemental instructors be appropriately certified for the subject or level for which instruction is given. It was held that subject or level was presumed to mean appropriate certification for an academic discipline, such as reading, art or music taught at either the elementary or secondary level. (Id., at 1049) Moreover, the Commissioner believes that it is important to note the history of the supplemental instruction regulation contained in N.J.A.C. 6:28-1.1 et seq. which the ALJ recites as a footnote on page 7 of the initial decision. It reads

In 1976, N.J.A.C. 6:28-3.19(c) prescribed that "teachers providing supplemental instruction shall be appropriately certified or approved and shall be employed by the board of education of a public school district." Proposed 2 N.J.R. 47(d); adopted 2 N.J.R. 72(a). Two years later, in 1978, the corresponding regulation, renumbered as N.J.A.C. 6:28-3.2(b)(5), was amended to clarify that supplemental teachers "shall be appropriately certified for the subject or level in which instruction is given." Proposed 10 N.J.R. 225(b); adopted 10 N.J.R. 383(a). Another amendment occurred in 1984, when the same regulation, recodified as N.J.A.C. 6:28-4.2(b)(iii), was readopted without any change in language. Proposed 16 N.J.R. 611(a); adopted 16 N.J.R. 1970. In 1989 the regulation, now designated N.J.A.C. 6:28-4.3(a)(3), was updated to cross-reference the code section on types of certifications by adding the phrase "according to the requirements of N.J.A.C. 6:11." Proposed 21 N.J.R. 239(a); adopted 21 N.J.R. 1385(a).

Furthermore, petitioner cannot prevail in this matter regarding her acquisition of tenure on the grounds of equitable estoppel because, contrary to her arguments otherwise, Jennings, supra, has superceded prior case law which determined on equitable bases that a person under certain circumstances could obtain tenure

when through no fault of his/her own he/she did not possess appropriate certification for the instruction provided but was eligible for such certification. The State Board's decision in Jennings, supra, quite definitively states that because the primary responsibility for applying for and possessing appropriate certification rests with the teacher, detrimental reliance on a board of education's improper action in assigning a teacher to a position for which the individual is not certified does not afford retroactive acquisition of tenure on the grounds of equitable estoppel. It states:

Under the circumstances, we conclude that the statements of the athletic director and principal and the Board's improper action in assigning him to teach health without the appropriate certification cannot be used to excuse the Petitioner's failure to acquire a health endorsement, and Petitioner's reliance upon such actions in the face of clear regulations to the contrary cannot be regarded as reasonable. Petitioner had primary responsibility to apply for and possess appropriate certification during his employment. Ledwitz v. Bd. of Ed. of the Manalapan-Englishtown Regional School District, decided by the State Board, January 6, 1988, slip op., at 4, aff'd, Docket #A-2861-87T7 (App. Div. 1989). We therefore agree with the ALJ that the Petitioner cannot show a reasonable reliance upon the Board's actions so as to warrant the application of equitable estoppel.

Thus, even accepting as true the facts proffered (sic) by Petitioner, and considering the moving papers and pleadings in a light most favorable to Petitioner, we find that he is not entitled to tenure as a teaching staff member***.

(Jennings Slip Opinion, at p. 9)

It is unfortunate that petitioner was ignorant of the fact that she was not appropriately certified for providing supplemental instruction, but as stated above, the plain language of the home economics endorsement clearly delineates the scope of that

endorsement's authorization to teach. It is likewise unfortunate that the district failed in this responsibility to assure that petitioner was appropriately certified. However, the consequences of functioning without appropriate certification must first be governed by Spiewak, supra, and most recently by Jennings, supra.

Accordingly, for the reasons expressed by the ALJ in the initial decision and elaborated upon herein, the petition is hereby dismissed.


COMMISSIONER OF EDUCATION

MAY 28, 1991

DATE OF MAILING - MAY 28, 1991

JOANNE McANENY, :
PETITIONER-APPELLANT, :
V. : STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE SCHOOL : DECISION
DISTRICT OF THE CHATHAMS, MORRIS :
COUNTY, :
RESPONDENT-APPELLANT. :
_____ :

Decided by the Commissioner of Education, May 28, 1991

For the Petitioner-Appellant, Bucceri & Pincus
(Sheldon H. Pincus, Esq., of Counsel)

For the Respondent-Respondent, Rand, Algeier, Tosti &
Woodruff (David B. Rand, Esq., of Counsel)

For the Participants, Balk, Oxfeld, Mandell & Cohen
(Sanford R. Oxfeld, Esq., of Counsel)

Petitioner-Appellant Joanne McAneny (hereinafter "Appellant") was employed from 1976-1988 on a part-time basis as a Supplemental Teacher by the Chatham Township Board of Education. Her service in that assignment was largely at the high school level, where she tutored small groups of students in reading and writing skills, as well as in basic mathematics and science. Although the regulations in effect at that time required that teachers providing supplemental instruction be appropriately certified, Appellant possessed certification only as a Teacher of Home Economics.

Effective July 1, 1988, the School District of Chatham Township was dissolved and, as provided by N.J.S.A. 18A:13-34 et seq., the School District of the Chathams began operation as a regional school district. Following notification that she would not be employed by the new regional district without appropriate

certification. Appellant obtained certification as an Elementary Teacher in June 1988 upon completion of additional course work and as a Teacher of the Handicapped in September 1988 after passing a national examination. She was employed by the Board of Education of the School District of the Chathams and served as a Supplemental Teacher during 1988-89 until terminated effective June 30, 1989, as part of a reduction in force. Appellant challenged her dismissal, alleging that it violated her tenure and seniority rights and also sought sick leave benefits from January 1976 to June 1985.

In his Initial Decision, the Administrative Law Judge recommended denying relief to Appellant, concluding that since she had not possessed an appropriate certificate, she had not satisfied the statutory conditions for tenure and hence could have no entitlement to displace any other teacher in the district. Emphasizing that primary responsibility for obtaining appropriate certification rests with the teaching staff member and that the certification requirements for supplemental teachers had not changed substantially since Appellant began her employment, the ALJ stressed that any reasonable person should have known that a home economics endorsement does not confer authorization to provide supplemental instruction. In view of his determination, the ALJ found that Appellant's claim for sick leave benefits was moot.

The Commissioner concurred with the ALJ that Appellant had not acquired tenure pursuant to N.J.S.A. 18A:28-5 because she had not possessed the appropriate certificate for service as a supplemental teacher until the 1988-89 school year. Like the ALJ, the Commissioner rejected Appellant's contention that she was entitled to tenure on equitable grounds. In this respect, the

Commissioner found that it was unfortunate that Appellant was ignorant of the fact that she was not appropriately certified to provide supplemental instruction, but that the plain language of the home economics endorsement clearly delineated the scope of the authorization to teach thereunder.

We affirm that Appellant was not tenured at the time of her termination, substantially for the reasons set forth in the decisions below. In affirming, we emphasize that our decision in Jennings v. Board of Education of the Borough of Highland Park, decided by the State Board, February 28, 1989, was limited to the circumstances presented to us by that case, and that, under those particular circumstances, we found that the Petitioner could not show reasonable reliance upon the district board's actions so as to warrant application of equitable estoppel. We did not hold that the doctrine would never apply in assessing whether statutory prerequisites of N.J.S.A. 18A:28-5 had been satisfied.

Here, although the regulations requiring appropriate certification may not have been uniformly abided by prior to the New Jersey Supreme Court's decision in Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982), such regulations were in effect throughout the entire period of Appellant's employment by the Chatham Township Board of Education, see Initial Decision, at 7 n.7, as was the regulation which clearly and unambiguously specifies the scope of authorization to teach under the home economics endorsement. See N.J.A.C. 6:11-6.2(a)12. In the face of these regulations, any reliance Appellant placed on the Board's ignorance can not be regarded as reasonable.

Finally, we recognize that entitlement to sick leave

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benefits under N.J.S.A. 18A:30-2 is not limited to persons protected by tenure so that our conclusion that Appellant was not tenured does not automatically render moot her claim for such benefits. However, Appellant is only now in this action asserting her claim for benefits from January 1976 through June 1985. Given that the Chatham Township Board of Education provided Appellant with sick leave benefits as of the 1985-86 school year and that more than five years has passed since then, we find that this claim is time barred. N.J.A.C. 6:24-1.2(c).

October 2, 1991

Date of mailing _____

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