

State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAWS

Enacted during the Legislative Session of 1961

SCHOOL LAW DECISIONS

1960 - 1961

Keep with 1938 Edition of New Jersey School Laws

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SCHOOL LAWS, SESSION OF 1961

AMENDMENTS*

CHAPTER 70, LAWS OF 1961

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

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

1. Section 36 of the act of which this act is amendatory is amended to read as follows:

36. Should a member, after having completed 20 years of service, be separated voluntarily or involuntarily from the service, before reaching service retirement age, and not by removal for inefficiency, incapacity, conduct unbecoming a teacher or other just cause under the provisions of sections 18:13-16 to 18:13-19 of the Revised Statutes, inclusive, such person may elect to receive, in lieu of the payment provided in section 34:

a. the payments provided for in section 37 of this act, if he so qualified under said section; or

b. a deferred retirement allowance, beginning at age 60, which shall be $\frac{1}{70}$ of his final compensation for each year of service credited as Class A service and $\frac{1}{60}$ of his final compensation for each year of service credited as Class B service, calculated in accordance with section 44 of this act, with optional privileges provided for in section 47 of this act; provided, that such election is communicated by such member to the board of trustees in writing stating at what time subsequent to the execution and filing thereof he desires to be retired; and provided, further, that such member may later elect: (a) to receive the payments provided for in section 37 of this act, if he had qualified under that section at the time of leaving service; or (b) to withdraw his accumulated deductions with interest as provided in section 34. *If such member shall die before attaining service retirement age, then his accumulated deductions, plus regular interest after January 1, 1956, shall be paid to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate, or if such member shall die after attaining service retirement age and has not withdrawn his accumulated deductions, there shall be paid an amount equal to 3/16 of the compensation received by the member in the last year of creditable service to such person, if living, as he shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate.*

* Italics show amendments of 1961.

2. Section 53 of the act of which this act is amendatory is amended to read as follows:

53. a. Each member who is a member on *January 1, 1958*, and each person who thereafter becomes a member will be eligible to purchase the additional death benefit coverage hereinafter described, provided that he selects such coverage within 1 year after *January 1, 1958*, or after the effective date of membership, whichever date is later.

b. The board of trustees shall establish schedules of contributions to be made by the members who elect to purchase the additional death benefit coverage. Such contributions shall be so computed that the contributions made by or on behalf of all covered members in the aggregate shall be sufficient to provide for the cost of the benefits established by subsections *c* and *e* of this section. Such schedules of contribution shall be subject to adjustment from time to time, by the board of trustees, as the need may appear.

c. Upon the receipt of proper proofs of the death in service of any such member while covered for the additional death benefit coverage there shall be paid to such person, if living, as the member shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate, an amount equal to $1\frac{1}{2}$ times the compensation received by the member in the last year of creditable service or some lesser amount as may be provided by the board of trustees and elected to purchase by the member; provided, that if such death in service shall occur on or after July 1, 1956, and after the member has attained age 70, the amount payable shall equal $\frac{3}{16}$ of the compensation received by the member in the last year of creditable service instead of $1\frac{1}{2}$ times such compensation.

d. *The board of trustees may also provide, effective as of January 1, 1961, for additional death benefit coverage, as described in subsection e of this section, for former members who are receiving retirement allowances pursuant to the provisions of this act, subject to the provisions hereinafter stated, and the board may terminate such coverage at any time. The additional death benefit coverage to be so provided shall be in accordance with rules as determined by the board from time to time on the basis of dates of retirement or other factors deemed appropriate by it. In no event shall the additional death benefit coverage described in subsection e of this section apply to any former member receiving a retirement allowance unless such member was covered by the additional death benefits described in subsection c of this section during the member's last month of creditable service, nor shall such coverage apply prior to a member's attainment of age 60. No contributions toward the cost of additional death benefit coverage described in subsection e of this section shall be required of a former member while he is receiving a retirement allowance pursuant to the provisions of this act.*

e. *Upon receipt of proper proofs of the death of a former member who was covered for the additional death benefit coverage pursuant to subsection d of this section, there shall be paid to such person, if living, as the member shall have nominated by written designation duly executed and filed with the board of trustees, otherwise to the executor or administrator of the member's estate, an amount equal to $\frac{3}{16}$ of the compensation received by the member in the last year of creditable service.*

f. The contributions of a member for the additional death benefit coverage shall be deducted from his compensation, but if there is no compensation from which such contributions may be deducted it shall be the obligation of the member to make such contributions directly to the board of trustees or as directed by the board; provided, however, that no contributions shall be required while a member remains in service after attaining age 70 but that his employer shall be required to pay into the fund on his behalf in such case an amount equal to the contributions otherwise required by the board of trustees in accordance with this section.

g. Any other provisions of this act notwithstanding, the contributions of a member for the additional death benefit coverage under this section shall not be returnable to the member or his beneficiary in any manner, or for any reason whatsoever, nor shall any contributions made for the additional death benefit coverage be included in any annuity payable to any such member or to his beneficiary.

h. A member who has elected to purchase the additional death benefit coverage provided by this section may file with the board of trustees, and alter from time to time during his lifetime, as desired, a duly attested, written, new nomination of the payee of the death benefit provided under this section. Such member may also file and alter from time to time during his lifetime, as desired, a request with the board of trustees directing payment of said benefit in 1 sum or in equal annual installments over a period of years or as a life annuity. Upon the death of such a member, a beneficiary to whom a benefit is payable in 1 sum may elect to receive the amount payable in equal installments over a period of years or as a life annuity.

i. All other provisions of this section notwithstanding, this section and the benefits provided under this section shall not come into effect until a required percentage of the members shall have applied for the additional death benefit coverage under this section. This required percentage shall be fixed by the board of trustees. Any such percentage may be made applicable to male or female members only or to other groupings as determined by the board of trustees. Applications for such additional death benefit coverage shall be submitted to the secretary of the board of trustees in such manner and upon such forms as the board of trustees shall provide.

j. Any person becoming a member of the retirement system after benefits provided under this section shall have come into effect, who is, by sex or other characteristic, within the grouping to which the additional death benefit coverage under this section is applicable, for the first year of his membership in the retirement system shall be covered by the additional death benefit coverage provisions of this section with the benefit in the event of death, in the first year of membership only, being based upon contractual salary instead of compensation actually received and shall make contributions as fixed by the board of trustees during such period. Such member shall have the right to continue to be covered by the benefits of this section and to contribute therefor after his first year of membership has been completed. This subsection shall not apply in the case of such a member who has already attained his sixtieth birthday prior to becoming a member of the retirement system unless he shall furnish satisfactory evidence of insurability at the time of becoming a member.

3. This act shall take effect immediately.

Approved June 3, 1961.

CHAPTER 85, LAWS OF 1961

AN ACT concerning education, amending section 18:14-1 of the Revised Statutes and supplementing the State School Aid Act of 1954, approved June 30, 1954 (P. L. 1954, c. 85).

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

1. Section 18:14-1 of the Revised Statutes is amended to read as follows:
18:14-1. Public schools shall be free to the following persons over 5 and under 20 years of age:

- a. Any person who is domiciled within the school district;
- b. Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, but the board of education of any school district before accepting any such person as a pupil in such district may require such other person to file with the secretary or district clerk of the board a sworn statement that he is domiciled within the district, is supporting the child gratis, will assume all personal obligations for the child relative to school requirements, and intends to so keep and support the child gratuitously and not merely through the school term;
- c. Any person whose parent or guardian, even though not domiciled within the district, is residing temporarily therein but no person who has had or shall have his all-year-round dwelling place within the district for 1 year or longer shall be deemed temporarily resident therein;
- d. Any person, for whom the New Jersey State Board of Children's Guardians is acting as guardian and who is placed in the district by said board;
- e. Any person, nonresident of the district, who is placed in the home of a resident of the district by order of a court of competent jurisdiction in this State, or by any society, agency or institution incorporated and located in this State having for its object the care and welfare of indigent, neglected or abandoned children, *or children in danger of becoming delinquent, or any person who is a resident in any institution operated, by any such society, agency or corporation, on a nonprofit basis*, whether or not such resident, *society, agency or institution* is compensated for keeping such nonresident child; but no district shall be required to take an unreasonable number of nonresidents under this subsection *except upon order of the Commissioner of Education issued in accordance with the rules established by the State Board of Education*.

The public schools of any district shall be free to such persons, over the age of 20 years, who, except for age, would be entitled to free education in the district, as the board of education of the district may determine.

Any person entitled to free education under this section shall be subject to all of the provisions of this chapter.

Nonresidents of the school district, if otherwise competent, may be admitted to the schools of the district with the consent of the board of education upon such terms as the board may prescribe.

2. Whenever the Commissioner of Education shall determine, upon application of a board of education made in accordance with rules established by the State Board, that there are in a school district an unreasonable number of persons, as defined in paragraphs d. and e. of section 18:14-1 of the Revised Statutes, applying for admission to the schools of the district, he may order the district to accept such pupils, in which case he shall approve and grant to the district special State-aid in such amount as he shall determine in accordance with rules adopted by the State Board of Education.

3. This act shall take effect immediately.

Approved June 26, 1961.

CHAPTER 98, LAWS OF 1961

AN ACT concerning education and the creation of certain regional school districts, amending and supplementing chapter 122 of the laws of 1960.

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

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

2. The secretary of the school district shall transmit to the county superintendent of schools of the county in which said school district is situate a certificate of the results of the election in each of the municipalities in such school district. In the event that the municipalities of the school district are situated in different counties, the secretary of the school district shall transmit a certificate of the results of the election to the county superintendent of schools of each county in which such constituent municipalities are situated. If the county superintendent or each such county superintendent of schools, as the case may be, shall determine from such certificate that the total number of votes cast in each municipality in the district in favor of the proposal for creating a regional school district exceeds the total number of votes cast in each such municipality against the same, he shall immediately notify the board of education of the school district of his determination, and of the fact that the regional school district shall be created on the succeeding July 1, on which date the existing school district shall be dissolved *and thereupon each such municipality shall be deemed to constitute a constituent school district comprising part of the regional school district within the meaning and for all the purposes of chapter 8 of Title 18 of the Revised Statutes, as amended and supplemented.*

2. If any consolidated school district or school district comprising 2 or more municipalities comprising a school district now governed, or hereafter governed by the provisions of chapter 8 of Title 18 of the Revised Statutes, has or shall have, while governed by the provisions of chapter 7 of said Title, by referendum authorized bonds of said consolidated school district or school district comprising 2 or more municipalities in accordance with

article 7 of chapter 7 of said Title which remained unissued at the time of the creation of a regional school district in said consolidated school district or school district comprising 2 or more municipalities, such referendum shall after such creation be authority for the issuance of bonds of the regional school district in the amount and for the purpose or purposes set forth therein and from and after the date of such creation shall for all the purposes of chapter 8 of Title 18 of the Revised Statutes, be deemed to constitute a proposal duly adopted by the legal voters of the regional school district authorizing the board of education of the regional school district to issue bonds of the regional district for the purpose or purposes and in the amount or amounts set forth in a proposal or proposals adopted at such referendum. The bonds so issued shall be dated and sold and made payable in accordance with the provisions of said chapter 8 and any provisions of resolutions with respect to the dates and maturities of such bonds shall not affect the powers of the regional board of education with respect to such dates and maturities.

3. This act shall take effect immediately.

Approved August 9, 1961.

CHAPTER 145, LAWS OF 1961

AN ACT concerning the State Federation of District Boards of Education, and amending section 18:9-6 of the Revised Statutes.

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

1. Section 18:9-6 of the Revised Statutes is amended to read as follows:

18:9-6. For the purpose of defraying the necessary expenses of the State Federation, the various district boards may pay the necessary expenses incurred by its delegates, and may appropriate annually such sums for dues as may be assessed by the federation at any delegate's meeting, which assessment of dues shall be made only upon $\frac{2}{3}$ vote of the delegates present at such delegate's meeting, after notice of the taking of such vote shall have been given to each district board in writing at least 60 days before such delegate's meeting. The aforesaid dues shall be assessed upon a graduated scale according to the size of the school district, but in no case shall the dues for any 1 district exceed the sum of \$300.00 for any 1 year. Dues shall be payable by the custodian of school moneys of the school district to the treasurer of the State Federation.

2. This act shall take effect immediately.

Approved February 21, 1962.

SCHOOL LAWS, SESSION OF 1961

SUPPLEMENTS

CHAPTER 34, LAWS OF 1961

A SUPPLEMENT to "An act to provide for and regulate the granting of sick leave to certain persons in the public schools of this State, and supplementing Title 18 of the Revised Statutes, and to repeal 'An act to provide for and regulate the granting of sick leave to certain teachers, principals, assistant superintendents and superintendents in the public schools of this State, and supplementing chapter 13 of Title 18 of the Revised Statutes,' approved May 6, 1942 (P. L. 1942, c. 142), as the title of said act was amended by chapter 237 of the laws of 1952," approved July 22, 1954 (P. L. 1954, c. 188).

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

1. Whenever a board of education employs any person who has an unused accumulation of sick leave days from another school district in *the same county of New Jersey*, the employing board may grant, not later than the end of the first year of employment, part or full credit therefor. The amount of any such credit shall be fixed by resolution of the board uniformly applicable to all employees and subject to the provisions of this act.

2. Upon termination of employment of any employee from any school district, the board shall issue, at the request of the employee, a certificate stating such employee's unused accumulation of sick leave days as of the date of such termination. Such certificate shall be filed with the new employer within 1 year of the date of such new employment.

3. The accumulation of sick leave days from another district, when granted in accordance with this act, shall be credited upon receipt of the certificate of the prior employer. The days of sick leave so credited may be used immediately or if not so used shall be accumulative for additional leave thereafter as may be needed. The number of such days when granted shall be irrevocable by the board of education of the school district.

4. This act shall take effect immediately.

Approved May 31, 1961.

CHAPTER 94, LAWS OF 1961

A SUPPLEMENT to "An act making appropriations for the support of the State Government and for several public purposes for the fiscal year ending June 30, 1961, and regulating the disbursement thereof," approved June 14, 1960 (P. L. 1960, c. 46).

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

1. The following sum is hereby appropriated *from* those sums previously appropriated *to the Department of Education for State aid purposes* in the act to which this act is a supplement for the purposes hereinafer specified:

DEPARTMENT OF EDUCATION

P 10. COMMISSIONER'S OFFICE

For a continuing survey of the needs for higher education as directed by subparagraph q. of section 18:2-4 of the Revised Statutes \$25,000 00

2. This act shall take effect immediately.

Approved August 7, 1961.

SCHOOL LAWS, SESSION OF 1961
ACTS AND RELATED LAWS

CHAPTER 3, LAWS OF 1961

AN ACT concerning the Federal Census of 1960 and amending section 52:4-2 of the Revised Statutes.

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

1. Section 52:4-2 of the Revised Statutes is amended to read as follows:

52:4-2. The Federal Census of 1960 shall *become effective May 6, 1961, or on the date of the filing of the bulletin provided for in section 52:4-1 of the Revised Statutes, whichever date is later.*

2. This act shall take effect immediately but shall not apply to chapter 1, P. L. 1961.

Approved February 21, 1961.

CHAPTER 13, LAWS OF 1961

AN ACT concerning civil service.

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

1. No person holding office, position or employment in the classified service of the civil service under this State or under any county, municipality or school district thereof, or any other agency operating under the provisions of subtitle 3 of Title 11 of the Revised Statutes, shall be laid off or separated from such service because of economy or otherwise, and not because of any delinquency or misconduct on his part, nor shall his position or office be abolished until after he shall have first been given notice in writing, personally or by certified mail, of the date upon which he will be laid off or his services so dispensed with, and the reasons therefor. The said notice shall be served at least 45 days before the lay-off or abolition becomes effective, and a copy of the said notice shall also be served upon the Civil Service Commission in the same manner. Upon receiving such notice it shall be the duty of the Chief Examiner and Secretary to forthwith determine the said employee's re-employment or demotional rights of such employee and thereafter promptly notify both the employee and the appointing authority of such determination of re-employment and demotional rights.

2. This act shall take effect immediately.

Approved May 8, 1961.

CHAPTER 35, LAWS OF 1961

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

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

1. A person who has been a member of the Public Employees' Retirement System and who has taken or shall take office, position, or employment in any position covered by the Teachers' Pension and Annuity Fund and is a member of said fund shall be entitled, upon application, to prior service credit for the length of his membership in such system in the Teachers' Pension and Annuity Fund or who shall become a member of the Public Employees' Retirement System, and who has taken or shall take office, position or employment in any position covered by the Teachers' Pension and Annuity Fund, shall be entitled upon application therefor, to membership in the fund, upon transferring his interests from the Public Employees' Retirement System or the State Employees' Retirement System to the fund. If he has withdrawn his interests from the Public Employees' Retirement System or the State Employees' Retirement System, he shall be entitled to membership in the fund upon paying into the latter fund such sum as shall be required by the trustees therefor for that purpose. For the purpose of carrying out the provisions of this section, the board of trustees may make all necessary rules and regulations.

2. This act shall take effect immediately.

Approved May 31, 1961.

CHAPTER 53, LAWS OF 1961

AN ACT concerning crimes and supplementing chapter 98 of Title 2A of the New Jersey Statutes.

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

1. Any person who submits a bid, in response to solicitation of sealed bids, to any board, agency, authority, department, commission, public corporation or other body of this State, of this and 1 or more other States, or of 1 or more political subdivisions of this State, on any requirements for public works, goods or services and who, prior to the date of submission of such bid, directly or indirectly knowingly (a) disclosed the amount said person planned to bid to any other person who was eligible to bid and who thereafter did submit a bid on such requirements, or (b) caused or induced, or attempted to cause or induce any other person not to participate in the bidding, is guilty of a misdemeanor.

2. A person convicted of a violation of this act shall be sentenced to a fine of not more than \$20,000.00 or not more than 20% of the amount such person bid, whichever is greater, or by imprisonment for not more than 5 years, or both. Except as may otherwise be ordered by the Attorney General

as the public need may require, a person so convicted shall be ineligible to submit a bid to any such body for a period of 5 years from the date of conviction, or from the date of release from confinement under sentence for such conviction, whichever is later.

3. This act shall take effect immediately.

Approved June 3, 1961.

CHAPTER 96, LAWS OF 1961

AN ACT concerning municipalities, and amending sections 40:60-39 and 40:60-40.

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

1. Section 40:60-39 of the Revised Statutes is amended to read as follows:

40:60-39. When the governing body of a municipality shall determine that all or any part of a tract of land with or without buildings erected thereon, owned by the municipality, is no longer desirable, necessary or required for other public purposes, it may transfer and convey such land or any portion thereof, with or without improvements thereon, to the board of education in the municipality or a regional board of education of a regional school district *or a consolidated board of education of a consolidated school district* of which the municipality is a constituent part, for a nominal consideration to be used for public purposes connected with the district board of education or the regional board of education *or the consolidated board of education*. A prior dedication or use for park purposes of such land or any part thereof shall not be deemed to preclude a transfer and conveyance thereof under the provisions of this section.

2. Section 40:60-40 of the Revised Statutes is amended to read as follows:

40:60-40. No transfer or conveyance of such land or property as provided in section 40:60-39 of this Title shall be made until the governing body of the municipality shall have adopted a resolution declaring the property to be no longer desirable or necessary or required for other public purposes, and authorizing the conveyance thereof for public purposes by deed executed by the proper officers of the municipality under the municipal seal, nor until the board of education in said municipality or the regional board of education *or the consolidated board of education*, to whom such conveyance is to be made, shall have adopted a resolution requesting or approving the conveyance of such lands or property for such public purposes.

3. This act shall take effect immediately.

Approved August 9, 1961.

CHAPTER 106, LAWS OF 1961

AN ACT to amend the "Law Against Discrimination," approved April 16, 1945 (P. L. 1945, c. 169), and chapter 198 of the laws of 1954 which is supplemental thereof.

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

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

4. All persons shall have the opportunity to obtain employment, *and* to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accommodation, *and other real property* without discrimination because of race, creed, color, national origin or ancestry, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

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

5. As used in this act, unless a different meaning clearly appears from the context:

a. "Person" includes 1 or more individuals, partnerships, associations, labor organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and fiduciaries.

b. "Employment agency" includes any person undertaking to procure employees or opportunities for others to work.

c. "Labor organization" includes any organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment or of other mutual aid or protection in connection with employment.

d. "Unlawful employment practice" and "unlawful discrimination" includes only those unlawful practices and acts specified in section 11 of this act.

e. "Employer" does not include a club exclusively social or a fraternal, charitable, educational or religious association or corporation, if such club, association or corporation is not organized and operated for private profit, nor does it include any employer with fewer than 6 persons in his employ.

f. "Employee" does not include any individual employed by his parents, spouse or child, or in the domestic service of any person.

ff. "Liability for service in the Armed Forces of the United States" means subject to being ordered as an individual or member of an organized unit, into active service in the Armed Forces of the United States by reason of membership in the National Guard, naval militia or a reserve component of the Armed Forces of the United States or subject to being inducted into such armed forces through a system of national selective service.

- g. "Division" means the "Division on Civil Rights" created by this act.
- h. "Commissioner" means the State Commissioner of Education.
- i. "Commission" means the Commission on Civil Rights created by this act.
- j. "A place of public accommodation" shall include any tavern, roadhouse, or hotel, whether for entertainment of transient guests or accommodation of those seeking health, recreation or rest; any retail shop or store; any restaurant, eating house, or place where food is sold for consumption on the premises; any place maintained for the sale of ice cream, ice and fruit preparations or their derivatives, soda water or confections, or where any beverages of any kind are retailed for consumption on the premises; any garage, any public conveyance operated on land or water, or in the air, and stations and terminals thereof; any public bathhouse, public boardwalk, public seashore accommodation; any auditorium, meeting place, or public hall; any theatre, or other place of public amusement, motion-picture house, music hall, roof garden, skating rink, swimming pool, amusement and recreation park, fair, bowling alley, gymnasium, shooting gallery, billiard and pool parlor; any comfort station; any dispensary, clinic or hospital; and any public library, any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey. Nothing herein contained shall be construed to include or to apply to, any institution, bona fide club, or place of accommodation, which is in its nature distinctly private; nor shall anything herein contained apply to any educational facility operated or maintained by a bona fide religious or sectarian institution, and the right of a natural parent or one in loco parentis to direct the education and upbringing of a child under his control is hereby affirmed; nor shall anything herein contained be construed to bar any private secondary or post-secondary school from using in good faith criteria other than race, creed, color, national origin or ancestry, in the admission of students.
- k. "A publicly assisted housing accommodation" shall include all housing built with public funds or public assistance pursuant to chapter 300 of the laws of 1949, chapter 213 of the laws of 1941, chapter 169 of the laws of 1944, chapter 303 of the laws of 1949, chapter 19 of the laws of 1938, chapter 20 of the laws of 1938, chapter 52 of the laws of 1946, and chapter 184 of the laws of 1949, and all housing financed in whole or in part by a loan, whether or not secured by a mortgage, the repayment of which is guaranteed or insured by the Federal Government or any agency thereof.
- l. *The term "real property" includes real estate, lands, tenements and hereditaments, corporeal and incorporeal, provided however that, except as to publicly assisted housing accommodations, the provisions of this act shall not apply (1) to the sale or rental of a dwelling, or of a portion thereof, containing accommodations for not more than 3 families, 1 of which is maintained by the owner at the time of sale or rental as the household of his family, or; (2) to the sale or rental of a dwelling, or a portion thereof, containing accommodations for not more than 2 families, except, however, such dwellings shall be included within the term "real property" when they are part of a group of 10 or more dwelling houses constructed or to be con-*

structed on land that is contiguous (exclusive of public streets) and are offered for sale or rental by a person who owns or has owned or otherwise controls or has controlled the sale or rental of such group of dwelling houses, or; (3) to the rental, by the owner or occupant of a 1-family accommodation in which he or members of his family reside, of a room or rooms in such accommodation to another person or persons. Nothing herein contained shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, in the sale, lease or rental of real property, from limiting admission to or giving preference to persons of the same religion or denomination or from making such selection as is calculated by such organization to promote the religious principles for which it is established or maintained.

m. *“Real estate broker” includes a person, firm or corporation who, for a fee, commission or other valuable consideration, or by reason of a promise or reasonable expectation thereof, lists for sale, sells, exchanges, buys or rents, or offers or attempts to negotiate a sale, exchange, purchase or rental of real estate or an interest therein, or collects or offers or attempts to collect rent for the use of real estate or solicits for prospective purchasers or assists or directs in the procuring of prospects or the negotiation or closing of any transaction which does or is contemplated to result in the sale, exchange, leasing, renting or auctioning of any real estate or negotiates, or offers or attempts or agrees to negotiate a loan secured or to be secured by mortgage or other encumbrance upon or transfer of any real estate for others, or any person who, for pecuniary gain or expectation of pecuniary gain conducts a public or private competitive sale of lands or any interest in lands. In the sale of lots, the term “real estate broker” shall also include any person, partnership, association or corporation employed by or on behalf of the owner or owners of lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise, to sell such real estate, or any parts thereof, in lots or other parcels, and who shall sell or exchange, or offer or attempt or agree to negotiate the sale or exchange, of any such lot or parcel of real estate.*

n. *“Real estate salesman” includes any person who, for compensation, valuable consideration or commission, or other thing of value, or by reason of a promise or reasonable expectation thereof, is employed by and operates under the supervision of a licensed real estate broker to sell or offer to sell, buy or offer to buy or negotiate the purchase, sale or exchange of real estate, or offers or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon or transfer of real estate, or to lease or rent, or offer to lease or rent any real estate for others, or to collect rents for the use of real estate, or to solicit for prospective purchasers or lessees of real estate, or who is employed by a licensed real estate broker to sell or offer to sell lots or other parcels of real estate, at a stated salary, or upon a commission, or upon a salary and commission, or otherwise to sell real estate, or any parts thereof, in lots or other parcels.*

3. Section 6 of the act of which this act is amendatory is amended to read as follows:

6. There is created in the Department of Education a division to be known as “The Division on Civil Rights” with power to prevent and eliminate dis-

crimination in employment against persons because of race, creed, color, national origin or ancestry or because of their liability for service in the Armed Forces of the United States, by employers, labor organizations, employment agencies or other persons and to take other actions against discrimination because of race, creed, color, national origin or ancestry or because of their liability for service in the Armed Forces of the United States, as herein provided; and the division created hereunder is given general jurisdiction and authority for such purposes.

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

11. It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

a. For an employer, because of the race, creed, color, national origin or ancestry, of any individual, or because of the liability for service in the Armed Forces of the United States, of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, however, it shall not be an unlawful employment practice to refuse to accept for employment an applicant who has received a notice of induction or orders to report for active duty in the armed forces.

b. For a labor organization, because of the race, creed, color, national origin or ancestry, of any individual, or because of the liability for service in the Armed Forces of the United States, of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

c. For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment, or to make any inquiry in connection with prospective employment, which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin or ancestry or liability of any applicant for employment for service in the Armed Forces of the United States, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification.

d. For any employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any practices or acts forbidden under this act or because he has filed a complaint, testified or assisted in any proceeding under this act.

e. For any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so.

f. For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly to publish, circulate,

issue, display, post or mail any written or printed communication, notice, or advertisement to the effect that any of the accommodations, advantages, facilities, or privileges of any such place will be refused, withheld from, or denied to any person on account of the race, creed, color, national origin, or ancestry of such person, or that the patronage or custom thereof of any person of any particular race, creed, color, national origin or ancestry is unwelcome, objectionable or not acceptable, desired or solicited, and the production of any such written or printed communication, notice or advertisement, purporting to relate to any such place and to be made by any owner, lessee, proprietor, superintendent, or manager thereof, shall be presumptive evidence in any action that the same was authorized by such person.

g. For the owner, lessee, sublessee, assignee or managing agent of, or other person having the right of ownership or possession of or the right to sell, rent, lease, assign, or sublease any real property or part or portion thereof, or any agent or employee of any of these:

(1) To refuse to sell, rent, lease, assign, or sublease or otherwise to deny to or withhold from any person or group of persons any real property or part or portion thereof because of the race, creed, color, national origin or ancestry of such person or group of persons;

(2) To discriminate against any person or group of persons because of the race, creed, color or national origin of such person or group of persons in the terms, conditions or privileges of the sale, rental or lease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment or sublease of any real property or part or portion thereof, or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property, or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin or ancestry, or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person.

h. For any real estate broker, real estate salesman or employee or agent thereof:

(1) To refuse to sell, rent, assign, lease or sublease, or offer for sale, rental, lease, assignment, or sublease any real property or part or portion thereof to any person or group of persons or to refuse to negotiate for the sale, rental, lease, assignment, or sublease of any real property or part or portion thereof to any person or group of persons because of the race, creed, color, national origin or ancestry of such person or group of persons, or to represent that any real property or part or portion thereof is not available for inspection, sale, rental, lease, assignment, or sublease when in fact it is so available, or otherwise to deny or withhold any real property or any part or

portion or facilities thereof to or from any person or group of persons because of the race, creed, color, national origin or ancestry of such person or group of persons;

(2) To discriminate against any person because of his race, creed, color, national origin or ancestry in the terms, conditions or privileges of the sale, rental, lease, assignment or sublease of any real property or part or portion thereof or in the furnishing of facilities or services in connection therewith; or

(3) To print, publish, circulate, issue, display, post, or mail, or cause to be printed, published, circulated, issued, displayed, posted or mailed, any statement, advertisement, publication or sign, or to use any form of application for the purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof or to make any record or inquiry in connection with the prospective purchase, rental, lease, assignment, or sublease of any real property or part or portion thereof which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin or ancestry or any intent to make any such limitation, specification or discrimination, and the production of any such statement, advertisement, publicity, sign, form of application, record, or inquiry purporting to be made by any such person shall be presumptive evidence in any action that the same was authorized by such person.

i. For any person, bank, banking organization, mortgage company, insurance company or other financial institution or lender to whom application is made for financial assistance for the purchase, acquisition, construction, rehabilitation, repair or maintenance of any real property or part or portion thereof or any agent or employee thereof:

(1) To discriminate against any person or group of persons because of the race, creed, color, national origin or ancestry of such person or group of persons or of the prospective occupants or tenants of such real property or part or portion thereof, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of any such financial assistance or in the extension of services in connection therewith; or

(2) To use any form of application for such financial assistance or to make any record or inquiry in connection with applications for such financial assistance which expresses, directly or indirectly, any limitation, specification or discrimination as to race, creed, color, national origin or ancestry, or any intent to make any such limitation, specification or discrimination.

5. Section 1 of chapter 198 of the laws of 1954 is amended to read as follows:

1. The Division on Civil Rights in the Department of Education shall enforce the laws of this State against discrimination in housing built with public funds or public assistance, pursuant to any law, *and in real property, as defined in the law hereby supplemented*, because of race, religious principles, color, national origin or ancestry. The said laws shall be so enforced in the manner prescribed in the act to which this act is a supplement.

6. This act shall take effect July 1, 1961.

Approved September 13, 1961.

CHAPTER 116, LAWS OF 1961

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

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

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

13. Each member shall file a detailed statement of school service and service in a similar capacity in other States rendered by him prior to becoming a member for which he desires credit and on account of which he desires to contribute, and of such other facts as the board of trustees may require for the proper operation of the system. Members shall have the right to purchase credit for the prior service evidenced therein, up to the nearest number of years and months, but not exceeding 10 years. *No application shall be accepted after the effective date of this act for the purchase of credit for such prior service, however, if, at the time of application, the member has a vested right to retirement benefits in another retirement system based in whole or in part upon that service.*

The board of trustees shall verify as soon as practicable the statement of service submitted. The member may obtain credit for such service by making a lump sum payment or by contributing installment payments in such manner as the board of trustees shall approve. The board of trustees shall issue to the member a service certificate certifying to the aggregate length of such service on account of which he has contributed or agreed to contribute.

Any member electing to contribute toward such service, who retires prior to completing payments as agreed with the retirement system for the purchase of such service will receive pro rata credit for service purchased prior to the date of retirement, subject to provisions of section 68 of this act, but if he so elects at the time of retirement, he may make such additional lump sum payment as will be necessary to provide full credit at that time.

2. This act shall take effect immediately.

Approved November 29, 1961.

CHAPTER 117, LAWS OF 1961

AN ACT to amend "An act extending Federal Social Security coverage upon referendum to certain public employees heretofore ineligible for such coverage by reason of their being in positions covered by retirement systems, and bring the State Enabling Act for Social Security coverage into conformity with amendments to the Federal Social Security Act and the Internal Revenue Code; amending and supplementing 'An act to provide for the coverage of certain persons holding office, position or employment in the service of the State and of any county, municipality or school district and of any public department, board, body, commission, institution, agency, instrumentality or authority of, or in, the State and of, or in, any

county, municipality, or school district in the State under the Old Age and Survivors' Insurance provisions of Title II of the Federal Social Security Act, as amended,' approved June 20, 1951 (P. L. 1951, c. 253)," approved June 1, 1955 (P. L. 1955, c. 38).

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

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

2. For the purposes of this act:

(a) the term "wages" means all remuneration for employment as defined herein, including the cash value of all remuneration paid in any medium other than cash, except that such term shall not include that part of such remuneration which, even if it were for "employment" within the meaning of the Federal Insurance Contributions Act, would not constitute "wages" within the meaning of that act;

(b) the term "employment" means any service performed by any person holding office, position or employment in the service of the State or of any county, municipality or school district or of any public department, board, body, commission, institution, agency, instrumentality or authority of, or in, the State or of, or in, any county, municipality or school district in the State for such employer, except (1) service which in the absence of an agreement entered into under this act would constitute "employment" as defined in the Social Security Act; or (2) service which under the Social Security Act may not be included in an agreement between the State and the Secretary of Health, Education, and Welfare entered into under this act. Service which under the Social Security Act may be included in an agreement only upon certification by the Governor, *or an official of the State designated by him*, in accordance with section 218 (d) (3) of that act shall be included in the term "employment" if and when the Governor, *or an official designated by him*, issues with respect to such service, a certificate to the Secretary of Health, Education, and Welfare pursuant to section 6 (b) of this amendatory and supplementary act.

(c) the term "employee" includes any person holding office, position or employment in the service of the State or of any county, municipality or school district or of any public department, board, body, commission, institution, agency, instrumentality or authority of, or in, the State or of, or in, any county, municipality or school district in the State.

(d) the term "employer" means and includes the State and any county, municipality or school district and any public department, board, body, commission, institution, agency, instrumentality or authority of, or in, the State and of, or in, any county, municipality or school district in the State by whom employees, as defined in this section, are employed in employment, as defined in this section.

(e) the term "State Agency" means the State Treasurer *and the functions of the State Agency under this act shall be performed by the division of pensions*.

(f) the term "Secretary of Health, Education, and Welfare" includes any individual to whom the Secretary of Health, Education, and Welfare has delegated any functions under the Social Security Act with respect to coverage under such act of employees of States and their political subdivisions, and with respect to any action taken prior to April 11, 1953, includes the Federal Security Administrator and any individual to whom such administrator has delegated any such function;

(g) the term "Social Security Act" means the Act of Congress approved August 14, 1935, chapter 531, 49 Stat. 620, officially cited as the "Social Security Act" (including regulations and requirements issued pursuant thereto), as such act has been and may from time to time be amended; and

(h) the term "Federal Insurance Contributions Act" means subchapter A of chapter 9 of the Federal Internal Revenue Code of 1939 and sub-chapters A and B of chapter 21 of the Federal Internal Revenue Code of 1954, as such codes have been and may from time to time be amended; and the term "employee tax" means the tax imposed by section 1400 of such Code of 1939 and section 3101 of such Code of 1954.

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

3. The State agency, with the approval of the Governor *or the official designated by him*, is hereby authorized to enter on behalf of the State into an agreement with the Secretary of Health, Education, and Welfare, consistent with the terms and provisions of this act, for the purpose of extending the benefits of the Federal old-age and survivors insurance system to employees with respect to services specified in such agreement which constitute "employment." Such agreement may contain such provisions relating to coverage, benefits, contributions, effective date, modification and termination of the agreement, administration, and other appropriate provisions as the State agency and Secretary of Health, Education, and Welfare shall agree upon, but, except as may be otherwise required by or under the Social Security Act as to the services to be covered, such agreement shall provide in effect that:

(1) Benefits will be provided for employees whose services are covered by the agreement (and their dependents and survivors) on the same basis as though such services constituted employment within the meaning of Title II of the Social Security Act;

(2) The several employers other than the State shall pay to the State agency and the State agency shall in turn pay to the Secretary of the Treasury the amounts severally due on behalf of the State and of such other employers, at such time or times as may be prescribed under the Social Security Act, contributions with respect to wages (as defined in section 2 of this act), equal to the sum of the taxes which would be imposed by the Federal Insurance Contributions Act if the services covered by the agreement constituted employment within the meaning of that act *and for the purpose of this paragraph, the amounts severally due on behalf of the State and of such other employers may be determined in accordance with section 218 (e) (2) of the Social Security Act*;

(3) Such agreement shall be effective with respect to services in employment covered by the agreement performed after a date specified therein;

(4) All services which constitute employment as defined in section 2 and are performed in the employ of the State by employees of the State, shall be covered by the agreement;

(5) All services which constitute employment as defined in section 2 and performed by the employees of any employer other than the State in this State and are covered by a plan which is in conformity with the terms of the agreement and has been approved by the State agency shall be covered by the agreement;

(6) As modified, the agreement shall include all services described in either paragraph (4) or paragraph (5) of this subsection and performed by individuals to whom section 218 (c) (3) (C) of the Social Security Act is applicable, and shall provide that the services of any such individual shall continue to be covered by the agreement in case he thereafter becomes eligible to be a member of a retirement system; and

(7) As modified, the agreement shall include all services described in either paragraph (4) or paragraph (5) of this subsection and performed by individuals in positions covered by a retirement system with respect to which a certificate *has been issued* to the Secretary of Health, Education, and Welfare pursuant to section 6 (b) of this amendatory and supplementary act.

3. Section 6 of the act of which this act is amendatory is amended to read as follows:

6(a). The Governor is empowered to authorize a referendum on the question whether service in positions covered by a retirement system which is supported in whole or in part by the State and which is established by the State or by a political subdivision thereof should be included under an agreement under this act. With respect to employees of a political subdivision in positions covered by a retirement system which is not supported in whole or in part by the State and which is applicable to more than 1 political subdivision, the Governor is empowered to authorize such a referendum. With respect to employees of any political subdivision in positions covered by a retirement system which is not supported in whole or in part by the State and which is established by a political subdivision thereof, the Governor shall authorize such a referendum upon the request of the governing body of such subdivision; and in all cases the referendum shall be conducted, and the Governor shall designate an agency or individual to supervise its conduct, in accordance with the requirements of section 218 (d) (3) of the Social Security Act on the question of whether service in positions covered by a retirement system established by the State or by a political subdivision thereof should be included under an agreement under this act.

The notice of referendum required by section 218 (d) (3) (C) of the Social Security Act to be given to employees shall contain or shall be accompanied by a statement, in such form and such detail as the agency or individual designated to supervise the referendum shall deem necessary and sufficient, to inform the employees of the rights which will accrue to them and their dependents and survivors, and the liabilities to which they will be subject, if their services are included under an agreement under this act.

(b). Upon receiving evidence satisfactory to him that with respect to any such referendum the conditions specified in section 218 (d) (3) of the Social Security Act have been met, the Governor *or the official designated by him* shall so certify to the Secretary of Health, Education, and Welfare.

4. This act shall take effect immediately.

Approved November 29, 1961.

CHAPTER 138, LAWS OF 1961

AN ACT concerning planning and zoning and supplementing chapter 55 of Title 40 of the Revised Statutes.

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

1. No planning or zoning ordinance heretofore or hereafter enacted by any municipality governing the use of land by, or for, schools shall, by any of its terms or provisions or by any rule or regulation adopted in accordance therewith, discriminate between public and private day schools, not operated for profit, of elementary or high school grade.

2. This act shall take effect immediately.

Approved January 10, 1962.

CHAPTER 140, LAWS OF 1961

AN ACT concerning the youth of the State, creating a youth division in the Department of State consisting of the New Jersey State Youth Commission and a division director; prescribing the powers and duties of the said division, the commission, and the director.

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

1. There is hereby established in the Department of State a youth division, consisting of the New Jersey State Youth Commission, and a division director.

2. The New Jersey State Youth Commission shall consist of 9 citizen members. Each member shall be appointed by the Governor, with the advice and consent of the Senate, for 3 years and until his successor is appointed and qualified, except that of those first appointed 3 shall be appointed for a term of 3 years each, 3 for a term of 2 years each, and 3 for a term of 1 year each. All vacancies caused other than by expiration of term shall be filled for the unexpired term only. Not more than 5 members shall belong to the same political party. A chairman and other officers of the commission shall be elected by the members for a term of 2 years and biennially thereafter.

3. The members of the commission shall serve without compensation but shall be entitled to reimbursement for their necessary expenses incurred in the performance of their duties, as provided by law.

4. The director shall be appointed by the Governor with the advice and consent of the Senate for 5 years. The director shall be deemed to be a full-time State official and shall be paid such compensation as shall be provided by law. The director or his representative shall attend all meetings of the commission, and its committees but shall have no vote. Under general supervision of the commission, the director shall be the chief administrative officer of the division.

5. The director, subject to the approval of the commission, may appoint such professional, technical, and clerical assistants and employees as may be necessary to enable the division to perform the duties imposed upon it by this act and shall fix their compensation within the limits of available appropriations and as shall be provided by law. The said assistants and employees together with the director, shall be deemed to be the staff of the division and of the commission. A suitable office to be known as the Youth Division shall be provided.

6. The commission shall meet at regular intervals and at least 4 times annually. The times and places for the said meetings shall be fixed by the commission and special meetings may be called by the chairman on not less than 10 days' written notice to each member, and any such notice shall specify the object of the meeting. The commission may adopt by-laws for the regulation of its affairs.

7. The commission shall:

(a) Engage in a continuous study of the needs and problems of children and youth in New Jersey and of programs and developments to meet those needs;

(b) Serve as a clearing house for information and materials on children and youth in these fields;

(c) Serve as the central permanent agency for the coordination and evaluation of programs and services for the young people of the State and as a planning agency for the development of such services;

(d) Request State departments and other public and private agencies on a State, county and local level to cooperate in joint efforts to study and resolve problems of overlapping concern;

(e) Report annually to the Governor on its activities and recommendations for improving existing services and for developing new services;

(f) Publish and disseminate information relative to the development and welfare of children and youth and develop other educational programs as it sees fit;

(g) Consult with, advise and otherwise provide professional assistance to other State agencies on request and to organized efforts by communities, organizations, associations, and groups who are working toward any and all forms of assistance to children and youth;

(h) Encourage research studies related to the needs of children and youth and conduct such research projects itself, where practicable;

(i) Engage in studies of special problems at the request of the Governor, the Chief Justice or the Legislature;

(j) Appoint citizen advisory committees and professional advisory committees, which may include heads of State departments or their representatives. These committees shall be directed to study and advise; or to develop a program for stimulating citizen interest and activity on county and local levels; or to take such action as shall be specified by the commission with regard to any problem or need in the field of children and youth;

(k) Do all other things necessary and desirable to carry out the powers and duties granted to it.

8. The Legislature, from time to time, shall provide for the salaries and expenses of the division by inclusion in any general or supplemental appropriation act or by a direct appropriation.

9. Appointments may be made and preliminary action taken in advance of the going into operation of this act.

10. This act shall take effect immediately.

Approved January 12, 1962.

CHAPTER 144, LAWS OF 1961

AN ACT to amend "An act to provide for increases in the retirement allowance of certain retired public employees" approved November 24, 1958 (P. L. 1958, c. 143).

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

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

2. The retirement allowance being received by any retirant shall be increased in accordance with the following formula:

a. The first \$600.00 of the retirement allowance, or the full retirement allowance if such allowance is less than \$600.00, shall be increased in accordance with the "ratio of increase" formula in this act if the retirant shall have had established 25 years of service credit prior to retirement, or shall have been retired for service-connected disability.

b. If the retirant shall have established less than 25 years of service credit prior to retirement and shall not have been retired for service-connected disability, the first \$600.00 of the retirement allowance, or the full retirement allowance if such allowance is less than \$600.00, shall be increased in accordance with the "ratio of increase" formula, except that this increase shall be in the same proportion to the increase provided under the "ratio of increase" formula as the number of years of service credit is to 25.

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

3. The "ratio of increase" which shall apply to the retirement allowance, a part thereof as specified in section 2 of this act, being received by a retirant shall be calculated in accordance with the following percentages as determined by the calendar year in which the retirement became effective.

<i>Year of Retirement</i>	<i>Ratio of Increase</i>	<i>Year of Retirement</i>	<i>Ratio of Increase</i>
1915	185%	1935	107%
1916	179%	1936	111%
1917	166%	1937	109%
1918	142%	1938	106%
1919	116%	1939	104%
1920	88%	1940	103%
1921	72%	1941	101%
1922	64%	1942	96%
1923	61%	1943	87%
1924	61%	1944	79%
1925	66%	1945	70%
1926	66%	1946	61%
1927	65%	1947	51%
1928	65%	1948	41%
1929	65%	1949	33%
1930	66%	1950	26%
1931	71%	1951	19%
1932	79%	1952	15%
1933	89%	1953	12%
1934	99%	1954	10%

3. This act shall take effect July 1, 1962.

Approved January 12, 1962.

SCHOOL LAWS, SESSION OF 1961

RESOLUTIONS

CHAPTER JOINT RESOLUTION 6, LAWS OF 1961

A JOINT RESOLUTION directing a study concerning State aid to school districts and making an appropriation therefor.

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

1. The *Commission on State Tax Policy* is hereby directed to undertake *a re-examination of the means of providing increased State financial assistance for the public schools of the State* and a special study in depth of the adequacy of the existing program of State aid to school districts to meet the expanding needs of the public school system throughout the State. Such study shall include an evaluation of and recommendations concerning:

(a) the capital and operational financial needs of the public schools of the several school districts of the State,

(b) the amount of money estimated to be required annually as State aid to school districts and

(c) the equity and adequacy of the existing formulæ for calculating and distributing State aid to school districts.

2. The *commission* is authorized to employ or to contract for such professional, research, statistical, editorial, clerical and incidental services and to incur such other expenses as it may deem necessary for the proper and timely accomplishment of the purposes of the study hereby directed and as may be within the limits of sums appropriated for this purpose.

3. The *commission* and their representatives shall consult with and shall be entitled to call to their assistance and avail themselves of the services and facilities of such State and local governmental agencies as may be appropriate and which may reasonably be made available to aid in the study hereby directed.

4. The *commission* shall report specially to the Governor and the Legislature, on the results and recommendations resulting from the study hereby directed, in the month of January, 1962.

5. This joint resolution shall take effect immediately.

Approved June 2, 1961.

ASSEMBLY RESOLUTION No. 2

AN ASSEMBLY RESOLUTION to create an investigating committee consisting of 5 members, to be appointed by the Speaker of the General Assembly, with power to investigate any public body receiving funds in whole or in part from the State and to make such other investigations as may be directed by the General Assembly.

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

1. There is hereby created a committee to be known as the "General Assembly Investigating Committee" to be composed of 5 members of the General Assembly to be named by the Speaker thereof, who shall constitute a committee for the purpose of investigating the finances, affairs and operations of any and all departments, boards, officers and commissions of the State Government, and all other bodies and political subdivisions of the State who shall be receiving State moneys or public funds of any kind and to make such other investigations as the General Assembly shall, from time to time, direct. The committee is authorized to examine into the pay and duties of the employees and the conduct of the work and affairs of all such boards, commissions, officers and departments and other bodies and political subdivisions of the State who shall be receiving State moneys, for the purpose of recommending ways and means of reducing costs of administration and promoting efficiency.

2. Such committee shall serve without additional compensation therefor, but is authorized to employ counsel and such accounting, investigating, clerical or other assistants as it may deem necessary.

3. Such committee shall have the power to subpoena and examine witnesses and any accounts, records or other matter pertaining to the operating of any department or departments of the State Government, of any political subdivision of the State, or of any other body receiving State moneys or public funds of any kind, or of any bi-State commission which may be acting jointly with another State.

4. The committee may appoint a secretary who need not be a member of the committee. Said committee shall meet from time to time, hold hearings and examinations in a manner and in places which to them may seem best and proper.

5. Any agency, board or department of the State Government, any officer or employee of any political subdivision of the State or of any other body receiving State funds, and the officers and employees of any bi-State commission which may be acting jointly with another State, shall furnish to such committee such information, records and data as may be required for a comprehensive analysis of the operation and financial affairs of such agency, board or commission, or other public body, including any bi-State commission, as from time to time such committee shall determine.

6. Investigations and examinations may be made privately or publicly, but it shall be unlawful for any person to divulge the results of any investigation or examination to any person or persons other than such committee,

unless a public hearing shall have first been held. Whenever any person shall be examined by such committee or by its duly authorized representative or representatives, under the powers contained in this act, at a public hearing, the officer, department, board, bureau, commission or individual under investigation or scrutiny may through his or its authorized representative or representatives cross-examine any such person on any phase of the matter concerning which he has been examined or questioned, and such officer, department, board, bureau, commission or individual may introduce other evidence to explain, enlarge upon, or clarify the matter, situation or condition under investigation or scrutiny, to the end that the full details of any such matter, situation or condition may be developed and presented at one and the same time.

7. This committee shall remain in effect and force until the opening day of the 1962 Legislature, notwithstanding any sine die adjournment.

Filed May 1, 1961.

SCHOOL LAW DECISIONS

1960 - 1961

I

BEHAVIOR OF TEACHER OVER LONG PERIOD OF TIME MAY CONSTITUTE BASIS FOR CHARGE OF UNFITNESS

RUTH SCHROEDER,

Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD,
OCEAN COUNTY,

Respondent.

For the Petitioner, Mr. Howard Ewart.
For the Respondent, Mr. Mark Addison.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal by a teacher under tenure in the Lakewood public school system from her dismissal by resolution of the Board of Education adopted on January 21, 1959. Hearings were held by the Board in sessions beginning December 1, 1958, and ending January 13, 1959. There were 1040 pages of testimony.

The following charges were brought by the Secretary of the Board of Education by direction of the Board by resolution adopted November 3, 1958, at a special meeting:

- (1) The said Ruth Schroeder has during her employment as a teacher in the Lakewood Senior High School neglected the responsibilities entrusted to her as a teacher and has failed to carry out her duties in a proper and efficient manner;
- (2) The said Ruth Schroeder has reported to teach on various occasions while physically and emotionally unfit to do so and has at such times been incapable and unfit to properly perform the normal duties assigned to her;
- (3) The said Ruth Schroeder has become extremely untidy in her dress and in her personal appearance, setting a bad example and being a poor influence upon her pupils in her class, all of which constitutes conduct unbecoming a teacher.

Appellant was found guilty of the first two charges and acquitted of the third.

In answer to demand for particulars, the following dates were fixed in connection with the above charges: November 9, 1953, November 10, 1953,

February 5, 1954, June 1, 1954, October 19, 1954, January 11, 1956, March 20, 1956, April 6, 1956, November 14, 1956, November 15, 1956, December 6, 1956, and at various other times during the school years between 1951-1952 and the end of December, 1956. It is charged in the Bill of Particulars that appellant appeared to have consumed alcoholic beverages immediately prior to the opening of school, was emotionally disturbed, acted in an unusual manner unlike her normal quiet self, was often physically unsteady, exhibited poor physical coordination, was sometimes incoherent, was unable to maintain classroom discipline properly, and generally failed to meet the normal standards of conduct required of its teachers by the Lakewood Board of Education and the Principal of the Lakewood High School.

Appellant says the above Bill of Particulars fails to give any details as to where the alleged offenses occurred or as to the manner or respect in which she failed to carry out her duties in a proper and efficient manner nor particulars as to the manner or respect in which she was alleged to have neglected her responsibilities as a teacher. Appellant contends that the proceedings conducted by the Board of Education and the Determination of Guilt against her were improper, illegal and unwarranted for the following reasons:

- (a) The members of the Board of Education, or some of them prejudged the question of appellant's innocence or guilt and that some members of the Board publicly stated that the case had been prejudged, that the hearings would be held on the charges for the purpose of collecting information to be forwarded to a higher authority, and that the proceedings were like a court martial. Despite appellant's challenge of the right of this member to sit because of his prejudgment, he persisted in sitting as a member and participated in the finding of guilt, thereby depriving her of the right to a trial and hearing before a fair and impartial tribunal.
- (b) The Board was guilty of laches in having preferred charges against appellant on or about November 3, 1958, which charges covered the period from September of 1951 to December of 1956, in that approximately 23 months elapsed between the date upon which the charges were made and the latest date covered by the charges.
- (c) By its own actions in renewing appellant's teaching contracts yearly during the period covered by the charges, the Board is estopped from preferring such charges against the appellant.
- (d) Appellant was deprived of a fair and impartial hearing in that a great deal of hearsay and other improper evidence was admitted over appellant's objection and, also over objection, evidence was admitted of alleged misconduct of the appellant subsequent to December, 1956, a period of time outside of and beyond the period covered by the original charges and by the Bill of Particulars.
- (e) The Board members, having prejudged appellant's guilt, resolved all doubts against her and the finding of guilt was against the great weight of the credible evidence.

Appellant prays that the action of the Board in dismissing her be set aside and that the Board be directed to reinstate her and pay her salary from

September 1, 1958, less a credit for such amounts as the Board has paid on account thereof.

Respondent in its answer to the petition of appeal denies the insufficiency of the Bill of Particulars. It alleges that the transcript of the proceedings and the record show it to be free of prejudice, hostility, or personal animus on the part of any member of the Board against the appellant, including the challenged member. Respondent further claims that appellant received a fair and impartial trial and that the Board made a reasonable and proper finding after hearing the testimony and examining the exhibits, which finding was in accordance with the weight of the evidence presented. Appellant's rights were not prejudiced because charges were filed against her in November, 1958, says respondent, and the doctrine of laches does not apply to the particular facts of this case. Nor, the Board argues, is the Board estopped from preferring charges because contracts were renewed for each year covered by the charges. Respondent maintains that the decision was not based upon hearsay evidence or testimony, and any evidence or testimony regarding conduct of the appellant subsequent to December 15, 1956, was either testified to by the appellant subsequent to December 15, 1956, was either testified to by the appellant herself or admitted in rebuttal in connection with the testimony of appellant or her witnesses relative to events or appellant's condition on or after December 15, 1956. Respondent further alleges that the finding of guilt against the appellant was in accordance with the great weight of the credible evidence presented at the hearing before the Board.

The Commissioner, in reviewing tenure cases, must search the record to find whether there was a rational and reasonable basis for the dismissal and whether there was substantial, competent, and relevant evidence to support the finding of guilt. *Redcay v. State Board of Education*, 130 N. J. L. at 371, *Reichenstein v. Newark*, 130 N. J. L. 115, *Mackler v. Board of Education of the City of Camden*, 16 N. J. at 371. He must weigh the evidence and make an independent finding of fact in the record presented, and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibility. *Masiello v. State Board of Examiners*, 25 N. J. 590.

According to N. J. S. A. 18:13-17, a teacher under tenure may be dismissed for inefficiency, incapacity, conduct unbecoming a teacher or other just cause after charges have been made, an opportunity to be heard given, and the charges found to be true in fact.

It is the opinion of the Commissioner that the record will not support a finding that the appellant did not give efficient instruction in the subject-matter to the classes assigned to her. The Superintendent of Schools testified that there was no question as to her competency as a teacher when she was physically fit. Both the former and the present high school principals testified that she was above average as a teacher of college preparatory pupils and there was also testimony by the present high school principal that she was an above average teacher in subject-matter. The head of the English department testified that she was a conscientious and excellent teacher. The school librarian and teacher-counselor also testified favorably as to her competence as a teacher. Fellow teachers, satisfied parents, present and former pupils took the stand to express their appreciation of her teaching.

Appellant was charged with being physically and emotionally unfit at various times to perform her duties in a proper manner. In the Bill of Particulars in this regard it was charged that she appeared to have consumed alcoholic beverages immediately prior to the opening of the school, was emotionally disturbed, acted in an unusual manner unlike her normal quiet self, was often physically unsteady, exhibited poor physical coordination and sometimes was incoherent. It is the opinion of the Commissioner that the occurrences on the dates listed should not be regarded as isolated incidents but rather should be considered as intensified manifestations of a condition which was gradually becoming worse. If proved guilty of such a charge, appellant would, in the opinion of the Commissioner, be incapacitated and unfit within the intentment of the teacher tenure act.

A number of persons, including the superintendent of schools, former and present school principals, teachers, the school physician and parents, testified as to appellant's behavior on the dates cited. From their recital it appears that on a number of occasions appellant's behavior was such as to raise serious questions as to her fitness to be in school. The testimony described appellant on one or more of these occasions as being incoherent, irrational, loud, thick and slurred in her speech; poorly coordinated, unsteady and half-staggering in her walk; emotionally upset, crying and sobbing; "glassy-eyed" and flushed of face; noticeably anxious to avoid close proximity to supervisors; in difficulty parking or finding her car. Two mothers testified that at conferences between parents and teachers arranged to discuss the progress of pupils, appellant could not seem to comprehend why the parent was there nor who her child was, and even had difficulty in finding the pupil's name in her records. Some of those who testified believe appellant was intoxicated and claimed to have detected the odor of alcohol on her breath. Appellant denies that she was intoxicated and contends she cannot remember many of these occurrences and that those she does remember were the result of her not feeling well.

A member of the Board of Education from 1952 to February, 1958 testified that on various occasions during the period covered by the charges, complaints had been received and there had been discussions at Board meetings concerning appellant. Although the Board members were cognizant of the problems respecting appellant, they did not prepare charges during this period and voted to renew her contracts. Her salary increment was withheld in 1953 in the hope that this disciplinary action would cause her to pull herself together. Later this increment was restored on the basis of the following report of the principal and vice-principal to the superintendent of schools dated February 4, 1954:

"Following is the report that you requested in regard to restoring Miss Schroeder's salary increment. Last November on one occasion we thought that we had detected a recurrence of the offense under question. However, in the final issue I don't believe that we would have sufficient proof to back up the charge against her. Aside from this, her classroom discipline has improved and as long as she is assigned to better academic work she does a satisfactory teaching job. For this reason we recommend that Miss Schroeder receive the regular increment." (Tr. 365)

Appellant's condition evidently became worse shortly thereafter as indicated by the occurrences of February 5, 1954, and June 1, 1954, previously

described herein. In 1956 there was a marked worsening of her condition as particularly manifested in the occurrences of March 20, April 6, November 14 and December 6, 1956. The superintendent testified that during 1956 he had a number of conferences with appellant concerning her teaching and personal problems. During the summer of 1956 he had her come to his office every two weeks to try to help her. He advised her to take a leave of absence.

The minutes of the Board meeting of August 13, 1956, show that the Board went into executive session to discuss appellant's problem and the minutes of the November 26, 1956, meeting disclose that by action of the Board appellant was "requested to take a leave of absence beginning immediately and terminating September 1, 1958, and to submit to medical and psychiatric examination by doctors designated by the Board to determine her fitness to resume teaching." (Tr. 198) The superintendent testified that appellant was reluctant to ask for a leave, but on December 12, 1956, she did apply for a leave beginning December 15, 1956, and terminating September 1, 1957. The Board denied this request for a shorter leave and requested that she comply with the original motion of the Board. Appellant finally complied with the request of the Board and the superintendent notified her under date of January 29, 1957, that she was granted a leave of absence from December 15, 1956, to September 1, 1958.

Appellant's personal physician testified that he took her to a rest home near Baltimore in June, 1957, not because she was mentally disturbed but she was nervous and needed a rest. During her stay she had no medication and no psychiatric treatment. Since 1951 she had had symptoms of the menopause and became nervous and lost weight. She had had the symptoms until six months or a year prior to his testimony (December 1, 1958). He stated that the background of appellant's case should be considered—the long illness of her mother, the death on the Anzio Beachhead of her brother whose medical education she had financed, followed shortly thereafter by the death of her father. Appellant was not only teaching school but kept house and cared for her mother. All these burdens coupled with the menopause had a wearing-down effect causing poor appetite, weakness, and nervousness, in his opinion. He considered that the physical and emotional manifestations were now all in the past and did not expect any recurrence of the conditions caused by the menopause.

In a letter under date of May 31, 1958, appellant asked the Board of Education to re-employ her. The following is an excerpt from her letter:

"I am asking the Board of Education to give me an opportunity to prove that I will with my more stable outlook upon life never again betray the confidence placed in me or neglect the responsibility entrusted to me."
(Tr. 104)

In her testimony she denied that she had ever betrayed the confidence of the Board or neglected the responsibilities imposed upon her. Her explanation was that she wanted the Board members to see that she was as cooperative as they apparently wanted her to be. Her letter also included this statement:

"The care of my mother as well as the responsibilities of teaching brought a great hardship upon me and when in company of friends, as well-meaning as they may have been, I was induced to relieve my tension

in a way in which my depressed state and weakened condition was unable to tolerate.”

When asked to explain what she was trying to say, she made a similar explanation—she was trying to explain to the Board that she wanted her position back. She denied that she meant to imply that she relieved her tensions by drinking. When pressed to explain, she testified that she meant that she stayed up later than usual.

Appellant admitted that her physician had suggested that she take the leave of absence in December 1956. When questioned as to whether she would have been able to continue teaching at that time, she answered: “I believe I would have been able to. I don’t know. I needed a rest.” (Tr. 385) She testified that she had regained her lost weight and felt able to resume her teaching career and give full service.

On April 19, 1958, appellant’s physician had written to the Board of Education to the effect that she was physically able to resume her work the following September. On May 13, 1958, the Superintendent wrote to appellant that prior to the consideration of her contract for the coming school year, it would be necessary for her to submit to an examination by a medical doctor and a psychiatrist. On May 21, 1958, appellant was examined by William W. Weissberg, M. D., of Elizabeth, New Jersey. The following is an excerpt from his report to the Superintendent of Schools under date of May 24, 1958:

“There is nothing in this examination which might disqualify this person on the basis of organic illness. If psychiatric evaluations are not abnormal, I would not disapprove of Miss Schroeder returning to her teaching position.”

On May 22, 1958, appellant was examined by a noted Trenton psychiatrist. The following is the pertinent part of his report to the school physician:

“I learned from her that she worked as a teacher in Lakewood continuously since 1934 and that there were no complaints about her efficiency or behavior until sometime in 1956 when she began to drink more than usual and became rather careless in her personal appearance. She has good insight and recognizes that the statements made about these changes in appearance and demeanor were factual. She denies any alcohol except an occasional glass of wine with her meals since her removal from duties more than a year ago. During this interval she has remained at home assisting with the housework and care of her semi-invalid mother.

“Psychiatric study of this lady revealed a number of significant psychogenic factors. Her mother was born in Austria and has maintained the continental attitude of complete control and direction of the activities of this daughter. Over the years there has been an increasing resentment and feelings of antagonism towards the mother which she has attempted to bury because of her feelings of loyalty and sense of duty to her parent. Her sense of obligation led to many frustrations and modifications of social life and opportunities for marriage which she controlled successfully until she reached the beginning of the involutational period. She then attempted to escape from these subconscious irritations through the use of alcohol with the resulting changes in her work efficiency and social interrelation-

ships. Efforts of her family physician to control her nervous state with tranquilizing drugs were unsuccessful by the refusal of Miss Schroeder to take medication.

"Miss Schroeder was much impressed and concerned by her forced leave of absence and apparently has given considerable thought and has gained some understanding of her behavior pattern that led to the School Board's action. She is now confident that improvement in her mother's health and a better understanding of the problems of the two with the help of the drug, which she now agrees to take regularly, will enable her to once again function with an efficiency acceptable to the school authorities.

"I feel that Miss Schroeder should be given an opportunity to return to her occupation as a teacher. The probabilities are that there will be no repetition of the difficulties and problems which she presented earlier. However, she should be given more than the usual amount of supervision for the first few months and should there be any evidence of a relapse into the former unstable state her services should be terminated promptly. I consider the prognosis as guardedly favorable."

Under direct examination by her counsel, appellant denied that she had told the psychiatrist that in 1956 she began to drink more than usual. She testified that he gave her all this information as soon as she met him. The personal history which he used was not from her. She denied that from 1951-1956 she had used alcoholic beverages to excess, had never been intoxicated or had come to the school building under the influence of liquor.

On cross-examination, the psychiatrist admitted that he had had a letter before interviewing appellant from the school physician under date of May 2, 1958, containing the following:

"About five years ago Miss Schroeder became emotionally unstable, presumably due to the onset of her menopause; she became derelict in her dress and unfortunately there has been a break in her sense of propriety regarding the intake of alcohol both at home and in public" and that "She has come to school obviously under the influence of alcohol." (Tr. 856-857)

He denied that the history was based on this letter. He testified that the history was taken directly by him from appellant.

Appellant's dentist was called by the respondent as a rebuttal witness. When asked to describe appellant's condition when she appeared in his office in April, 1958, he testified that she was somewhat incoordinated with a thickened speech, acting in a foolish, simple, giggling manner. Her movements were incoordinated and her walk was not steady. He noticed a strong odor of alcohol on her breath which he associated with whiskey. On previous occasions she had been reserved, dignified, and not at all as she was on this particular occasion. Appellant's counsel objected to this testimony because the charges covered only the years from 1951 to 1956. Appellant denied she had drunk any wine or beer or any intoxicating beverages before her dental appointment. She attributed her condition that morning to nervousness and tenseness.

To counteract the testimony of witnesses who had testified that they detected the odor of liquor on appellant's breath, counsel asked questions

directed to show the possibility that the odor might be attributed to liquid medicine which she had been taking. The druggist who made up nerve tonics for appellant on her physician's prescription testified that such tonics have a 10% alcoholic base from which there would be a faint odor of alcohol. He was unable to answer whether this faint odor of alcohol bears a marked resemblance to what are customarily known as alcoholic beverages. (Tr. 725-26)

On this subject, appellant first testified that she never took any medicine which would create an odor of alcoholic beverages about her while she was in school. Later, she testified that she might have kept some medicine at times in the teachers' room. She had no knowledge of what could have created the odor of alcoholic beverages about her that was testified to.

The Board was guarded in its charges about appellant's drinking of alcoholic beverages. It did not accuse her directly of being intoxicated on duty. It did not go beyond the charge in the Bill of Particulars that she "appeared" to have consumed alcohol before coming to school and accused her of actions often associated with intoxication without actually charging intoxication. It seems to the Commissioner in reading the record that the school authorities were hesitant to attempt to establish intoxication in the absence of expert testimony.

In *State v. Pichadou*, 34 N. J. Super. 177, the court reaffirmed the rule that the average person of ordinary intelligence, although lacking special skill, knowledge and experience, but who has had an opportunity for observation, may testify whether a certain person was intoxicated, that in prosecution for driving an automobile while under the influence of intoxicating liquor, the intoxicated condition of the defendant could be established in the absence of expert testimony. In the case "incoherent," "blurring" and "slurred" speech, pungent odor of alcohol and staggering were mentioned as evidence.

In *State v. Brezina*, 45 N. J. Super. 596 at 604, it was said:

"Whether a man is sober or intoxicated is a matter of common observation not requiring any special knowledge or skill and is habitually and properly inquired into of witnesses who have occasion to see him and whose means of judging correctly must be submitted to the trier of facts. *Castner v. Sliker*, 33 N. J. L. 95. However, when this type of evidence is the only evidence submitted, it must be such as would not raise a reasonable doubt in a prosecution for driving an automobile while under the influence of intoxicating liquor."

It should be pointed out that appellant is not being tried for a crime. Her fitness to teach is being determined. Our courts have held that the evidence produced in a tenure proceeding does not have to be such as would support a conviction upon an indictment. *Reilly v. Jersey City*, 64 N. J. L. at page 510. In *Borough of Park Ridge v. Salimone*, 36 N. J. Super. at 498, it was said:

"The *quantum* of proof necessary to convict is different. The proof might not be sufficient to demonstrate guilt of a crime to a jury beyond a reasonable doubt but it might indicate clearly and by the preponderance of the credible evidence of an employee's guilt of conduct unbecoming a police officer or subversive of good order and discipline of the force."

Beggans v. Civil Service Commission, 10 N. J. Misc. 1142, (Sup. Ct. 1932), *Smith v. Carty*, 120 N. J. L. 335, 343, (E. & A. 1938).

It is the opinion of the Commission that an examination of the testimony reveals that there was substantial evidence to prove that appellant's actions were as charged in the Bill of Particulars. On March 20, 1956, before school, her talk was irrational, very loud, and without continuity. On June 1 her gait was unsteady and she was in an emotional state and very upset. There was testimony that she was under the influence of liquor. On April 6, 1956, her eyes were bleary, her face flushed and her speech incoherent. She was upset and again there was conflicting testimony as to whether she had been drinking. Before school on December 6, 1956, the then assistant principal found it necessary to help her park her car and to assist her into the building. Her walk was in uneasy movements and more or less a stagger. He smelled what appeared to him to be alcohol.

At a parent-teacher conference in 1955 a parent testified that appellant's eyes were glassy, her speech thick and slurred. She thought she detected the odor of alcohol. At a conference on November 14, 1956, her condition was similar. The odor of alcohol was very strong and she assumed that appellant was intoxicated. Another parent on the same night found appellant slumped over her desk and experienced difficulty in explaining to her who she was and why she was there. Appellant had difficulty in finding her boy's name. There was other testimony to the effect that her talk was loud and her walk was abnormal on that occasion.

The Commissioner does not consider it necessary to find that appellant was actually intoxicated. To demonstrate unfitness, it is sufficient to find that she came to school with the odor of alcohol on her breath. The Commissioner holds that the evidence did not establish that she was incompetent as a teacher of subject-matter. But a teacher is more than an instructor in subject-matter. She is also an exemplar.

The Supreme Court of Wyoming in *Tracy v. School District No. 22*, 70 Wyo. 1, 243 P. 2d 933 (1954) quoted as follows:

"The peculiar relationship between the teacher and his pupils is such that it is highly improper that the character of the teacher be above reproach. . . . The Court of Appeals of Kentucky has said, both parents and pupils regard the teacher as an exemplar whose conduct might be followed by his pupils and the law by necessary intendment demands that he should not engage in conduct which would invite criticism and suspicion of immorality. *Grover v. Stovall*, 237 Ky. 172, 35 S. W. 2d 24. Even charges or reputation for immorality, even though not supported by full proof, might in some cases be sufficient ground for removal. Not merely good character but good reputation is essential to the greatest usefulness of the teacher in the schools."

In a more recent Pennsylvania case, *Kaplan v. School District of Philadelphia*, 113 A. 2d 164, at 168, the Supreme Court said:

"It is contended by the appellee that he was not a harmful personal influence upon his students because there were no charges of improper teaching or classroom conduct ever made against him. The influence of a teacher upon his pupils is not limited to what he says and does in the

classroom. As a minister's conduct outside of the church is a matter of concern to his parishioners, so is the conduct of the teacher outside the schoolroom a matter of concern to the school authorities. Children frequently attempt to emulate their teachers and their every known act frequently becomes a matter of importance to the student. Although a teacher's conduct outside of the classroom is probably less important in urban districts than in rural districts and in high school than in grammar school, nevertheless the teacher's right to teach cannot depend solely upon his conduct in the classroom. We, of course, do not suggest that a teacher's every act may be scrutinized by a school board to find some slight indiscretion to be used as an excuse to discharge him, but we do say that the board is not limited to consideration of his conduct in the classroom when passing upon his fitness to teach."

Without raising the question of the propriety of a teacher's drinking alcoholic beverages in moderation, the Commissioner believes that parents and taxpayers have a right to expect that teachers will not report for duty with the odor of alcohol on their breath.

The Commissioner is not unaware of the testimony of the druggist that the tonic prescribed for appellant had a 10% alcohol base and that it was difficult to mask the odor of the medicine without leaving a faint odor of alcohol. While this testimony would show the possibility that appellant's medicine might have been responsible for a faint odor, the testimony is not convincing that the medicine actually was responsible for the odor detected by witnesses on a number of occasions. Appellant's own testimony was not convincing in this regard. Even if it were proved that the medicine did cause the odor of alcohol, appellant would be subject to censure for neglecting to take measures to remove the odor before reporting for duty. As pointed out in the Kentucky case, *supra*, a good reputation is essential for a teacher. Appellant's testimony reveals that she knew there were rumors about her. It was her responsibility not only to avoid evil but also the appearance of evil so as not to destroy her usefulness as a teacher. Like Caesar's wife, a teacher ought to be above suspicion. A teacher should not, of course, be allowed to be a victim of idle gossip, but she, herself, should not contribute to rumors by her carelessness.

It is the opinion of the Commissioner that the case for dismissal does not stand or fall on the question whether appellant appeared to have been drinking when she reported to school. The crucial question is whether she was unfit for duty. It is not necessary to determine whether appellant's unfitness on any particular occasion was sufficiently flagrant, in itself, to justify dismissal. Unfitness for a position in the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. *Redcay v. State Board of Education, supra*. The testimony concerning her condition on the various dates listed shows that appellant was not fit for duty. The evidence is convincing that she was not fit for duty when she took the leave of absence. Her personal physician testified that she was highly nervous and had lost weight. He ordered her to take a rest. Appellant, herself, admitted that she had needed a rest and did not know whether she would have been able to continue her teaching.

Next to be considered is the Board's refusal to permit appellant to resume teaching at the termination of her leave of absence. It will be remembered

that the Board of Education in the resolution of November 26, 1956, requesting appellant to take a leave of absence, terminating September, 1958, stipulated that appellant should submit to medical and physical examinations to determine her fitness to resume teaching. The medical examination revealed no organic illness which would disqualify her.

The record of the psychiatric examination discloses that the prognosis was guardedly favorable. The probabilities were that there would be no repetition of the difficulties and problems which she presented earlier. The psychiatrist felt that she should be given an opportunity to resume teaching under more than the usual amount of supervision. Should there be any evidence of a relapse into the former unstable state, her services should be terminated promptly. In his testimony the psychiatrist could give no assurance that there would not be a relapse. He estimated the probabilities of her maintaining her stability were about 60-40. He thought that her personal problems, including her relationship with her mother over a large period of years, were partially, if not wholly, responsible for the escape from her problems with alcohol. He understood that her mother was about to be placed in a nursing home. This would be an important factor in helping her maintain her stability. He did not consider the menopause a factor at this time. He reiterated that if she continued to indulge in alcoholic beverages to excess that his opinion as to the probability of her maintaining stability would be unfavorable.

It should be noted that psychiatrist's rather guarded prognosis as to appellant's continued stability was conditional in three respects: (1) that her drinking of alcoholic beverages had been brought under control, (2) that she was to be relieved of the care of her mother by placing her in a nursing home, and (3) that she be given more than the usual amount of supervision. The diagnosis and prognosis of this distinguished psychiatrist should be considered with great respect. However, his prognosis was guarded and conditional. The school authorities would know best what was the actual situation with respect to these conditions. Especially would they be in a better position to judge the practicability in a school situation of the suggestion that she be given more than the usual amount of supervision.

The testimony of appellant's dentist discloses that in April, 1959, appellant did not have her drinking under control. Appellant testified that her mother was still residing with her. It might be practicable to place under extra supervision a non-teaching employee who worked constantly in the presence and under the immediate oversight of a supervisor. In the opinion of the Commissioner, it would not be feasible to give the needed supervision to a teacher. Indeed, such supervision would be self-defeating because the knowledge that she was being constantly supervised would place an added strain upon such a person. Furthermore, it would not be conducive to the proper teacher-pupil relationship for the pupils to know that the teacher, who was supervising them, required extra supervision herself.

It is the opinion of the Commissioner that the Board of Education was justified in not permitting appellant to resume teaching.

Appellant contends that the testimony of the dentist in rebuttal, as to her condition in his office in April, 1955, was inadmissible because his testimony was beyond the scope of the charges. It is the opinion of the Commissioner that the testimony was inadmissible with regard to occurrences between 1951

and 1956 but was admissible to rebut appellant's testimony concerning her drinking habits subsequent to that period. This evidence also had an important bearing in relation to the psychiatrist's statement that his opinion would be unfavorable if she did not control her drinking of alcoholic beverages. Furthermore, the Board was sitting as a quasi-judicial tribunal. Board members are quasi-judges. *State v. Winne*, 21 N. J. Super. 198, *Pyatt v. Mayor and Council of Dunellen*, 9 N. J. 548 at 555. Presumably, the Board would have the same right as a court to permit the prosecution to reopen its case after it rested. In *State v. Hubschman*, 133 N. J. L. 520, it was held that permitting the state to reopen the case, after it had rested, was purely discretionary with the trial court and afforded no ground for review.

"A proceeding of the character here in question, is not required to be governed by the strict rules of procedure followed in courts of law and equity, but only in such manner that substantial justice is done and the accused rendered a fair trial." *McAlpine v. Garfield Water Commission*, 134 N. J. L. 432. Also see *Reilly v. Jersey City*, *supra*.

Even if the Commissioner errs on the admissibility of this testimony, the case against appellant does not stand or fall on this issue. The other reasons for not permitting appellant to resume her duties are sufficient to justify the Board's action.

Appellant next contends that during the period of 1951 to 1956 the Board must have been aware of the alleged offenses occurring in those years and by renewing her contracts annually the Board evidenced an intent to disregard any such alleged offenses. A similar question was raised in *Redcay v. State Board of Education*, *supra*, and held to be without merit. The Court said:

"His was not an elective office where the citizens by their vote had made the selection. The evidence was overwhelming in scope and justified the action taken, and there is no reason whatever why the local Board, the Commissioner of Education and the State Board of Education should be reversed for technical reasons and no such reasons appear of record."

In this same decision, it was held that unfitness might be shown by a series of incidents or by one flagrant incident. Tenure charges often result not from one flagrant instance but from the cumulative effect of a series of occurrences over a period of years, the climactic incident of which, while no more serious than the others, becomes the proverbial straw that breaks the camel's back. A board should not be limited to incidents happening within one contract period because the cumulative effect might not be sufficient in that length of time to warrant charges. Such a limitation might also work a hardship on teachers in situations where a board, even though it felt inclined to give the teacher an opportunity to improve, might hesitate to do so lest it be foreclosed from proceeding against her in case she did not improve.

Appellant points out that the latest charge in the Bill of Particulars was in December 1956 which was some twenty-three months prior to the preferring of the charges. This, she contends, is too great a delay. The Commissioner does not agree. Appellant was put on notice in the Board's resolution of November 26, 1956, requesting her to take a leave of absence, that she would be required to submit to an examination to determine her fitness to resume teaching. By requesting the leave, she acquired no immunity

against charges being preferred later. The Board could not have granted her immunity even if it had so desired. It is well established that a board of education is a non-continuous body, which cannot bind its successors unless it is so empowered by statute. *Skladzien v. Bayonne*, 12 Misc. 602, affirmed 115, N. J. L. 203, *Gulnac v. Board of Freeholders of Bergen County*, 74 N. J. L. 543.

By the terms of N. J. S. A. 18:5-50.5 the Board may require an individual examination of an employee whenever in its judgment such an employee shows evidence of deviation from normal physical or mental health. The Board in power in 1958 ordered an examination. The results of the examination were such that the Board deemed it necessary to bring charges to dismiss the teacher. The Commissioner cannot think the Board in 1958 was helpless to bring charges because the Board in 1956 failed to do so. In *Redcay v. State Board of Education*, *supra*, at 370, it was said:

"An inefficient and incapable principal may do great injury to both pupils and teachers. When the charges of such conduct have been clearly proved, the removal should be easy and prompt. *Devault v. Mayor of Camden*, 48 N. J. L. 433."

In *Borough of Park Ridge v. Salimone*, 21 N. J. at 44, the State's Chief Justice said that "the welfare of the people as a whole, and not specifically or exclusively the welfare of the civil servant, is the basic policy underlying the law."

From the testimony covering her physical and emotional state at the time appellant accepted the leave of absence, it would appear very doubtful whether she would have been in condition to stand trial. By accepting the leave, she gained time to regain her health sufficiently to resume her position or, if denied reinstatement, to find another position or to be well enough to stand trial. It seems to the Commissioner that the decision of the State Board of Education in *Conrow v. Board of Education of Lumberton Township*, 1938 S. L. D. 462 at 464, is dispositive of this entire question of estoppel. The State Board said:

"There is a suggestion that the Board of Education is estopped to claim that Miss Conrow is incapacitated because she has been in its employ for many years during most, if not all, of which time her hearing was defective. We cannot subscribe to a doctrine that a Board which, because of its sympathy or other reason, tolerates an inefficient teacher, thereby estops itself and the public which it represents from dismissing her. If such were the law, a sympathetic, or an incompetent, or a dishonest board might confer a life tenure on an absolutely incompetent teacher."

The Commissioner takes this view: The Board in 1958 did not consider appellant fit to teach. The decision to move for her dismissal was not taken in haste. The members of the Board and the administrative staff had been most patient in dealing with her. The testimony shows that complaints had been received from 1952 to 1958 and the Board had found it necessary to take time to discuss these charges, meet with the appellant, and had to go into executive session several times concerning her problem. The Superintendent found it necessary to hold numerous conferences with appellant and during the summer of 1956 had her come to his office every two weeks. The time of

the principal was also taken up by her problems. On two occasions it was necessary to call the school physician.

In dealing with such cases, a board has a dual obligation. On the one hand, it has the obligation to be patient and to show consideration and kindness and, on the other, it must be ever mindful of its responsibility to maintain the efficiency of school work. Eventually, the latter obligation becomes paramount. At what time this responsibility becomes paramount is a matter for the board's judgment honestly and fairly exercised. In the instant case, the Commissioner thinks the Board did exercise its judgment honestly and fairly. In his opinion the Board waited long enough to find out whether appellant had recovered to the point where the Board could permit her to resume teaching with assurance she would maintain her stability. The first occurrence discussed herein happened on June 1, 1954. Beginning April 6, 1956, her condition worsened until she was granted the leave. She was still having difficulty in April 1958.

Having determined to bring charges, it was proper for the Board, according to *Redcay v. State Board of Education, supra*, to show, by the manifestations on the days listed in the Bill of Particulars, the nature of an incapacity which could be disruptive of the normal functioning of the school. Such incidents taken together would be sufficient to justify dismissal, especially since the Board had knowledge that the conditions upon which the psychiatric report was predicated were either impracticable in a school situation or had not been carried out. It has already been pointed out that appellant's problems had made great demands upon the time of the school board and staff. There is a limit to the time which they may be expected to give to the problems of a single teacher. The Commissioner would point out that it is not only what happened at various times between 1951-1958, but also the lack of stability which is indicated that constitute the grounds for dismissal.

Even if it is held that appellant did not appear to have been drinking before coming to school or on the occasion of the visit to the dentist's office, one cannot escape the conclusion, after reading the entire record, that, regardless of whether it was the cause or result of her problem, the excess use of alcoholic beverages aggravated the condition which caused her to ask for the leave of absence. While the modern scientific view is that the use of alcohol in excess is to be considered an illness, such an illness seriously impairs the capacity and usefulness of a school teacher. The school authorities were most patient and considerate in dealing with appellant's problem. The time had to come when, with due regard to its responsibilities to the school pupils, the Board of Education could not risk a relapse. It needed assurance there would be no such relapse. In the opinion of the Commissioner the guarded and conditional report of the psychiatrist did not provide sufficient assurance to justify the reinstatement of the appellant.

The stresses and strains of the classroom are severe even for poised, stable and well-balanced teachers. An upset condition which is likely to be temporary may be tolerated, but the classroom is not the place for a person whose upsets are likely to be recurrent. Reference has been made to the teacher as an exemplar. It seems to the Commissioner that parents and taxpayers have a right to expect that the teachers of their children will be reasonably poised and stable. It was the judgment of the Board of Education, with due regard

for its responsibility to the school pupils, that it could not accept the risk of a relapse when presented only with a guarded and qualified prognosis by the psychiatrist. The Commissioner believes he should not set aside the Board's action in dismissing appellant.

Finally, appellant contends that she was entitled to a hearing before a body free from bias, prejudice, or personal interests and members who had not prejudged the issues to be determined. The statement of one member of the Board that "of course, the case has been prejudged," she argues, would disqualify him to sit as an impartial member of the Board and would invalidate the action of the whole Board.

The tenure statutes under the School Law empower boards, and even make it their duty at times, to be investigators, accusers, prosecutors, triers of fact, and jurors in the same case. In nearly every case which comes before the Commissioner under this statute, the Commissioner is asked to reverse dismissals because board members have prejudged the case. It would seem to the Commissioner that it is unrealistic to expect board members to investigate and bring charges without forming any judgment concerning them. It should be pointed out that the courts have refused to disqualify members unless a personal interest is shown or unless evidence of malice, ill-will, passion or prejudice appears in the record. *Mackler v. Board of Education of the City of Camden*, *supra*; *White v. Wohlenberg*, 84 N. W. 1026; *Reimer v. Essex County Board of Chosen Freeholders*, 96 N. J. L. 371; *Crane v. Jersey City*, 90 N. J. L. 109; *Freudenreich v. Borough of Fairview*, 114 N. J. L. 290; *Clawans v. Wangle*, 10 N. J. Super. 605; *Hamilton v. Board of Education of the Town of Irvington*, 1938 S. L. D. at 352. The board members are charged with the proper conduct of the schools. When evidence of inefficiency, incapacity or unfitness is found, there is not only the power but the duty to bring charges. If board members are to be disqualified for bringing charges within the line of their duties, then the efficiency of the schools will be seriously impaired.

It is incumbent upon the Commissioner in reviewing dismissals to prevent injustice under this procedure. He has an equal responsibility to protect fit teachers from arbitrary discharge and to protect the school system from continued service of unfit teachers. It is his duty, when charges of prejudgment, bias, prejudice, malice, ill-will, hostility and personal interest are made, to scrutinize the evidence with great care. He can safeguard justice by adjusting accordingly the weight which he gives to the evidence below. Prejudgment is not grounds for reversal unless it results in a verdict not fairly supported by the record. In the instant case, the Commissioner finds no evidence of malice, ill-will, hostility or personal interest in the outcome on the part of any Board member. After a careful study of the evidence and weighing all the circumstances in this case, the Commissioner finds and determines that the charges preferred against appellant were sufficient to warrant dismissal, that the record supports the charges and dismissal, that appellant was afforded full opportunity to make a defense and was given a fair trial. He concludes that the decision of the Lakewood Township Board of Education should be upheld. The petition is dismissed.

COMMISSIONER OF EDUCATION.

July 22, 1960.

Pending before State Board of Education.

II

ANN KOPERA

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE,
ESSEX COUNTY,

Respondent.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued: October 20, 1959.

Decided: March 14, 1960.

Hyman B. Mintz, Newark, for petitioner-appellant.

Samuel A. Christiano, Newark, for respondent Board of Education of Town of West Orange.

Murry Brochin, Deputy Atty. Gen., for respondent State Board of Education (David D. Furman, Atty. Gen., attorney).

Before Judges PRICE, GAULKIN and FOLEY.

The opinion of the court was delivered by GAULKIN, J. A. D.

Appellant, a tenure teacher of sewing, was denied an increment and a raise by the Board of Education of the Town of West Orange (West Orange) for the school year 1956-57 because the principal and the head of the Home Economics Department of her school had given her an "unsatisfactory" rating. The denial was affirmed by the State Commissioner of Education who, in turn, was affirmed by the State Board of Education. Hence this appeal. We directed, after the first oral argument in this appeal, that the State Board of Education be joined as a respondent.

West Orange admits that its 1956-57 salary schedule provided for a \$200 increment and a \$600 raise for teachers in appellant's category, but says that they were to be given only under the following regulations, which were a part of the salary schedule:

"All increases on all guides will be based on meritorious service. Favorable reports by the superintendent and those charged with supervisory responsibility, and approval by the Board of Education are a prerequisite to the granting of all increases in salary.

"3. Progress on the guides shall be automatic until the maximum is reached unless the services rendered are evaluated as unsatisfactory under the rules and regulations of the Board of Education.

"4. If employees are rated unsatisfactory during the school year, progress on the guide shall be withheld for the following year. When the employee is again rated satisfactory, such employee will be returned to that point on the guide corresponding to the years of service rendered in West Orange."

Appellant began to teach in West Orange in 1949. She had received a satisfactory rating for every year prior to 1956-57, and in the year 1955-56 had reached the \$4,625 level. Because of the unsatisfactory rating she was paid the same sum for 1956-57. It is to be noted that \$4,625 is more than the minimum fixed by R. S. 18:13-2, N. J. S. A., for teachers with appellant's training and experience. It may also be observed that for 1957-58 appellant was given a satisfactory rating, and in that year received the \$600 raise and a \$200 increment.

Appellant does not deny that in 1956-57, and for years before, West Orange demanded a satisfactory rating as a prerequisite for raise or increment. The record shows that for the year in question appellant was rated by the principal with the same techniques and upon the same forms (prescribed by West Orange) as he rated all other teachers, and that all teachers were rated annually. It was established that when a principal rated a teacher satisfactory no further evaluation was made, but when the rating was unsatisfactory the head of that teacher's department made an additional check. That was the reason the head of the Home Economics Department made the evaluation in the case at bar.

Appellant does not contend that the principal or the head of the Home Economics Department had any animosity or personal bias against her—on the contrary, appellant described the principal as friendly, patient and helpful. Nor does appellant appear to challenge, in any substantial measure, the facts upon which the evaluators based their conclusion that her performance was unsatisfactory. Appellant's chief argument is that those facts were not serious enough, even in the aggregate, to warrant the unsatisfactory rating, with its serious consequences.

Appellant first protested her rating to West Orange. She was advised by letter that "after a great deal of deliberation, it was the decision of the Board that your contract salary as voted at the April meeting remain as established and that there be no change for the ensuing school year." There was no formal hearing before West Orange, nor is there anything in the record to indicate that one was requested. If there was an informal hearing, that, too, is not in the record.

Upon the appeal to the Commissioner there was heard, as he said in his opinion, "much testimony and argument as to the propriety of the evaluation of Miss Kopera's work * * * ." However, the Commissioner did not make any findings upon that issue. Appellant contends that it was the Commissioner's duty to make his own independent findings whether the facts existed which West Orange claimed justified the rating, and then to say whether on the facts as he found them he agreed that the appellant's performance for the year in question was, in fact, unsatisfactory. In short, it is appellant's contention that she may be deprived of the increment and the raise only if West Orange proves that she was in fact unsatisfactory and, therefore, when she challenged her rating it was the burden of West Orange to prove its correctness in an adversary hearing of the type described in *In re Masiello*, 25 N. J. 590, 605-607, 138 A. 2d 393 (1958), either before the local board or the Commissioner. Granting that the proceedings before the Commissioner constituted such a hearing, appellant contends that the decision of the Commissioner (affirmed by the State Board without opinion upon the record before the Commissioner)

should nevertheless be reversed for lack of such findings and conclusions, or, at least, the case should be remanded to him to state them.

In answer, respondents point out that "the legal basis for the action appealed from determines the scope of review before the Commissioner," and therefore the Commissioner is not required to make findings of fact of the same type or scope in every appeal. Indeed, say respondents, he need not always find facts or even take testimony. R. S. 18:3-14, N. J. S. A.; *Boult v. Board of Education of Passaic City*, 136 N. J. L. 521, 57 A. 2d 12 (E. & A. 1948); cf. *Borough of Fanwood v. Rocco*, 59 N. J. Super. 306, 157 A. 2d 712 (App. Div. 1960).

Respondents contend that the granting of raises and increments above the statutory minimum is discretionary even under a salary guide; the only difference made by a salary guide being (as the Commissioner said in his opinion) "If a board adopts rules with respect to the application of a salary guide, then it must apply them without bias or prejudice." *Fraser v. State Board of Education*, 133 N. J. L. 15, 42 A. 2d 269 (Sup. Ct. 1945), affirmed 133 N. J. L. 597, 45 A. 2d 590 (E. & A. 1946); *Offhouse v. State Board of Education*, 131 N. J. L. 391, 36 A. 2d 884 (Sup. Ct. 1944), appeal dismissed 323 U. S. 667, 65 S. Ct. 68, 89 L. Ed. 542 (1944); *Greenway v. Board of Education of City of Camden*, 129 N. J. L. 461, 29 A. 2d 890, 145 A. L. R. 404 (E. & A. 1943); *Liva v. Board of Education, Lyndhurst Tp.*, 126 N. J. L. 221, 18 A. 2d 704 (Sup. Ct. 1941).

We hold that it is lawful and reasonable for West Orange to require "favorable reports by superintendents and those charged with supervisory responsibility and approval by the Board of Education [as] a prerequisite to the granting of all increases in salary." See *Fraser v. State Board of Education*, *supra*; *Liva v. Board of Education, Lyndhurst Tp.*, *supra*; *Heinlein v. Anaheim Union High School District*, 96 Cal. App. 2d 19, 214 P. 2d 536 (Cal. App. 1950).

Respondents point to the well established rule that action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. *Boult v. Board of Education of Passaic City*, *supra*; *Fraser v. State Board of Education*, *supra*; *Offhouse v. State Board of Education*, *supra*; *Greenway v. Board of Education of City of Camden*, *supra*. Hence, say respondents, since appellant failed to obtain the required "favorable reports" through no fault of West Orange and not because of any bias or prejudice, and since those who made the evaluation admittedly acted in good faith, there may be no inquiry as to whether the evaluation was too severe. Therefore, say respondents, the only question the Commissioner was called upon to decide was whether West Orange had the right to require a satisfactory rating as a condition precedent to a raise or, an increment. Since that was a question of law (*cf. Masiello, supra*, 25 N. J. at pages 606-607, 138 A. 2d at pages 401-402), respondents contend the Commissioner properly refrained from making findings of fact, and from saying whether he agreed with the rating. It may be that the Commissioner did intend so to limit his review, for he said in his opinion:

"Although there is much testimony and argument as to the propriety of the evaluation of Miss Kopera's work * * * it was at least established that she was given an unsatisfactory final rating for that year.

* * * * *

"A board of education is certainly within its statutory authority if it establishes satisfactory performance as a criterion for advancement in salary. Indeed, a board is given specific authority to deny a statutory increment under the minimum salary laws '* * * for inefficiency or other good cause * * *.' N. J. S. A. 18:13-13.7.

"The petitioner has made no claim of any violation of any statute, any rule of the State Board of Education, or any rule adopted by the Board of Education of the Town of West Orange; neither has she claimed any bias or prejudice on the part of that board in denying her an increase in salary. The Commissioner, therefore, finds that the Board of Education of the Town of West Orange did not exceed its authority in denying the petitioner an increase in salary for the school year of 1956-1957.

"The petition is dismissed."

Respondents say further that if this court determines that the Commissioner's scope of review was not so narrow, his widest power was to determine whether those who made the evaluation had a reasonable basis for their conclusions. As the Attorney General's brief says, "Under this view of the substantive law, the Commissioner could not properly redetermine for himself whether petitioner had in fact been unsatisfactory as a teacher; that issue would be irrelevant as a matter of law. The only question open for review by the Commissioner would be whether the Board had a reasonable basis for its factual conclusion." We hold that the quoted statement accurately defines the review required here. *Fraser v. State Board of Education, supra*; cf. *Borough of Fanwood v. Rocco, supra*.

In re Masiello, supra, is not to the contrary. In that case the Commissioner had taken the view that his function was "to study the proof in order to decide whether the action of the Board of Examiners was arbitrary or capricious or whether it was the result of bias or prejudice". 25 N. J. at page 605, 138 A. 2d at page 401. The reason the Supreme Court said this was too narrow a view was because the issues did not involve discretion. The chief issue was the one of fact, i. e., whether Masiello had served the three years required for an administrator's certificate. It was an issue of the type presented in the "second class of cases" mentioned in *Borough of Fanwood v. Rocco, supra* [59 N. J. Super. 306, 157 A. 2d 717], where we said "If the evidence is not there, no amount of 'discretion' can supply the deficiency." In cases which turn upon a question of law (the "first class" of cases mentioned in *Borough of Fanwood v. Rocco, supra*) discretion also plays no part: hence the court said in *Masiello*, 25 N. J. at page 607, 138 A. 2d at page 402, that the Commissioner must determine whether the action under review is violative of the law and, if it is, "the proper discharge of his duty requires corrective action." In the case at bar the challenged action is discretionary, even though that discretion is not completely uninhibited and, therefore, this case falls into the "third class" described in *Borough of Fanwood v. Rocco*, in which the scope of the Commissioner's review is, as respondents say, not to

substitute his judgment for that of those who made the evaluation but to determine whether they had a reasonable basis for their conclusions.

However, since the proceeding before the Commissioner was the first "hearing" afforded appellant of the type specified in *Masiello, supra*, we think the Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise en scene*; and that the burden of proving unreasonableness is upon the appellant.

Since the Commissioner's opinion does not say what he found to be the underlying facts, nor whether he found the evaluation unreasonable, we must remand the case to the Commissioner for such findings or make them ourselves. Cf. *Laba v. Newark Board of Education*, 23 N. J. 364, 382, 129 A. 2d 273 (1957). Respondents urge that we do the latter, citing R. R. 4:88-13; R. R. 1:5-4, 2:5, and *Cullum v. Board of Education of Tp. of North Bergen*, 15 N. J. 285, 294, 104 A. 2d 641 (1954), especially since "by the admission of petitioner herself the facts are not contested; the parties disagree only as to the inference to be drawn therefrom." Were it only a matter of "finding" the underlying facts we might do it ourselves, but there is also the question whether the rating was unreasonable. This the Commissioner is doubtless better equipped than we are to judge, by reason of his training and experience. Cf. *In re Masiello, supra*, 25 N. J. at page 603, 138 A. 2d at page 399; *Borough of Fanwood v. Rocco, supra*. Therefore, we deem it best to remand the case to him for the necessary findings.

Appellant further argues that the denial of the increment and the increase was in effect a reduction in salary of the appellant, and West Orange was, therefore, required to proceed in accordance with N. J. S. A. 18:13-17. That is not so. The failure to receive an increase of salary does not constitute a reduction. *Offhouse v. State Board of Education, supra*; *Greenway v. Board of Education of City of Camden, supra*; *Liva v. Board of Education of Township of Lyndhurst, supra*.

Appellant further argues that it was not proved that the rules had been formally adopted by West Orange. To begin with, we find that there is enough in the record to prove that they were adopted. Moreover, if the rules fall for lack of proof of adoption, the salary schedule does as well, and without the salary schedule appellant's case becomes weaker still, for then the discretion of the local board in granting increases is not circumscribed even by a schedule. If it be appellant's argument that the adoption of the schedule was proved, but the adoption of the rules not, we would reach the same result, for West Orange would still have the right, even in the absence of a written rule, to refuse a raise or an increment to a poor teacher. N. J. S. A. 16:13-13.7 recognized that right and regulated its use in connection with employment, increments or adjustment increments under L. 1954, c. 249, as amended by L. 1957, c. 153; and see *Heinlein, supra*.

Tenure is a status, a protection, not a contract. *Redcay v. State Board of Education*, 130 N. J. L. 369, 33 A. 2d 120 (Sup. Ct. 1943), affirmed 131 N. J. L. 326, 36 A. 2d 428 (E. & A. 1944). As a status, tenure protects all teachers who have it, the merely adequate as much as the excellent. How-

ever, that does not give all the same rights to increase or promotion. As was said in *Redcay, supra*, at page 370 of 130 N. J. L., at page 121 of 33 A. 2d, "The system cannot function except by the services of capable and efficient principals and teachers," and local boards have the right to reward the capable and the efficient, provided they do it fairly, without bias, prejudice, favoritism or discrimination, and they have the right to adopt any reasonable means toward that end. West Orange followed rules which had been followed for years and which were known to all. Therefore, even if the rules were not adopted with sufficient formality it would make no difference, for it would then be, at least, an appropriate administrative mechanism, well known to all, which West Orange has the right to use to separate the able from the sufferable. *Cf. Heinlein, supra*.

The case will be remanded to the Commissioner for the findings and conclusions above mentioned. If he thinks any facts are in dispute, he will resolve them.

No costs.

SALARY INCREMENT MAY BE WITHHELD ON
UNSATISFACTORY RATING

ANN KOPERA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST ORANGE,
ESSEX COUNTY,

Respondent.

For the Petitioner, Mr. Hyman B. Mintz.

For the Respondent, Mr. Samuel A. Christiano.

DECISION OF THE COMMISSIONER OF EDUCATION
ON REMAND

Petitioner, a teacher of science under tenure, was denied an increment and an increase in salary by the Board of Education of the Town of West Orange for the school year 1956-57 because the principal and the head of the Home Economics Department of the school had rated her work "unsatisfactory." Her petition to the Commissioner of Education was denied.

In his decision the Commissioner said:

"The petitioner has made no claim of any violation of any statute, any rule of the State Board of Education, or any rule adopted by the Board of Education of the Town of West Orange; neither has she claimed any bias or prejudice on the part of that board in denying her an increase in salary. The Commissioner, therefore, finds that the Board of Education of the Town of West Orange did not exceed its authority in denying the petitioner an increase in salary for the school year 1956-1957."

The State Board of Education affirmed without written opinion the decision of the Commissioner.

Petitioner appealed to the Superior Court of New Jersey, Appellate Division. In its opinion, the Court said:

“The Commissioner should have determined (1) whether the underlying facts were as those who made the evaluation claimed, and (2) whether it was unreasonable for them to conclude as they did upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice and closely familiar with the *mise en scene*; and that the burden of proving unreasonableness is upon appellant. Since the Commissioner’s opinion does not say what he found to be the underlying facts, nor whether he found the evaluation unreasonable, we must remand the case to the Commissioner for such findings or make them ourselves.”

The Court deemed it best to remand the case to the Commissioner for the findings and conclusions above mentioned.

The West Orange school system pays higher salaries than are required by law. The salaries for 1956-57 were fixed according to a salary guide in effect for that year. The following are the pertinent excerpts from the guide:

- (a) All increases on all guides will be based on meritorious service.
- (b) Favorable reports by the superintendent and those charged with supervisory responsibility, and approval by the Board of Education are a prerequisite to the granting of all increases in salary.
- (c) Progress on the guides shall be automatic until the maximum is reached unless the services rendered are evaluated as unsatisfactory under the rules and regulations of the Board of Education.
- (d) If the employees are rated unsatisfactory during the school year, progress on the guide shall be withheld for the following year.

Since increases are based on meritorious service, those who administer the guide are responsible for seeing that the efficient and capable are rewarded and that those who do not perform such services are not rewarded. Equal care must be taken to insure that no increase is withheld because of unfairness, bias, prejudice, favoritism or discrimination.

To accomplish these purposes, provisions were made for the evaluation of teachers. An evaluation scale was prepared with seven principal items:

- (1) Personal Characteristics.
- (2) Social Characteristics.
- (3) Professional Characteristics.
- (4) Class Management.
- (5) Teaching Procedure.
- (6) Results in Pupils.
- (7) Co-Curricular Activities.

To further clarify the meaning, each major item was subdivided into minor items.

Each teacher is evaluated as "satisfactory" or "unsatisfactory" for each of the seven items by the building principal prior to the issuing of teacher contracts for the ensuing year. If any item is rated "unsatisfactory", an explanation must be made. The final evaluation of satisfactory or unsatisfactory does not depend upon the number of "S's" or "U's" appearing in the seven major items. A "U" for one item might result in a final unsatisfactory rating. Whenever there is a question as to a final satisfactory rating, all supervisors who have contact with the teacher are asked to make a supplementary evaluation which is submitted to the superintendent of schools with that of the principal. A teacher is shown her evaluation sheet and signs it before it is submitted to the superintendent. Any teacher may appeal an unsatisfactory rating to the superintendent, who will then hold a conference with the teacher and all those who participated in making the determination.

It is the opinion of the Commissioner that the evaluation scale, together with the procedures devised to administer it, is adequate to determine whether a teacher is entitled to an increment or an increase based on meritorious service and, if fairly and competently administered, is also adequate to protect a teacher from the withholding of an increment because of bias, prejudice, favoritism or discrimination. It is further his opinion that it would not be unreasonable to conclude that a teacher who received an unsatisfactory rating on the basis of such an evaluation, properly and fairly made, was not entitled to an increment.

The Commissioner will now consider the evaluation of appellant for the year 1955-56 under litigation. It would appear from the record that appellant's work had not been altogether satisfactory prior to this time. The principal's testimony discloses that, although her final evaluation had been marked "satisfactory", she had received "unsatisfactory" ratings in the items Class Management, Teaching Procedure, and Results in Pupils, over a period of five years. She had experienced difficulty with discipline in general science classes and found it necessary to send pupils to the principal's office because she could not control her classes. In 1955-56 all her classes were in domestic science, which was supposed to be her forte. The principal testified that when he found the same things going on while appellant was working with girls only, he felt it was time to make a judgment somewhat stronger than the previous year. After there had been no improvement in the areas in which he had rated her down for three or four years, he came to the conclusion that something had to be done. (Tr. 38 and 144)

Appellant's Evaluation Sheet (Ex. P. 1) shows that the principal marked her "unsatisfactory" in the areas of Class Management, Teaching Procedure, and Results in Pupils. Under the item Class Management, there is the following notation:

"Sewing machines are allowed to break down and not repaired—six at one time."

Under Teaching Procedure it is noted:

"Girls are not able to keep up their work and lose interest. Mothers complain that they have to do too much at home."

There is the further notation under Results in Pupils that:

"Girls are refusing to elect sewing."

The principal testified that he observed confusion in appellant's classroom and a good deal of talking. Too many times when he went into the classroom girls "were not doing anything and were not working on their projects." Sometimes they would be studying, reading or doing something other than the assigned work. There was evidence of a lack of organization and planning on the part of the teacher. (Tr. 37 and 38)

The principal further testified that he used the same basis for forming a judgment as to appellant as with other teachers. It should be noted that appellant did not appear to challenge, in any substantial manner, the facts upon which the principal based his evaluations. She admitted that his notations on the Evaluation Sheet were true, but contends they were insufficient to justify an unsatisfactory evaluation.

The testimony reveals that the principal estimated that his classroom observations were based upon approximately five visits (Tr. 42) although appellant estimates he visited her classes from seven to nine times. (Tr. 81) The principal considered his visits sufficient to make a fair sampling of her teaching and believed that what he observed in these visits was typical of her work. (Tr. 47) He contended that an experienced supervisor can tell by such visits and observations "whether a class is moving along or whether there is just plain confusion." (Tr. 43) Appellant's counsel admitted the principal's professional qualifications and appellant made no charge that the principal was motivated by personal bias or animosity. Indeed, she was complimentary as to his patience and friendliness.

The record discloses that the superintendent of schools asked the Home Economics supervisor to make an independent evaluation of appellant. The Evaluation Sheet she completed and filed (Ex. P. 2) shows the following:

- I. PERSONAL CHARACTERISTICSSatisfactory
Notation: Voice too low—needs to be more forceful in working with students and other personnel. Seldom takes the initiative in any situation but is cooperative when plans are presented. Personal appearance good at all times.
- II. SOCIAL CHARACTERISTICSSatisfactory
Notation: Very cooperative. Interested in school program but needs to develop a broader viewpoint of home economics.
- III. PROFESSIONAL CHARACTERISTICSSatisfactory
Notation: Needs to develop a broader viewpoint of home economics. Would recommend membership in Home Economics Association and attendance at professional meetings as a means of developing this broader concept.

- IV. CLASS MANAGEMENTUnsatisfactory
Notation: Lacks an awareness of what is happening in entire class—concentrates on small groups.
a. Girls leave room in groups to go to office.
b. Talking in small groups.
c. Other work being done.
Needs to develop techniques for more efficient handling of routine matters. Noise in classroom interferes with work of students. Needs to be consistent in standards of work and behavior set for class and homeroom.
- V. TEACHING PROCEDURESUnsatisfactory
Notation: No clear outline of work so that students fall behind in garment construction—must stay after school to finish or else fail. Needs to concentrate in beginning to see that girls complete steps on time. Needs to plan work with girls and to include them in evaluation of work done. Needs to organize lesson materials so as not to waste time—use printed instruction sheets, work plans, girls work in partners, etc.
- VI. RESULTS IN PUPILSUnsatisfactory
Notation: Does not have pupil attention when giving instructions, demonstrations, etc. Not all girls are completing garments, hence pupils are losing interest in course. Many of the garments made in clothing classes show excellent workmanship.
- VII. CO-CURRICULAR ACTIVITIESSatisfactory
Notation: Will accept responsibility when asked to participate in any department activity.

The final evaluation was “Unsatisfactory.”

Appellant requested a conference with the superintendent of schools on her evaluation and, as a result, the superintendent, principal and home economics supervisor met with her. The superintendent did not recommend an increase and none was granted by the Board of Education on the basis of this evaluation. At appellant’s request, the Board reviewed the case and confirmed its previous action. There was no charge made nor proof offered that any evaluation or recommendation or any action taken in connection with withholding of the increase was tainted with bad faith; nor were the underlying facts substantially challenged. It is the opinion of the Commissioner that the procedures established to evaluate teachers to determine whether they are entitled to increases for meritorious service were properly and fairly administered in appellant’s case.

Finally, there is the question whether those who made the evaluation had a reasonable basis for their conclusion. It is conceded that those who made the evaluation were qualified and without bias and prejudice. It is the opinion of the Commissioner that from the evidence adduced, it was reasonable for them to conclude as they did and for the Board of Education to withhold the increase on the basis of the evaluation.

It must be borne in mind that the West Orange Board of Education pays salaries in excess of the minimum required by law. Its Salary Guide amounts

to an offer to the teacher to pay higher salaries in consideration of meritorious service based on an evaluation of "Satisfactory." To withhold an increment on such a salary schedule, it is not necessary to show shortcomings on the part of a teacher sufficient to justify dismissal under the Teachers' Tenure Act. It seems to the Commissioner, from the evidence adduced, that appellant's shortcomings in Classroom Management, Teaching Procedures, and Pupil Results were such as to make it reasonable for those who made the evaluation to conclude that her teaching did not meet the standard of excellence required for an increment under the requirements of the salary guide.

The Commissioner finds (1) that the evaluation scale adopted by the West Orange Board of Education, including the procedures devised to administer it, was adequate to determine whether a teacher is entitled to an increment based on meritorious service; (2) that these procedures were properly and fairly administered in evaluating appellant's work; (3) that there was no charge or proof of bad faith on the part of those who had any part in the withholding of appellant's increase; (4) that the underlying facts were not substantially challenged; and (5) that there was a reasonable basis for those who made the evaluation to justify their conclusions and for the Board of Education to withhold the increase on the basis of the evaluation.

COMMISSIONER OF EDUCATION.

August 2, 1960.

III

SENDING-RECEIVING RELATIONSHIP MAY BE TERMINATED FOR GOOD REASON

IN THE MATTER OF THE SENDING-RECEIVING RELATIONSHIP OF THE SCHOOL
DISTRICTS OF THE BOROUGH OF SOUTH RIVER AND THE TOWNSHIP
OF MADISON, MIDDLESEX COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The Commissioner in this case is asked to decide the schedule for the termination of the sending-receiving relationship between the school districts of the Borough of South River and the Township of Madison, Middlesex County. South River is one of four districts to which Madison Township sends its high school pupils. Growth of enrollments in the area has made necessary additional secondary school facilities and both districts expect to occupy new high school buildings now under construction in September, 1961. The severance of the sending-receiving relationship has been anticipated for some years and plans have been made to accomplish it, but construction delays have forced several postponements and agreement cannot now be reached on a proposed modification of the plan for withdrawal.

The record shows that in September, 1955, the South River Board of Education adopted a resolution notifying the Madison Township Board of its intention to discontinue receiving secondary school pupils and calling for conferences to put this decision into effect. Following such a conference in January, 1956, the South River Board set the close of the 1956-57 school year

as the date after which no new entering class would be received. It became impossible for Madison Township to arrange facilities for its pupils in that space of time and, therefore, a new agreement was reached at a conference in January, 1957, and subsequently adopted by both boards. This revised schedule for termination provided that after the year 1958-59 no new entering classes would be sent, but pupils already attending South River would continue there. Although the record does not show it, this agreement was evidently extended for one additional year which would have resulted in withdrawal of the ninth grade in September, 1960.

It appears that construction of the new Madison Township High School has been delayed and hope of occupancy at the start of the 1960-61 year has had to be abandoned. Accordingly, in January, 1960, the Madison Township Superintendent of Schools wrote to the South River Superintendent requesting the acceptance of 117 ninth grade pupils in September, 1960. The South River Board's reply, following a conference, was in the form of a resolution agreeing to postpone the withdrawal schedule one more year, so that one less class would be in attendance at South River High School each year beginning in September, 1961, and further limiting the number of new ninth grade pupils in September, 1960, to not more than 75. The Madison Township Board then notified all four of its receiving districts that it intended to withdraw all of its ninth grade and tenth grade pupils upon the completion and occupancy of its new high school in September, 1961. South River found this unacceptable and on May 17, 1960, adopted a resolution reading in part as follows:

"1. In the event the Board of Education of the Township of Madison persists in its action to withdraw Freshmen students entering this School District for the school year 1960-61 at the end of said school year, then this Board in such event hereby withdraws its consent allowing said Freshmen to enter this School District and, further, hereby declares the resolution heretofore adopted extending the sending-receiving district relationship aforesaid to be rescinded, null and void."

Agreement could not be reached and the Commissioner was, therefore, petitioned to decide the dispute between the two positions which are as follows:

Madison Township, because of the delay in completion of its building, asks that South River accept 117 ninth grade pupils in September, 1960, with the further understanding that they will be withdrawn at the end of the year and no new classes will enter. South River is willing to accept 75 ninth grade pupils from Madison Township in September, 1960, on the condition that they remain for the duration of their high school program. If they are to be withdrawn at the end of one year, they are not agreeable to accepting any ninth grade pupils. As a basis for its position, South River points out that it has been patient and has tried to cooperate with its sending districts, that it instituted conferences aimed at developing orderly, fair and reasonable procedures for withdrawal in good time, and that it has been willing to modify and revise these agreements when the schedule could not be met. In its opinion, further delay is not justified and if Madison Township needs relief for an additional year, it should seek to send its ninth grade elsewhere. In any case, the Board argues that it should not be required to accept more than 75 ninth grade pupils because it does not wish to exceed the enrollment of

1,244 pupils with which the 1959-60 school year closed. It contends further that, once accepted, these pupils should not be withdrawn at the end of one year as this would cause an unreasonable financial burden upon the South River taxpayers by requiring them to absorb a loss of tuition from two classes instead of one. It is its belief that corresponding savings in instructional and operational costs cannot be made sufficient to offset the loss of revenue from this number of tuition pupils.

Madison Township defends its position by calling attention to the unexpected delays in construction which made it impossible to put into operation the agreed upon schedule of termination. It states that attempts have been made to find space for its ninth grade pupils in other schools for this next year, but except for Jamesburg's agreement to take 25, it has found no place for the rest of the class. With regard to withdrawal of this group at the end of the year as well as the class that will be ready to enter ninth grade in September, 1961, it states that it will not be able to operate its new high school effectively without at least ninth and tenth grade classes, and, furthermore, it cannot justify the paying of transportation and tuition to another district for pupils whom it could house in its own school.

A hearing on these issues was held by the Assistant Commissioner in Charge of Controversies and Disputes in the Middlesex County Court House on July 6, 1960, in order to establish the facts of the contentions.

The testimony shows that both districts are currently constructing new high school facilities and occupancy in September, 1961, is a realistic expectation in each case. South River High School, while not on "double sessions" is overcrowded and for the last three years has resorted to "overlapping sessions" in which the first group reports at 7:55 A. M. in an effort to accommodate the increased enrollment. The same schedule will be in effect for the coming year.

The South River Superintendent of Schools presented data to show the effect of the two withdrawal plans on South River High School as follows:

Total enrollment, June 1, 1960	1,244
Tuition pupils only	629
Estimated total enrollment September, 1960	1,288
(including 120 Madison Twp. ninth grade pupils)	
Estimated tuition pupils September, 1960	635
(including 120 Madison Twp. ninth grade pupils)	
Estimated total enrollment, September, 1961	1,154
(including 120 Madison Twp. tenth grade pupils)	
Estimated tuition pupils, September, 1961	451
(including 120 Madison Twp. tenth grade pupils)	
Estimated tuition loss over previous year	184
(184 pupils x \$445 = \$81,880.00)	
Estimated total enrollment, September, 1961	1,034
(without 120 Madison Twp. tenth grade pupils)	
Estimated tuition pupils, September, 1961	348
(without 120 Madison Twp. tenth grade pupils)	
Estimated tuition loss over previous year	287
(287 pupils x \$445 = \$127,715.00)	

These estimates show a difference of \$45,000 in tuition receipts by the South River Board of Education between the two plans.

It is clear that both parties in this case have made sincere efforts to dissolve the relationship between the two districts in an orderly and equitable manner. The South River Board of Education, in particular, anticipated the need to do so and took appropriate and timely measures to effect a withdrawal in such a way that a minimum of disruption and difficulty would result. The Board's foresight and initiative, its patience and understanding with delays, and its willingness to revise and postpone agreed upon plans is commendable. Likewise, the Madison Township Board of Education, faced with a complex and difficult problem, has made diligent efforts toward a solution and has tried to be cooperative. It is unfortunate that a series of delays, unforeseen and no fault of either district, has forced postponement of the agreed upon plans a number of times, eventually producing the present lack of harmony.

Sending-receiving relationships for high school pupils are controlled by R. S. 18:14-7, the pertinent excerpts of which follow:

"Any school district heretofore or hereafter created, which has not heretofore designated a high school or schools outside such district for the children thereof to attend, and which district lacks or shall lack high school facilities within the district for the children thereof to attend, may designate any high school or schools of this State as the school or schools which the children of the district are to attend. Whenever 2 or more schools are designated, the board of education of such school district shall make an allocation and apportionment of pupils to the designated high schools.

"If no such allocation or apportionment of pupils has been made by resolution of the board of education of such district prior to the academic year 1943-1944, the actual allocation and apportionment of pupils to the designated high schools in effect in the academic year 1943-44 shall be deemed to be the allocation and apportionment of pupils for the purpose of this section * * * .

"No designation of a high school or schools heretofore or hereafter made by any district either under this section or under any prior law shall be changed or withdrawn, nor shall a district having such a designated high school refuse to continue to receive high school pupils from such sending district unless good and sufficient reason exists for such change and unless an application therefor is made to and approved by the commissioner. Whenever 2 or more high schools have been designated, the commissioner shall make equitable determinations on applications for change of designation and allocation and apportionment by allocating and apportioning pupils of the sending district to the designated high schools * * * ."

It appears that no allocation or apportionment of pupils was ever made by Madison Township, so that the actual allocation which existed in the 1943-44 school year must be referred to. The records for that year reveal that Madison Township high school pupils were enrolled in the same four districts as follows:

<i>Receiving High School</i>	<i>Madison Township Pupils</i>	
Matawan	125	68.3%
Sayreville	4	2.2%
South Amboy	4	2.2%
South River	50	27.3%

An examination of the records of the intervening years shows the allocations established above have not controlled the actual number of pupils sent from Madison Township to each of these high schools. The figures for the last two years are:

<i>Receiving High School</i>	<i>Madison Township Pupils</i>			
	<i>1958-1959</i>		<i>1959-1960</i>	
Matawan	141	23.3%	205	28.7%
Sayreville	175	29.1%	164	23 %
South Amboy	69	11.3%	111	15.5%
South River	218	36.2%	235	32.8%

It is apparent that, traditionally, Madison Township has apportioned its high school pupils to receiving districts on a geographical rather than a percentage basis. Thus, all pupils living in the Old Bridge area of the school district have attended South River High School. That they seek continuation of this arrangement for one more year is not disputed as the 120 ninth grade pupils under discussion are residents of this area. Under the Madison Township proposal, the estimated allocation for the ensuing school year will be:

<i>Receiving High School</i>	<i>Madison Township Pupils</i>	
Matawan	273	31%
Sayreville	208	23%
South Amboy	101	12%
South River	286	34%

These figures show that the proposed apportionment is in line with the practice which has prevailed in the relationship.

It is the practice of the Commissioner in deciding questions of this kind, to consider not only the financial aspects of the problem but to give great weight to the effect upon the educational program and the general welfare of the pupils concerned. Although he believes that financial losses or disadvantages are of primary importance, the welfare of the pupils involved must be the paramount concern.

In this case, it is the Commissioner's opinion that the educational benefits which will accrue to the Madison Township ninth grade pupils through attendance at South River High School for the 1960-61 school year with subsequent enrollment in the new Madison Township High School in September, 1961, are sufficient to offset any financial losses or other disadvantages which may result. It appears that there will be no disruption of the South River High School program because of their attendance and the Superintendent of Schools testified that the "overlapping" schedule will be in effect next year in either case. The enrollment in September will not exceed to any significant degree that of the previous September even with 120 pupils instead of the

75 South River has agreed to accept. Although these do not represent optimum conditions and understandably the South River Board wishes to improve them, their existence for one more year can be justified particularly in view of the lack of any adequate alternative. Under the circumstances, the Commissioner does not believe that allocating pupils in small groups to additional receiving districts for one year represents a justifiable alternative.

With regard to the withdrawal of both ninth and tenth grades from South River High School in September, 1961, the Commissioner must take the position that in the absence of any agreement between two districts to the contrary, such as is provided by R. S. 18:14-7.3, there is no statutory authority by which a local board of education, which provides high school facilities within its district, can be directed to continue sending its pupils to schools in another district. Thus, Madison Township may withdraw those grades for which high school facilities are provided and made available in its own district. It appears, too, that the South River Board was able to anticipate this problem in preparing its budget for the 1960-61 school year. Accordingly, it provided for the necessary expenditures for the Madison Township pupils and also anticipated tuition revenues from 75 who would enter the ninth grade. The tuition from the additional 45 pupils should, therefore, develop an unanticipated surplus which can be applied to a subsequent year to lessen the impact of the diminution of tuition receipts. In preparing its budget for 1961-62 South River should be able to plan reduced expenditures and apply this year's unanticipated surplus tuition revenue to reduce any financial impact caused by the withdrawal of two classes in one year.

The Commissioner would also point out that were it possible to have put into effect the original plan, even as postponed, part of the Madison Township enrollment would have been withdrawn by this time and South River would not have been receiving the tuition revenues which have already helped to ease the financial impact of its new facilities. The plan to continue for one more year is advantageous to Madison Township pupils educationally while not presenting any new educational disadvantage to the South River pupils, and will provide some unanticipated funds for South River which may be used to alleviate the withdrawal occurring one year hence. Once the Madison Township High School is ready for occupancy, a much more effective program will be possible for two grades instead of one, in the Commissioner's judgment. There will be time also for the South River Board to develop plans prior to the submission of the budget for the 1961-62 school year to provide for reductions and savings to compensate for reduced tuition revenue.

After considering all the facts, the Commissioner finds and determines that the proposal advanced by the Madison Township Board of Education to send its ninth grade pupils, who would normally attend there, to the South River High School for the 1960-61 school year and to withdraw this class at the close of the 1960-61 school year for subsequent attendance at the Madison Township High School, provides for the accrual of educational benefits to the pupils sufficient to offset any financial or other disadvantages which may result. The Board of Education of the Borough of South River is directed to continue receiving high school pupils from Madison Township on the same basis as has been in existence until the close of the 1960-61 school year.

COMMISSIONER OF EDUCATION.

August 9, 1960.

IV

POSITION OF VICE-PRINCIPAL MAY BE
ABOLISHED BY BOARD FOR PROPER REASONS

FRANCIS N. SILVESTRIS,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BAYONNE, HUDSON COUNTY,
AND HOWARD E. MERITY, SUPERINTENDENT OF SCHOOLS,

Respondent.

For the Petitioner, Pro Se.

For the Respondent, Mr. H. Hugh Cohen.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was a teacher in the Bayonne public school system from October 1943 to June 1955. By resolution of the Board of Education on June 9, 1955, he was appointed high school vice-principal and assigned to the Accredited Evening High School effective immediately at the same salary he was receiving. On March 14, 1957, his position was abolished and his services terminated by the following resolution:

“By Trustee Whalen:

“WHEREAS, in the opinion of this Board it is necessary for reasons of economy and efficiency and to effect a reorganization of the administration of the secondary schools that the number of high school vice-principals be reduced from three to two, now therefore be it

“RESOLVED, that one high school vice-principalship be and the same is hereby abolished and that the services of Francis Silvestris as high school vice-principal, having the least seniority therein, be terminated and that the said Francis Silvestris be returned to his former position as teacher, subject to assignment by the Superintendent of Schools, effective June 30, 1957.

“Discussion on the resolution was had, participated in by Trustee Brzostowski and President Zito.

“Trustee Brzostowski moved that the resolution be laid on the table. The motion was lost by the following vote:

“AYES: Trustees Brzostowski, Levis and Massarelli. NAYS: Trustees Abramson, Mitchell, Skutnick, Whalen, Vice-President Gartley and President Zito.

“TRUSTEE ABRAMSON: Due to the fact that it's for economy and if the resolution is legal, I vote yes.

“TRUSTEE MASSARELLI: I vote no because I had no knowledge of Mr. Silvestris being involved in this matter.”

Petitioner, in his brief, makes the following seven points in support of his contention that the abolition of his position and the termination of his services are illegal:

1. Appellant did not receive any increase in salary upon appointment to the position of high school vice-principal.
2. Appellant received an extra increment of \$50 per year for two years under the provisions of the salary schedule; this was not as a matter of right but as a matter of board policy.
3. The Board of Education always had the legal right and power to eliminate the extra \$50 increment without abolishing the position.
4. Appellant offered, at the pre-trial conference and during the hearing, to waive this extra increment, having the legal right to do so. See *Board of Education of Trenton v. State Board of Education*, 125 N. J. L. 611, 17 A. 2d 817, holding that "a teacher in a public school system having tenure may not suffer a reduction in salary except by waiver, or as the legislature may provide."
5. The extra \$50 increment amounts to an economy of about 4½ cents per hour.
6. Economy was not a consideration of the Board of Education when it expended substantial amounts of money for advertising students' lunches just prior to the closing of schools. (Ex. P. 11), giving luncheons (Ex. P. 12), or purchasing and engraving medallions (Ex. P. 13), during a period of time referred to as a "crisis."
7. The Board of Education had indicated that it may consider creating new positions which are administrative in nature, and which to some extent will duplicate duties of other personnel.

To prevail on points 1, 2, 3, 4, and 7, petitioner must show that the vice-principalship is protected by tenure. The Commissioner held in the case of *Eyler, et al. v. Board of Education of the City of Paterson*, decided December 14, 1959, that he was controlled by *Lascari v. Board of Education of the Borough of Lodi*, 36 N. J. Super. 426, wherein the Court held that the position of vice-principal is not protected by tenure, that boards of education are authorized to transfer teachers, and that the transfer of a teacher is in no sense a demotion. The Court said:

"Appellant would have us treat this case as though both coordinator and vice-principal were tenure categories. He is not entitled to this concession. R. S. 18:13-16 gives tenure to only four categories—teacher, principal, assistant superintendent and superintendent—and no rights of tenure attach to a gradation within any one of those categories. *Lange v. Board of Education of the Borough of Audubon*, 26 N. J. Super. 83 (App. Div. 1953). There being no tenure status as vice-principal, appellant's tenure is merely that of teacher and he has not been deprived of such status, nor has his salary been reduced. In *Greenway v. Board of Education of Camden*, 129 N. J. L. 461, 465 (E. & A. 1943) our former Court of Errors and Appeals said:

"The district boards are expressly invested with the authority to transfer principals and teachers. R. S. 18:6-20. The exercise of the

power rests in sound discretion, conditioned by the provisions of section 18:13-17. *Cheesman v. Board of Education of Gloucester City*, 1 N. J. Misc. R. 318; *Downs v. Board of Education of Hoboken*, 12 N. J. Misc. 345, affirmed 113 N. J. L. 401. The transfer was in no sense a demotion; * * *

“A transfer is not demotion or dismissal. *Cheesman v. Board of Education of Gloucester City*, 1 N. J. Misc. R. 318. (Sup. Ct. 1923.)”

The Commissioner concludes that the Board was not precluded by law from transferring petitioner to teaching duties.

The next question to be decided is whether the action of the Board was taken under such circumstances as to render it invalid. Petitioner argues that the resolution abolishing his position was not properly considered. The resolution was not prepared until late afternoon of the meeting day by the Board's counsel and one member of the Board. The proposed action was not discussed or considered by all the members of the Board prior to the meeting. A request to table it for further consideration was refused. Some members testified it was their understanding, at a conference held among the members on the Tuesday prior to the regular meeting, that only elementary vice-principalships could be abolished.

Petitioner contends that the Superintendent was neither consulted about the proposed action nor asked to participate in the preparation of the resolution. At the meeting, the Superintendent, although present, was not consulted or even asked for an opinion concerning the proposed action. He argues that the professional advice of the Superintendent was particularly important since three members of the Board had served only one and one-half months.

The testimony does not support the contention of the petitioner that the Superintendent did not participate in the preparation of the resolution. The Superintendent testified (Tr. 102, Sept. 24, 1957) that he did participate in the preparation of the resolution with regard to some parts of the phraseology. He had no conversation with the other two gentlemen present because the general plan of retrenchment had been discussed many times. The Commissioner would point out that by the terms of N. J. S. A. 18:6-37 the Superintendent of Schools has a seat in the Board and the right to speak on all educational matters. No evidence was offered that the Superintendent was denied the right to speak on this matter.

The abolition of petitioner's position must be considered against the background of conditions existing at the time the action was taken. The municipality and board of education were confronted with a demand from a prominent taxpaying concern that a 10% cut be made in operating budgets. The Board decided it must comply with this request. A number of economies were effected including the abolition of a number of vice-principalships. The principal of the day high school was assigned to the principalship of the Accredited Evening High School which had 76 pupils in grades 9-12. It was thought that it would be possible to dispense with the services of the petitioner as vice-principal. There was no item for this position in the budget for the ensuing year. It would appear, therefore, that the action of the Board with regard to petitioner was taken, as the Superintendent testified, according to a general plan of retrenchment which had been discussed previously.

Apparently, it was customary for the Board to have an agenda for its meetings and to confer on the Tuesday preceding the regular meeting date. The Superintendent, Secretary, and Board's counsel were usually available to the Board members for an hour before the Board meeting to answer questions on matters which might come before the Board. Petitioner urges that there was insufficient consideration because the resolution affecting him was not on the agenda and not discussed prior to the Board meeting. A similar question was raised in *Landrigan v. Board of Education of the City of Bayonne*, 1955-56 S. L. D. 91 at 94. The Commissioner said:

"The petitioner further claims that his transfer was not made in good faith, nor was it a result of due deliberation and consideration for the needs of the school system. The facts and the testimony clearly indicate that the action taken by the respondent board of education on April 8, 1954, was not listed upon the announced agenda for the meeting. Although the board of education did not discuss this transfer with the Superintendent of Schools prior to its meeting on April 8, 1954, the Superintendent was present at the public meeting when the resolution was presented to the Board of Education for consideration. There is no evidence to indicate that the Superintendent objected to this transfer and the minutes of the board of education and testimony show that the resolution was adopted by a majority of all members of the board of education as required by R. S. 18:6-20, * * *"

Petitioner relies upon the decision of the Supreme Court in the case of *Cullum v. Board of Education of North Bergen*, 1953-1954 S. L. D. 76, 15 N. J. 285. It is the opinion of the Commissioner that the circumstances in the instant case differ from those of the Cullum case. In the Cullum case a special meeting was called to consider the appointment of a superintendent. Previously the board members had agreed to observe a thirty-day mourning period because of the death of the previous superintendent and interested school principals were told not to file applications until its expiration. Notwithstanding this fact, a caucus was held at 7:00 P. M. prior to the meeting. No notice was given of this caucus and the minority members did not attend. No candidate, other than Mr. Cullum, was given any consideration by the majority at the caucus preceding the signing of the resolution at 7:55 P. M. The resolution appointing Mr. Cullum was presented as a *fait accompli*. The Court pointed out that, although the meeting had been called to consider the appointment of a superintendent there was no deliberation whatever and the public had no timely opportunity to be heard on the matter. The Court also pointed out that in view of the previous advice to principals not to file applications during the mourning period, elemental good faith and fairness demanded that they be given an opportunity to file applications before a superintendent was appointed.

In the instant case, the action abolishing petitioner's position was taken at a regular meeting. While a resolution was prepared in advance for introduction, there is no evidence that a majority of the members had agreed upon it in caucus and that it had been presented as a *fait accompli*. There was testimony that all members were advised of the regular meeting and that citizens were given an opportunity to be heard if they wished to avail themselves of it.

In *Werlock v. Woodbridge*, 1939-49 S. L. D. 107 at 111, the Commissioner said:

"A board of education has a legal right to use its discretion in determining which of several methods shall be adopted to attain a desired educational result; provided, such action is not in violation of a statutory provision. *Williams v. Board of Education of Madison*, 1938 S. L. D. 552. A tenure statute was never intended to interfere with carrying into effect those changes in the administration of public affairs which result from the discontinuance of old methods and the adoption of new ones in their places. *Beirne v. Jersey City*, 60 N. J. L. 110. The decision to change the supervisory pattern of elementary education in the Woodbridge school system is an administrative action. In the absence of bad faith and dishonesty, it is not a court function to review the exercise of judgment of an administrative body. *Boult v. Board of Education of Paterson*, 135 N. J. L. 329.

"Petitioner in his reply brief argues that by training, education, or experience, the members of the board of education were neither qualified nor equipped to pass judgment upon the question as to whether the continuance of the position of Supervisor of Elementary Education would be beneficial or detrimental to the interests of the school system. It is so well established as to require no citations of authority that the board of education is charged with the management and conduct of the public schools and the appointment, transfer, and dismissal of school personnel. An erroneous conclusion by a board of education in a matter before it for administrative determination is not an abuse of discretion. *Boult v. Passaic*, 136 N. J. L. 521. The Commissioner's review of a local board's action is judicial in nature. In exercising the reviewing power, the Commissioner must be guided by the principles governing the scope of judicial review of municipal action. He cannot in administrative matters substitute his judgment for the judgment of the members of the board of education elected by the people to manage the schools of the district. *Thompson v. Board of Education of the Borough of Elmer*, 57 N. J. L. 628; *Boult v. Passaic*, 136 N. J. L. 521; *Peters Garage, Inc. v. City of Burlington*, 121 N. J. L. 523, at 527. The Commissioner finds that there is no proof of bad faith and abuse of discretion so shocking as to require the Commissioner to intervene according to the rule laid down in the case of *Murphy v. Bayonne*, 130 N. J. L. 336."

The Commissioner, in the instant case, finds no proof of bad faith or abuse of discretion which would require him to set aside the action of the Board in abolishing petitioner's position.

Petitioner, in his brief, says that it is questionable that one member of the Board of Education was eligible to serve both as a member and officer in charge of the parliamentary procedure at the time the resolution abolishing the position of appellant as high school vice-principal was presented and acted upon. There is no record of any proceedings having been instituted to oust member Thomas W. Zito, who at the time of the hearing was President of the Board of Education. The Commissioner is without authority to remove a board member, but he is not precluded from passing upon his right to office for immediate purposes. (See *Donaghy v. Baker*, 1938 S. L. D. 36,

quoting *DuFour et al. v. State Superintendent of Public Instruction*, 72 N. J. L. 371.)

It appears from the record that Mr. Zito had been a teacher in the Bayonne public school system and had a suit against the Board of Education pending before the Commissioner of Education. The Superintendent of Schools testified that no formal resignation by Mr. Zito was on file. It is the opinion of the Commissioner that resignation is not the only way of relinquishing a position. It may also be relinquished by abandonment. In *Griff v. Board of Education of the City of Elizabeth*, 1938 S. L. D. at 597, the following is quoted from *Attorney General v. Mayberry*, 104 N. W. Rep. 324:

“The intention to abandon an office may be inferred from the conduct of the party. If his acts and statements are such as clearly indicate absolute relinquishment, a vacancy will thereby be created and no judicial determination is necessary.”

The record discloses (Tr. 197-202 Nov. 18, 1957) that on the occasion of his induction into office as a member of the Board on February 1, 1957, Mr. Zito referred to the fact that some questions had been raised concerning his eligibility to serve on the Board. He declared that he had waived all his rights and that he no longer had any interest, directly or indirectly, in any contract or claim against the Board. He executed a release from any claim he may have had against the Board.

Mr. Zito notified the Teachers' Pension and Annuity Fund as follows:

“As I am no longer a teacher in the public school system of the City of Bayonne and as I do not contemplate teaching again in the present school system, I am enclosing an application for withdrawal of all contributions in the Pension Fund.”

On February 3, 1956, Mr. Zito received a letter from Mr. John Allen, Secretary of the Teachers' Pension and Annuity Fund, enclosing a check that represented the return of moneys on the basis of his application for withdrawal and separation from employment covered by the Teachers' Pension and Annuity Fund.

On January 27, 1956, William Rubin, Attorney for Mr. Zito, advised Deputy Commissioner Clayton that Mr. Zito had authorized him to discontinue the suit pending before him against the Board of Education of the City of Bayonne. On February 9, 1956, Mr. Zito wrote to Commissioner Raubinger as follows:

“... my attorney, has requested that I inform you that an appropriate release has been given to the Board of Education of the City of Bayonne, prior to taking my appointment as Trustee of the Bayonne Board of Education.”

It seems clear to the Commissioner, from the foregoing, that Mr. Zito's acts and statements clearly indicate that he had relinquished any position or claims he may have had in connection with the Board of Education of the City of Bayonne. Furthermore, his vote was not essential for the adoption of the resolution abolishing petitioner's position.

Finally, there is the question of petitioner's placement on a preferred eligible list which by the terms of N. J. S. A. 18:13-19 is to be prepared by the Board of Education for reemployment as vice-principal in order of seniority. The Superintendent testified that actually no such list was prepared, but it would seem self-evident that petitioner would appear as the only one on it. (Tr. 92, Sept. 24, 1957.) The Secretary of the Board also testified that no action was taken by the Board to place petitioner's name on a list for reemployment. (Tr. 46, Oct. 28, 1957.) Member Zito testified that there was no question as to where petitioner would stand on a preferred eligible list. If another high school vice-principal were to be employed, there would be no question in his mind but that petitioner would be employed. (Tr. 212, Nov. 18, 1957.)

Counsel, in his brief, seeks the guidance of the Commissioner as to the placement of petitioner on a preferred eligibility list. In *Eyler et al. v. Board of Education of the City of Paterson, supra*, the Commissioner discussed the seniority standards with respect to vice-principals and pointed out that the only vice-principalship to which a vice-principal would be entitled by seniority is the particular one which he once held. The opinion of the Commissioner was based upon the following quotation included in the standards prepared by the Commissioner, pursuant to N. J. S. A. 18:13-19:

"Each vice-principalship, assistant principalship, or assistant to the principalship in categories 14-21 inclusive shall be a separate category."

By the terms of Rule 29, categories for evening schools correspond to those of day schools. It is the opinion of the Commissioner that petitioner is entitled to placement on the preferred eligibility list for reemployment in the position which he held at the time it was abolished.

The Commissioner finds that the Board of Education of the City of Bayonne did not violate the tenure law in abolishing the position of vice-principal and transferring petitioner to a teaching position, that the question of abolishing his position was sufficiently considered by the Board, and that the participation of member Zito was not cause for setting aside the action of the Board.

The Commissioner holds that petitioner is entitled to placement on the preferred eligible list for reemployment in the vice-principalship he once held. Otherwise, the petition is dismissed.

COMMISSIONER OF EDUCATION.

June 16, 1960.

V

TEACHER'S CERTIFICATE MAY BE REVOKED FOR
UNPROFESSIONAL CONDUCT

IN THE MATTER OF THE REVOCATION OF THE TEACHER'S CERTIFICATE
OF JEROME FINKELSTEIN.

DECISION OF THE COMMISSIONER OF EDUCATION

This complaint, brought by the Superintendent of the Westwood Consolidated Schools, alleges that Jerome Finkelstein, a teacher in that district, failed to honor the terms of his contract of employment and requests that the certificate to teach in the New Jersey public schools, issued to Mr. Finkelstein, be revoked for a period of one year. The Superintendent's complaint was filed with the Superintendent of Schools for Bergen County, who endorsed the request and recommended the certificate's revocation to the Commissioner of Education. Upon the request of the Commissioner, the State Board of Examiners reviewed the matter at a meeting on June 7, 1960, at which time Mr. Finkelstein was heard and interrogated. This hearing resulted in a finding of unprofessional conduct and a recommendation to the Commissioner that the certificate be revoked for one year. Accordingly, Mr. Finkelstein was notified to appear before the Commissioner on July 29, 1960, to show cause why the revocation should not be put into effect.

The pertinent statute in this case is R. S. 18:13-12, as follows:

"A teacher employed by a board of education, who shall, without the consent of the board, leave the school before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct. The commissioner may, upon receiving notice of that fact, suspend the certificate of the teacher for a period not exceeding one year."

At the hearing before the Assistant Commissioner in Charge of Controversies and Disputes, Mr. Finkelstein appeared *pro se* and argued that in his opinion his actions in this matter do not support a charge of "unprofessional conduct." He did not dispute the facts that he was employed to teach in Westwood from February 1, 1960 to June 30, 1960, under a contract which provided for sixty days' notice of termination by either party; that on April 29, 1960, he submitted a resignation to become effective on May 9, 1960, some ten days later; that the school authorities refused to consent to his leaving on short notice; that the superintendent warned him that failure to observe the terms of his employment would result in a recommendation for revocation of his license to teach; and that he did leave his employment at the close of school on Friday, May 6, and did not return thereafter. His reasons for leaving were (1) that his physical health was not good; (2) that his mental health was deteriorating as a result of problems with which he was contending; (3) that he had been notified that a re-scheduling of his teaching assignments the next year left no available position for him; and (4) as a result, he needed to take another position to insure the economic survival of his family. He considered taking sick leave, but rejected this as not representing any real solution to his problems.

In opposing the charge of unprofessional conduct, Mr. Finkelstein argues that, in his opinion, he fulfilled his professional obligations "as far as the Westwood School was concerned and as far as teaching in the class was concerned." He expressed the belief that in his brief stay, he did his professional best for the school and the pupils and stated that he made sure before leaving that there would be a competent substitute available so that his going would not adversely affect his pupils. He justifies his action by saying:

"They were primarily concerned . . . with having someone in the classroom. . . . I saw that they would have somebody in the classroom and so I decided that, since their point would be covered, that I might as well leave."

The Commissioner finds no merit in Mr. Finkelstein's argument. The fact that those charged with the responsibility of administering the schools did not share his opinion with regard to the necessity for his short-notice leaving, cannot be advanced as a reason for doing so. Nor can he claim the privilege of substituting his judgment for that of the Board as to the effect of a change of teachers on the pupils late in the school year. No matter to what extent Mr. Finkelstein was able to rationalize his course of action, it is indisputable that he did not fulfill the terms of his contract of employment.

The Commissioner raises no question of the quality of Mr. Finkelstein's professional service or conduct which may have been exemplary during the time he taught in the Westwood schools. He must, however, characterize his failure to honor his contract of employment as "unprofessional conduct." Indeed, the language of the statute itself defines such action in those words, saying:

"A teacher . . . who shall, without the consent of the board, leave the schools before the expiration of his employment, shall be deemed guilty of unprofessional conduct."

The Commissioner finds and determines that Jerome Finkelstein was guilty of unprofessional conduct in leaving his duties as a teacher in the Westwood Consolidated School District before the expiration of his term of employment and without the consent of the Westwood Board of Education. The certificate to teach in the public schools of New Jersey held by Jerome Finkelstein is hereby revoked for one year beginning July 29, 1960.

COMMISSIONER OF EDUCATION.

October 5, 1960.

VI

ROBERT LOWENSTEIN,

Appellant,

v.

NEWARK BOARD OF EDUCATION

Respondent.

DECISION OF THE SUPREME COURT OF NEW JERSEY

Argued, April 4, 1960. Decided, July 18, 1960.

Mr. Morton Stavis and Mr. John O. Bigelow argued the cause for appellant.

Mr. Jacob Fox argued the case for respondent.

Mr. David D. Furman, Attorney General, filed a statement in lieu of brief on behalf of the Commissioner of Education of the State of New Jersey. Mr. Murry Brochin, Deputy Attorney General, of counsel.

The opinion of the Court was delivered by HALL, J.

The appellant was one of the three Newark school teachers whose dismissals by the city Board of Education in 1955 were set aside by the State Commissioner of Education and that action affirmed by this court in *Laba v. Newark Board of Education*, 23 N. J. 364 (1957). The dismissals had been grounded on the teachers' refusal, in reliance on the Fifth Amendment of the United States Constitution, to answer questions, particularly as to their past and present Communist membership and association, posed by a subcommittee of the Un-American Activities Committee of the federal House of Representatives in the course of a hearing in Newark on May 19, 1955 investigating the current leadership of the Communist Party in the New Jersey area and infiltration in the fields of labor and education. The Board concluded that invocation of the privilege against self-incrimination in such an inquiry in itself constituted conduct unbecoming a teacher and justified dismissal under R. S. 18:13-17.

The reversal was based on *Slochower v. Board of Education*, 350 U. S. 551, 100 L. Ed. 692, 76 S. Ct. 637 (1956), rehearing denied 351 U. S. 944, 100 L. Ed. 1470, 76 S. Ct. 843 (1957), handed down after the Board action, which held that violation of due process of law occurs where a discharge from public employment is based solely upon exercise of the privilege before a congressional investigating committee whose inquiry was not directed at the witness' fitness or conduct in his employment. Mr. Justice Clark pointedly said: "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury." 350 U. S. at 557-558, 100 L. Ed. at 700.

The *Laba* decision, did not, however, direct reinstatement of the teachers, but continued their suspension without pay and ordered a remand of the matter to the local school authorities. The purpose of the remand was to enable a full and fair inquiry as to their continued competence and fitness to teach, which it was pointed out was called for by their conduct before the subcommittee. The purpose, scope and governing principles of that inquiry and any subsequent proceedings were set forth generally in the following portion of the opinion:

“In the light of our controlling legislation it is clear that in this State any person who is now a member of the Communist Party or who is now subject to its ideologies and disciplines is unfit to teach in our public schools and should be dismissed under R. S. 18:13-17. See R. S. 18:13-9.1; R. S. 18:13-9.2. . . . The matter may no longer be viewed simply as one of academic freedom of thought and expression, for it has actually become one of self-preservation; we are convinced that Communism is an alien concept which is dedicated to the overthrow of our form of government, by force if necessary, and seeks to deprive us of the very basic constitutional liberties which we all hold so dear; recent world happenings furnish further evidence of the futility of its solemn promises and the barbarism of its deliberate actions. We have no doubt that in examining into their continued fitness to teach the Newark school authorities may interrogate the appellant school teachers with respect to their present and past association with the Communist Party and affiliated organizations and are entitled to frank and full disclosures. Orderly procedure dictates that the preliminary inquiry on the subject be made fairly and conscientiously by the local school superintendent (R. S. 18:4-7, R. S. 18:4-10; R. S. 18:6-38); his interrogation may also include questions about the teachers’ conduct before the House subcommittee, although this inquiry should not be used as a means of undoing the acknowledged constitutional protection of the Fifth Amendment but should be fairly limited and directed towards ascertaining whether the refusals to answer were patently contumacious or frivolous rather than in good faith . . . If after the inquiry it appears that the teachers are now members of the Communist Party or are now subject to its ideologies and disciplines . . . or that they have willfully refused to answer pertinent questions fairly submitted by their administrative superiors . . . or that they have contumaciously or frivolously refused to answer before the House subcommittee . . . then there would seem to be ample basis for board action within the broad and valid statutory standard embodied in R. S. 18:13-17.” (23 N. J. at 388-389.)

In the course of the Superintendent’s inquiry which followed in May, 1957, appellant denied any Communist membership or activity presently and for a period of something less than two years prior to his 1955 appearance before the subcommittee. While he answered some questions relating to matters back of that time, for the most part he refused to respond to such queries, not on the ground that he might incriminate himself, but rather on a claim of remoteness and irrelevance to his present fitness to teach and of an improper invasion of his right of privacy and personal dignity. It should be noted that, after appellant told the Superintendent he had claimed the privilege before the subcommittee on the advice of counsel, that subject was quite properly not

pursued further. The matter of contumacious or frivolous refusal to answer as a basis for disciplinary action was thereby permanently removed from the case and nothing remained with respect to the original charges.

After the interview, the Superintendent preferred "supplementary" charges (actually new ones) asserting that appellant's unjustified refusals to answer questions claimed to be pertinent, particularly those relating to past Communist association, amounted to insubordination and conduct unbecoming a teacher, impeded an inquiry to determine whether he was on May 19, 1955 or since a member or subject to the ideologies and disciplines of the Communist Party and rendered him since that date unfit to teach in the Newark public schools. The Board sustained the charges after a hearing and ordered dismissal as of May 20, 1955, the day after appellant's appearance before the subcommittee and suspension. Mention should be made that at the hearing the Board denied an application to dismiss the original charges. While no special point is made of it before us, we may say that the motion should have been granted since, as has been said, no basis remained to support a claim of any improper conduct before the subcommittee.

The Commissioner sustained the dismissal, holding in effect that membership in the Communist Party "at any past time" may always be inquired into as relevant to the question of present subjection to its ideologies and disciplines and of present fitness to teach. However, he made the effective date the day in 1957 on which the refusal to answer the Superintendent's questions occurred and awarded the appellant back pay from the date of suspension to that of the interview. Appellant sought review of the dismissal affirmance and the Board cross-appealed from the modification relating to the effective date. The case is before us on our own certification prior to argument in the Appellate Division.

The present controversy, revolving as it does around the matter of whether, in the language of *Laba*, the disputed questions were "pertinent", seems to us to have been occasioned by misapprehension on both sides of some of the import of what was there said about the scope of the inquiry, with the result that neither the course of it nor the approach to it conformed to what we intended, despite our belief that all persons involved undoubtedly made every effort to comply with the mandate as they understood it. A brief reiteration of basic principles will demonstrate what we mean.

The right, in fact the duty, of a public employer to interrogate his employee, and the latter's obligation to respond fully and frankly, arise when the employer learns from any reasonable source of possible misconduct of any kind, which if true, would adversely affect his continued fitness to hold his position. What transpired at the subcommittee hearing, particularly the refusal to answer as to present party membership, gave rise to the necessity for such an inquiry here. The right to interrogate is only for the purpose of enabling the employer to judge whether there is a reasonable ground for the bringing of dismissal charges on the basis of the employee's answers to relevant questions and of any other information at hand. It is not a broad investigation such as a legislative committee conducts, a trial or an adversary proceeding in the usual sense. Nor is it to be considered an end in itself or as a primary method of dismissal, absent clear lack of cooperation or willful refusal to answer pertinent queries.

Here the inquiry was to aid in determining whether there was sufficient basis to charge that appellant was unfit to teach because subject to the ideologies and disciplines of Communism. Subjection connotes such belief in the overthrow of our government by force or other unlawful means and in the substitution of a totalitarian state with destruction of all our heritage of individual freedoms as to be subservient to commands to act in any way directed to carry out these nefarious purposes. It is essentially a state of mind, admittedly difficult to determine extrinsically but generally evidenced sufficiently by knowing membership and participation in true Communist organizations and activities designed to further the basic aim of such violent overthrow of our government.

The focal point of the inquiry in the instant case was such subjection now rather than in the past. It is not suggested by the Board that any past conduct of appellant would be of a nature that in itself would justify dismissal even if there were no present subjection, so we are not called upon to determine under what circumstances, if any, the right to discipline would exist in such a situation and what we are about to say further is directed particularly to the precise situation before us. In fact, the Board's brief specifically says that the "fitness inquiry . . . involved not only the question of *present* party membership but also the question of *present* subservience to the Party's 'ideologies and disciplines'" (emphasis supplied) and at oral argument the Board's counsel expressly agreed with the proposition that no right to dismiss exists merely because a teacher was a member of the Communist Party in the past when it is clear that he is not presently. Such a view follows state policy as expressed in the educational oath statute (N. J. S. A. 18:13-9.1 and 9.2) where the criterion is present allegiance. Cf. *Schwartz v. Board of Bar Examiners*, 353 U. S. 232, 246, 1 L. Ed. 2d 796, 805-806, 77 S. Ct. 752 (1957).

We therefore had in mind that the obviously relevant and primary questions should be directed to whether the employee is so subject, whether he is a knowing member or active participant in Communist organizations and causes and what his belief is toward American democratic principles, ideals and institutions. Questions relating to past conduct have no intrinsic relevancy and are not automatically proper in every case, as we will more fully explain shortly. On this score we think the Commissioner erred in holding to the contrary as an absolute proposition, as well as in suggesting that the failure fully and frankly to answer any questions asked by the employer, apparently whether or not relevant or material to the subject of inquiry, evidences secretiveness and lack of candor, thereby stamping the individual as not qualified to occupy a teaching post. Prior event queries may not be posed just for their own sake and one cannot be compelled involuntarily to bare one's soul as to the past for that reason alone. Relationship to the object of the inquiry must appear. And that relationship can be found in this kind of situation only where the employer sincerely doubts or has good reason in his own mind to test mere denials of present belief or affiliation. Then exploration of the past becomes pertinent to aid the interrogator in coming to a conclusion as to the truth of the present.

It was in this context and to this extent that we spoke of the right to inquire into past as well as present association with the Communist Party and affiliated organizations in our prior opinion (23 N. J. at 388). Seemingly pertinent expressions by the United States Supreme Court (*e. g.*, *Garner v. Board of*

Public Works of Los Angeles, 341 U. S. 716, 720, 95 L. Ed. 1317, 1322-1323, 71 S. Ct. 966 (1951), rehearing denied 342 U. S. 843, 96 L. Ed. 637, 72 S. Ct. 21 (1951); *Beilan v. Board of Education, School District of Philadelphia*, 357 U. S. 399, 409, 2 L. Ed. 2d 1414, 1433, 78 S. Ct. 1317, 1324 (1958)) must be considered in their context. In those cases the court upheld dismissals as not in violation of the Constitution where the employee refused to respond to any inquiry as to his Communist activities, present or past, and thus blocked all inquiry, as the Court said in *Beilan*, "however relevant to his present loyalty." (357 U. S. at 405, 2 L. Ed. at 1420.) In none of them can relevance of questions regarding past conduct to present loyalty be said to have been truly in issue as it is here.

To put more concretely what we intended where the vital question is, as we have said, present subjection, if the employee admits present guilt, so to speak, that obviously ends the inquiry. If he answers all questions relating to current status in the negative and the employer has no reason whatever, either because of other information in his possession or of skepticism as to whether the answer should be believed from the general standpoint of credibility, to doubt the full truth and sincerity of the denials and does not feel the need to test them, the inquiry must also end. But if the inquirer has honest doubts or other information at hand seems inconsistent with the present disavowal so as to indicate the need for test and further query, he is privileged to probe backward from the date of the interview, for past conduct then becomes relevant to the present. When such a course is indicated, and the interviewer decides to pursue it, he must, in fairness to the employee, tell him so and why, including a statement of the substance of information he may have from other sources if he intends to question further on the basis of that information, together with a general description of those sources. This is in order that the employee may have a sufficient basis to determine, at his risk, whether the further questions must be answered and also so that any reviewing tribunal may have a sound basis on which to determine any contention of irrelevancy. Such a disclosure by the employer will also give the opportunity, which fairness demands, for the employee to try to convince his interrogator and that the outside information mentioned is, for example, false and nothing but scurrilous gossip. Moreover, in any event, the employee should always be given the chance, apart from the answers to specific questions, to make his own statement to the interviewer, by way of explanation or otherwise, to attempt to explain away any claim or suggestion of wrongdoing or of unfitness to continue in his position. Even a justified backward inquiry into past conduct has its necessary limits. When denials of any wrongful conduct at a prior date reach the point in time where it becomes reasonably clear that the employee's assertion of present rectitude is sincere and truthful, further probe would be capricious and must cease. This we think ordinarily rules out a question, for instance, directed to whether the employee "ever" was a member of the Communist Party. Of course it is so self-evident that it seems unnecessary to add that, once a basis of relevancy is established as we have outlined, it is absolutely obligatory on the employee to answer.

We come to the specific application of the principles we have discussed to the interview and Board hearing before us for review. The reasons assigned by appellant on both occasions for his refusal to answer certain questions concerning affiliations and activities prior to July 1, 1953 are untenable, but,

in the interest of complete fairness, we are willing to assume that his position was taken in reliance on an honest misconception of the import of *Laba* with respect both to relevancy and fitness. Passing over the matter of any effect to be given to the fact that the refusal did not extend to all prior event questions, it seems clear that mere alleged invasion of privacy and personal dignity can constitute no bar to an inquiry of this type, if the questions posed are otherwise proper and appropriate. The subject is much too vital today to depend upon such personal views, however sincerely held. The matter is not simply one of academic freedom of thought and expression. As was so well said by Justice Heher in *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498 (1951): "The maintenance of the purity of the educational process against corruption by subversive influences is of the highest concern to society . . . Loyalty to government and its free democratic institutions is a first requisite for the exercise of the teaching function. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications." (at p. 513.) See also *Adler v. Board of Education*, 342 U. S. 485, 493, 96 L. Ed. 517, 524, 72 S. Ct. 380 (1951). Any concept of individual privilege against intrusion on privacy and conscience must give way in these times and these situations to the greater public interest.

Nor is there any legal justification for a teacher under inquiry to set an arbitrary date beyond which he will not speak on the ground of conclusive irrelevancy. There is no absolute lack of pertinency arising from a mere date any more than there is automatic relevancy. Appellant's position in this respect misconceived not only the applicable concept of relevancy as previously outlined but also that of fitness to teach. He argues irrelevancy of events back of the date he fixed on the ground that only his professional and academic record in that yonder period can have any bearing on his current fitness. But, we repeat, the kind of fitness with which this inquiry was concerned was present subjection to Communist ideologies and disciplines. As to that, pedagogical or academic proficiency presently or at any past time has little bearing.

Looking at the other side of the coin and conceding every desire to follow *Laba*, the difficulty we find with the interview, again assumedly the result of misapprehension, is that nowhere does it clearly appear that the Superintendent went into past affiliations and activities because he had reason to doubt or test the truthfulness of appellant's denials of present party membership or allegiance. While such may well have been the reason, he never expressly said so, even when answers were refused on the ground of remoteness and irrelevancy, and we cannot find sufficient from the context to warrant a plain enough inference. Our difficulty is compounded because for the most part questions as to the present came very late in the interrogation following inquiry as to the past and the interview did not follow the general pattern contemplated by *Laba*. The course and content indicated a close adherence to the general investigatory hearing held by the subcommittee and a considerable part of the inquiry would not seem to have any materiality at all, even approaching the possibility of suggestion of guilt by mere association. Consequently we cannot be assured that the present record sufficiently establishes that the inquiry as to the past was not for that sake alone, which it must demonstrate before the conclusion can be reached that appellant wrongfully refused to answer pertinent questions so as to warrant his dismissal on that

ground. It may also be added that the interrogation did not explore the matter of appellant's present beliefs with respect to our democratic principles and institutions. This important factor was not mentioned in the case, despite his counsel's advance request that the Superintendent go into it, until, on cross-examination at the Board hearing, appellant volunteered his disbelief in the overthrow of the government by force and his adherence to American doctrine.

Since both sides appear to have been acting under a misapprehension, we feel that we should not sustain the dismissal, but we definitely believe the public interest would not be served by directing appellant's reinstatement while his fitness to teach remains unresolved. The ends of justice and the desire to be certain of complete fairness to the Superintendent, the Board, the public interest and the appellant dictate that we reverse the Commissioner's affirmance of the dismissal and remand the matter to the Board so that a new inquiry may be pursued, to be conducted and participated in by both the Superintendent and appellant in accordance with the principles we have expressed. Thereafter such new charges may be preferred and determined as the situation indicates.

What we have said has its roots much deeper than mere niceties of procedure or so-called technicalities of the law of evidence. The most fundamental of a reviewing court's duties is to see to it both that the end result in a case is just and correct and that the means utilized are fair and proper. Such is the essence of due process of law. This truism is particularly apt in cases with loyalty connotations where feeling is likely to run high and may tend to trample upon fundamental considerations of fairness and justice. In protecting democratic government we "must do so without infringing the freedoms that are the ultimate values of all democratic living." *Wieman v. Updegraff*, 344 U. S. 183, 188, 97 L. Ed. 216, 220, 73 S. Ct. 215 (1952). While the opprobrium of dismissal from public employment for true disloyalty is deserved if fully and fairly proved, the stain is so deep and the consequences so devastating (the same holds true where the dismissal is for refusal to answer questions relating to loyalty) that the very fibre of every constitutional right we seek to preserve, as well as every consideration of civilized human decency, dictate that this brand of infamy shall never be implanted without complete understanding on all sides of applicable principles, abundant proof and every requisite of due process. Such grievous guilt can never be found from mere association or simply on suspicion, by innuendo or through alleged inference from truly non-relevant facts. Cf. *Wieman v. Updegraff*, *supra*; *Kutcher v. Housing Authority of the City of Newark*, 20 N. J. 181 (1955). A back door or indirect approach cannot be approved to disguise the real basis not directly and properly proved. See the dissenting opinion of Mr. Justice Brennan in *Beilan*, *supra* (357 U. S. at 417, 2 L. Ed. 2d at 1437) and the very recent opinion of the Pennsylvania Supreme Court in *Board of Education School District of Philadelphia v. Intille*, decided June 30, 1960. While we do not suggest that the proceedings at the local level here under review had such an object, this court must insist on every precaution to make certain that there can be no possible doubt on the subject and that such never can occur. Else none of us can be certain of any freedom.

This disposition makes it unnecessary to pass upon the question of the Commissioner's modification of the effective date of dismissal raised by the

Board's cross-appeal. Also we are of the opinion that the determination of all questions concerning back pay should more properly await the final outcome of the matter and so the Commissioner's award thereof is also reversed.

It is very apparent that this case has already consumed an inordinate amount of time. It is more than five years since appellant was suspended. It took the Board almost a year and a half after the decision in *Laba* to act finally on the remand and it was about another year before the administrative appeal was decided. This is much too long a time when a question of important public interest is involved and an individual is in an unsettled status concerning his position. In order that the controversy may now be finally disposed of without further undue delay and in the manifest interests of justice, we will retain jurisdiction and direct that all additional proceedings by and before the Board be completed within 60 days from the coming down of our mandate. Should the result be unfavorable to appellant and an appeal is desired, notice of appeal to the Commissioner shall be filed within 10 days of the Board's final action and the latter shall endeavor to make his determination within 30 days thereafter. Either party may then appeal directly to us within 10 days.

The action of the Commissioner of Education is reversed and the cause is remanded to the Newark Board of Education for further proceedings in accordance with this opinion. No costs.

33 N. J. 280 (1960).

ROBERT LOWENSTEIN,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK,
ESSEX COUNTY,

Respondent.

For the Appellant, Mr. John O. Bigelow and Mr. Morton Stavis.

For the Respondent, Mr. Jacob Fox.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal by a teacher against the action of the Newark Board of Education on September 27, 1960, dismissing him from its employ as of May 20, 1955. This matter has been in litigation for more than five years and has been before the Commissioner of Education on two previous occasions.

Appellant's dismissal was first ordered by the Newark Board of Education on June 23, 1955, on the grounds that he had invoked the privilege against self-incrimination when appearing before a Congressional inquiry into Communism and subversion in this country and that his refusal to answer questions as to his associations and affiliations on that occasion constituted cause for dismissal under the Teachers' Tenure Act (R. S. 18:13-16, et seq.). The Commissioner found that this action was inconsistent with the opinion of the

United States Supreme Court expressed in *Slochower v. Board of Education*, 350 U. S. 551, (1956) and remanded the case to the Board for further inquiry and proceedings. The Board then appealed to the New Jersey Supreme Court, which affirmed the decision of the Commissioner "in all respects." *Laba v. Newark Board of Education*, 23 N. J. 394 (1956).

Upon this remand, the Board of Education directed its superintendent to conduct a further inquiry along the lines laid down by the Supreme Court. At a subsequent interview held on May 16, 1957, the superintendent asked a number of questions which appellant refused to answer. Appellant's position at that time was that he would respond to questions having to do with his present activities and associations but that he could not be required to answer as to any time prior to the summer of 1953 and he would refuse to do so. The superintendent then filed "supplementary charges" with the Board aimed at appellant's fitness to teach in the Newark Public Schools as a result of his refusal to answer the questions put to him. At a hearing before the Board which followed, the charges were upheld and appellant's dismissal was affirmed as of the effective date of the original dismissal, May 20, 1955. Appellant then brought a second appeal to the Commissioner of Education.

The issue in this second appeal was confined to whether or not appellant's refusal to answer the questions asked by the superintendent justified a finding of conduct unbecoming a teacher and of unfitness as a teacher sufficient to warrant dismissal. The Board made no finding in regard to appellant's adherence to the Communist Party or its beliefs and, therefore, that question was not in issue. The Commissioner, in his decision dated June 1, 1959, sustained the action of the Board of Education in dismissing the appellant with the exception that the effective date was to be made May 16, 1957, the time of the superintendent's interview, instead of May 20, 1955, the date of the Congressional inquiry. Appellant then sought further review and, as in the prior case, the Supreme Court certified the matter on its own motion, taking jurisdiction and by-passing the preliminary procedural points. At the same time, the Board of Education cross-appealed from the action of the Commissioner in modifying the effective date.

In its decision, dated July 18, 1960, the Supreme Court reversed the action of the Commissioner and remanded the case once again to the Board of Education "for further proceedings in accordance with this opinion." The Court said further:

"The present controversy, revolving as it does around the matter of whether, in the language of *Laba*, the disputed questions were 'pertinent,' seems to us to have been occasioned by misapprehension on both sides of some of the import of what was there said about the scope of the inquiry, with the result that neither the course of it nor the approach to it conformed to what we intended, despite our belief that all persons involved undoubtedly made every effort to comply with the mandate as they understood it.

"Since both sides appear to have been acting under a misapprehension, we feel that we should not sustain the dismissal, but we definitely believe the public interest would not be served by directing appellant's reinstatement while his fitness to teach remains unresolved. The ends of justice and the desire to be certain of complete fairness to the Superintendent, the

Board, the public interest and the appellant dictate that we reverse the Commissioner's affirmance of the dismissal and remand the matter to the Board so that a new inquiry may be pursued, to be conducted and participated in by both the Superintendent and appellant in accordance with the principles we have expressed. Thereafter, such new charges may be preferred and determined as the situation indicates."

The Court also passed the question of the effective date of dismissal and of back pay, holding that these issues "should more properly await the final outcome of the matter." The Court retained jurisdiction and directed that any further proceedings before the Board and the Commissioner should be disposed of without delay.

Appellant appeared on request of the Newark Superintendent for a second interview with him on September 2, 1960, on which occasion counsel for both parties were present. The Superintendent asked a number of questions relating to appellant's knowledge of, adherence to, and affiliation with the Communist party, its beliefs, or its members. In his replies, appellant testified that he was not then and had not been a member of the Communist party or subject to its ideologies and disciplines since June, 1953. The Superintendent, after expressing skepticism and doubt as to these statements, indicated that he intended to ask questions as to some of appellant's past activities, and did so. With one exception, appellant declined to answer any questions which involved a period prior to June, 1953, on advice of counsel, on the ground that such questions were remote in time and not pertinent to the issue of his present fitness to teach and, therefore, were not in harmony with the directives of the Supreme Court. Following the interview, the Superintendent submitted seven charges to the Newark Board of Education on September 6, 1960, "supplementing charges filed * * * on May 23, 1955."

A hearing on the charges before the Newark Board of Education was held on September 15, 1960, with all members present. On September 20, 1960, the Board by a vote of 5 to 4 sustained the charges of the Superintendent and dismissed the appellant as of May 20, 1955. Thereafter, on September 27, 1960, the Board adopted by resolution "findings of fact and conclusions" in this case, the pertinent excerpts of which follow:

"On September 2, 1960, the Superintendent interviewed Lowenstein pursuant to the July 18, 1960, decision of the Supreme Court. In this interview, he again testified that he has not been a member of the Communist Party or subject to its ideologies and disciplines since July 1, 1953. In the course of the interview he was asked the questions and gave the answers set forth in the annexed schedule. The Superintendent then stated * * * frankly, I am skeptical as to some of the things you said about the present, and in view of these I do have sincere and honest doubts. Therefore, it seems to me that I have no choice, no alternative, but to question you as to some of your activities * * * involved in the past, and for the reasons I have stated I intend to do so.' The Superintendent thereupon asked the following questions to which Lowenstein gave the answers indicated:

'Q. Bob, were you a Communist since 1950?

'A. I decline to answer, sir, prior to July 1953.

'Q. Were you a member of any Communist front organization since 1950?

'A. The same declination, sir.

'Q. Were you subject to Communist ideology or discipline at any time since 1950?

'A. The same declination, sir, for the same reason.

'Q. Did you at any time since 1950 believe in the Communist ideology or principles?

'A. The same declination, sir.'

"The Superintendent then filed the pending charges, and hearings were duly held thereon on September 15, 1960 and September 20, 1960.

"It is the opinion and decision of this Board that the answers given in response to the Superintendent's questions, abstracted in the Schedule annexed, reasonably justified the doubts asserted by the Superintendent and the additional inquiry which he believed to be necessary by reason thereof.

"It is the further opinion and decision of this Board that under the circumstances it was Lowenstein's duty to answer the above quoted questions relating to the period from 1950 to date, and that his refusal to do so and to give any information as to Communist affiliations prior to July 1, 1953, 'cut-off' date, fixed by him, unduly obstructed the Superintendent's effort to ascertain all of the relevant facts which would serve to establish whether or not he is now a member of the Communist Party or subject to its ideologies and disciplines.

"It is, therefore, the decision and judgment of this Board that each of the Superintendent's charges of September 6, 1960, has been established; that facts adduced on each of them warrant dismissal, as of May 20, 1955, the effective date of the original dismissal, and that Robert Lowenstein is dismissed as of that date.

"SCHEDULE

(The figures in parenthesis indicate the page at which the excerpted material appears on the transcript of the interview of September 6, 1960.)

"(P. 14)

"Q. As of 1955, including June of that year, what did you know about the Communist Party and its program in the United States? A. Well, some things I must have known from what I read in the press at the time; but specifically, I don't know, sir.

"Q. Well, Bob, if you don't know specifically, do you know generally? . . . A. I would have to say I don't know, sir.

"(P. 15)

"Q. You don't know, is that your answer? A. That is correct, sir.

"Q. As of the same year, 1955, including June of that year, what did you know about the Communist Party and its program in the State of New Jersey specifically? A. I would say nothing, sir. That is as I recall, nothing. Nothing about it.

"Q. In the same year, 1955, including June, did you believe that the Communist Party advocated the violent overthrow of the Government of the United States as one of its purposes or goals? A. I think I know that the Congress of the United States, or I think I know that the Supreme Court of the United States said that they did. I am not always inclined to accept the opinion of the Congress of the United States, I always deferred to the opinion of the United States Supreme Court. And if the United States Supreme Court said that is the position of the Communist Party then I conclude that that is the position of the Communist party.

"Q. And therefore in that sense you believe it? A. That is right, sir.

"(Pgs. 18-19)

"Q. Bob, did you, during the period again through June of 1955, believe that the Communist Party was a party advocating its political beliefs, or did you believe it was an international conspiracy one of whose objects was to overthrow the Government of the United States by force? . . . A. I find it extremely difficult to answer that question, Dr. Kennelly, because I really don't grasp what its meaning is. In my opinion, the state of affairs at that time relative to the Communist Party, its essential outlook on things,—really, I don't know.

"Q. Well, if you don't know or did not know as of 1955, what do you believe today with respect to the same question? A. I will be very candid with you, Dr. Kennelly, I really don't know. I tried very scrupulously to avoid arriving at opinions and conclusions about matters that are not within my special field of competence as a citizen. I try to interpret what I read in the press, and very often I fail to arrive at any kind of a picture. I have no notion of what is going on in the Congo today, and I have no notion of what is right or what is wrong there. And so, this question as to what international communism is today, I really don't know.

"Q. You said earlier that you recognized certain things that Congress had said, I think I recall you said particularly that you respected and accepted particularly anything the United States Supreme Court has said. Do you think that anything that the United States Supreme Court has said in this area may be considered a matter of general knowledge? A. I would say, sir, I think the United States Supreme Court said that the Communist Party is a conspiracy to overthrow the Government by force and violence. I am not even certain about this, but I think the reference was to American Communist Party. I don't think the Supreme Court dealt with any international movement.

“(Pgs. 21-22)

“Q. In the year 1955, up to and including June, did you believe that a Communist was a fit person to teach in the Newark Public Schools? A. The question of fitness to teach, I interpret differently from many people. In my opinion, in a free society a person who meets the legal requirements in whatever capacity he chooses to engage in, the professional requirements for the position, is entitled to teach, provided, of course, that he is not abusive of his position and conforms to all legal and professional requirements and maintains his status of competence in those areas.

“Q. Bob, the question as I asked it I think is a very simple question. It is as to whether or not in 1955, including June of that year, did you believe that a Communist was a fit person to teach in the Newark Public Schools. It seems to me that you could answer that yes or no. . . . A. I decline, sir.

“(Pgs. 29-31)

“Q. In the year 1955, up to and including the month of June, did you think that a teacher who was a Communist could have the required scholarship and teaching methodology requisite for his position in a public school system? This is a simple question. A. To that I will say yes, sir.

“Q. Your answer to the question is yes? A. Yes, sir.

“Q. In the year 1955, up to and including June, did you think that a Communist teacher, or a teacher who was a Communist, could have the required respect for the individual that must be an integral part of the conviction and philosophy of any person fit to teach in the Newark Public School System? A. Well, without this kind of respect, that there can be no real academic scholarship. So when I answered the previous question yes I, by implication, meant that such a person could retain respect for the individual, but to be a scholar one must retain respect for anybody or anything that he deals with, in a most objective fashion.

“Q. And this includes a teacher who was a Communist? A. Yes, sir.

“Q. In the year 1955, up to and including June of that year, did you believe that a Communist teacher, meaning a teacher who was a Communist, could possess and display to his students the high ethical standards in his conduct that fits a person to teach in the Newark Public School System? . . .

“MR. STAVIS: We have advised Dr. Lowenstein not to answer the questions as being entirely irrelevant.

A. So I decline to answer.

“Q. Will you answer the question for the record, Doctor? A. I decline to answer it.

“Q. And your reason? A. On advice of counsel.

“(Pg. 24)

“Q. Bob, let me put the question to you again. The question is intended to be within the area of that distinction which you referred to, and it is simply this: In the year 1955, up to and including June, did you believe that a person could be a Communist and also be a loyal American citizen? That is a very simple question. . . .

“(Pgs. 25-27)

A. I am trying to recollect, sir, really what my view was in 1955, in the light of responsible opinion and in the light also of whatever my attitude may have been—I probably would say I thought so. He could and he could not. It depends upon the individual.

“Q. Is that your complete answer, Bob? A. Yes.

“Q. What is your belief today with respect to the same question? A. I would say that today I would so drastically modify what I think my view was in 1955, that I would probably say fewer and fewer people today could be loyal American citizens and Communists at the same time.

“Q. Fewer and fewer? A. Yes.

“Q. And the distinction you are making is that fewer today, much fewer today, than in 1955, than what you thought in 1955, is that it? A. That is right, sir.

“Q. Bob, will you tell me the reason or the reasons that have brought about this change in your view which you have just expressed between what you believe in 1955 and what you believe today? A. I say it is the course of events and the international relations in the past five years.

“Q. What do you think now, today, there is about the beliefs of those people that are described as Communists, the ones that you say there are fewer and fewer of that could be loyal citizens today, what are the things that they believe or advocate that makes you believe that fewer and fewer could be loyal citizens? A. I would have to answer categorically that I don't know at all, but I would imagine that they want institutional changes, changes in the attitude toward other peoples that probably don't feel confident, that we, through our normal processes, can eventually arrive at in order to improve the status of people all over the world.

“Q. Does the general universal knowledge that a Communist is required to deceive and cheat, and generally break the rules of a game as we know it, does this in any way enter into, in your opinion, into their inability to be loyal American citizens? A. About that I know nothing, and, shall I say also, I wonder what element of truth there may be in that. I don't know.”

From this action of the Board the present appeal was received by the Commissioner of Education on September 22, 1960. The record in the case

was supplemented by a memorandum on behalf of appellant and by oral argument of counsel for both parties before the Assistant Commissioner in Charge of Controversies and Disputes in Newark on October 17, 1960.

Appellant takes the position that in denying present membership in or subjection to the ideologies of the Communist Party, there was no basis for inquiry into his past affiliations and, when such questions were asked, the directives of the New Jersey Supreme Court in its earlier decision on remand were violated and he was, therefore, justified in his refusal to answer. He contends that no attack upon his veracity or truthfulness was ever made and that no basis for a reasonable doubt as spelled out in the Court's mandate was afforded by which the Superintendent could properly inquire into his past activities. He argues further that when the Court said: "The focal point of the inquiry in the instant case was such subjection now rather than in the past," it meant "present subjection", and, even if it conceded that this could be interpreted to be at the time of the Superintendent's first interview in 1957, it could never be stretched to mean at the time of the Congressional inquiry in 1955.

Respondent denies that it failed to observe the mandate of the Supreme Court and maintains that the questions as to his past activities which appellant refused to answer were pertinent and proper in view of the reasonable doubt created by his replies to other questions and by reason of information from other sources which had come to the Superintendent. The Board's position is that by his refusal to answer questions which it believed to be relevant and proper, appellant blocked the Board's efforts to determine adequately his continued fitness to teach and, therefore, it was justified in dismissing him for cause under the Teachers' Tenure Act. Respondent raises no contention that appellant is or was an adherent of Communism but solely that his refusal to respond to questions beyond a point in time arbitrarily set by him, effectively thwarted the Board's efforts to determine whether or not he should be continued as a teacher in the Newark Public Schools.

The underlying issues in this case have already been established by the Supreme Court in the case of *Laba v. Board of Education of Newark, supra*. In that case the right of inquiry and dismissal on the part of the employing board was stated as follows:

"(A school board) may inquire of public employees as to matters which relate to their continued fitness to serve as public employees including past and present membership in the Communist party and associated organizations and may discharge employees who fail to disclose pertinent information which the supervising authorities may require." (23 N. J. at 379-380.)

"We have no doubt that in examining into their continued fitness to teach the Newark school authorities may interrogate the appellant school teachers with respect to their present and past association with the Communist Party and affiliated organizations and are entitled to full and frank disclosures. Orderly procedure dictates that the preliminary inquiry on the subject be made fairly and conscientiously by the school superintendent. * * *" (23 N. J. at 388.)

"If after the inquiry it appears that the teachers * * * have willfully refused to answer pertinent questions fairly submitted by their admin-

istrative superiors * * * then there would seem to be ample basis for Board action with the broad and valid statutory standard embodied in R. S. 18:13-17." (23 N. J. at 389.)

"In the instant matter the teachers' conduct before the Congressional Sub-Committee reasonably calls for a fitness inquiry during which the teachers have a duty of cooperation and an affirmative burden in the establishment of their fitness. If they choose to remain silent under the protection of N. J. S. A. 2A:81-5, they must do so with full realization that their administrative superior may justifiably conclude that they are no longer fit to teach." (23 N. J. at 392.)

There being no question as to the authority of the Board of Education to hold an inquiry and to dismiss for cause under circumstances such as those present here, the issue to be decided in this case is narrowed to whether appellant was justified in refusing to answer certain of the questions put by the superintendent. The determination of this issue turns on whether the superintendent's interview conformed to the directives of the Supreme Court of New Jersey contained in the opinion of July 18, 1960. In that decision it was noted, as stated above, that there had been misapprehension on both sides of the import of the *Laba* case and, to dispel any further confusion, the Court went to some length to develop guide lines for the conduct of any ensuing proceedings. The Commissioner believes the following statements of the Court have particular significance for the issue in this case.

"The right, in fact the duty, of a public employer to interrogate his employee, and the latter's obligation to respond fully and frankly, arise when the employer learns from any reasonable source of possible misconduct of any kind, which if true, would adversely affect his continued fitness to hold his position. What transpired at the sub-committee hearing, particularly the refusal to answer as to present party membership, gave rise to the necessity for such an inquiry here. The right to interrogate is only for the purpose of enabling the employer to judge whether there is a reasonable ground for the bringing of dismissal charges on the basis of the employee's answers to relevant questions and of any other information at hand. It is not a broad investigation such as a legislative committee conducts, a trial or an adversary proceeding in the usual sense. Nor is it to be considered an end in itself or as a primary method of dismissal, absent clear lack of cooperation or willful refusal to answer pertinent queries.

"Here the inquiry was to aid in determining whether there was sufficient basis to charge that appellant was unfit to teach because subject to the ideologies and disciplines of Communism.

"* * * the obviously relevant and primary questions should be directed to whether the employee is so subject, whether he is a knowing member or active participant in Communist organizations and causes and what his belief is toward American democratic principles, ideals and institutions. Questions relating to past conduct have no intrinsic relevancy and are not automatically proper in every case * * * .

"Prior event queries may not be posed just for their own sake and one cannot be compelled involuntarily to bare one's soul as to the past for that

reason alone. Relationship to the object of the inquiry must appear. And that relationship can be found in this kind of situation only where the employer sincerely doubts or has good reason in his own mind to test mere denials of present belief or affiliation. Then exploration of the past becomes pertinent to aid the interrogator in coming to a conclusion as to the truth of the present.

“* * * if the inquirer has honest doubts or other information at hand seems inconsistent with the present disavowal so as to indicate the need for test and further query, he is privileged to probe backward from the date of the interview, for past conduct then becomes relevant to the present. When such a course is indicated, and the interviewer decides to pursue it, he must, in fairness to the employee, tell him so and why, including a statement of the substance of information he may have from other sources if he intends to question further on the basis of that information, together with a general description of those sources. This is in order that the employee may have a sufficient basis to determine, at his risk, whether the further questions must be answered and also that any reviewing tribunal may have a sound basis on which to determine any contention of irrelevancy. Such a disclosure by the employer will also give the opportunity, which fairness demands, for the employee to try to convince his interrogator and that the outside information mentioned is, for example, false and nothing but scurrilous gossip. Moreover, in any event, the employee should always be given the chance, apart from the answers to specific questions, to make his own statement to the interviewer, by way of explanation or otherwise, to attempt to explain away any claim or suggestion of wrongdoing or of unfitness to continue in his position.

“* * * once a basis of relevancy is established as we have outlined, it is absolutely obligatory on the employee to answer.

“The reasons assigned by appellant on both occasions for his refusal to answer certain questions concerning affiliations and activities prior to July 1, 1953, are untenable * * * mere alleged invasion of privacy and personal dignity can constitute no bar to an inquiry of this type, if the questions posed are otherwise proper and appropriate. * * * Any concept of individual privilege against intrusion on privacy and conscience must give way in these times and these situations to the greater public interest.

“Nor is there any legal justification for a teacher under inquiry to set an arbitrary date beyond which he will not speak on the ground of conclusive irrelevancy. There is no absolute lack of pertinency arising from a mere date any more than there is automatic relevancy. Appellant's position in this respect misconceived not only the applicable concept of relevancy as previously outlined but also that of fitness to teach.”

A study of the interview of September 2 shows that the Superintendent began with a series of questions directed toward appellant's current knowledge of an association with Communist activities, his present beliefs as to American ideals and institutions and his opinions in respect to the relationship of Communist affiliation and fitness to teach in the public schools. The Superintendent then stated that he had information that appellant had been “an active militant Communist,” and this information coupled with the “indirect answers” and the “general attitude and demeanor in many of the

answers" caused him to be skeptical and to have "honest and sincere doubts" as to some of the things said about the present. He stated further that as a result of these doubts he felt compelled to inquire into appellant's past activities and intended to do so. During the remainder of the inquiry, appellant refused to answer any question which referred to a time prior to June, 1953, with the exception of one in which he denied ever having solicited teachers to promote the communistic point of view in the classroom.

A review of the interview in the light of the Supreme Court's instructions brings the Commissioner to the conclusion that appellant was not justified in his refusal to answer the questions put to him and the action of the Board of Education in dismissing him except for the effective date, should be sustained.

However imperfect the inquiry of the Superintendent may be held to have been, it appears to the Commissioner that he attempted in all respects to carry out the instructions of the Court. He inquired at some length into the present status of appellant's beliefs and in the course of this questioning received some answers which engendered skepticism and doubt. Before testing appellant further, the Superintendent gave notice of his intent and reasons for doing so. At no time did the Superintendent extend the scope of the inquiry to the distant past nor to occasions indefinitely remote in time, nor were the questions unlimited in scope such as "Were you ever a Communist?" Neither does it appear that any of the questions were asked for their own sake or for the purpose of compelling appellant "to bare his soul involuntarily." Considered against the background of the climate and environment of this case, the answers given by appellant to the Superintendent's inquiries fell short of achieving the purpose of the interview and were such as to raise a reasonable doubt as to appellant's present fitness to teach, in the Commissioner's judgment. The need for further testing was thereby adequately established. The Commissioner holds, therefore, that the Superintendent's questions probing appellant's activities immediately prior to 1953 were relevant to the issue of present fitness and it was obligatory upon appellant to answer in order that no shadow of doubt might remain.

In the Commissioner's opinion appellant failed in his duty to cooperate with his administrative superiors in their attempt to resolve the issue originally provoked by the Congressional inquiry. The respondent Board of Education and its Superintendent bear a heavy responsibility to insure that the pupils in their charge are taught by persons of unquestioned loyalty to the United States and its democratic ideals and any doubt in this respect calls for unflagging efforts on their part to determine the truth. That those efforts cannot invade the rights which protect the individual has already been made clear in this case. It has also been made clear that when such doubts arise, teachers have "a duty of cooperation and an affirmative burden in the establishment of their fitness" and the school authorities "are entitled to frank and full disclosures." *Laba v. Newark Board of Education, supra.*

In the instant matter, appellant advanced no further reason for his refusal to answer questions put to him than he had in the previous cases although the Supreme Court has said that his reasons on those occasions were untenable. Despite the Court's statement that there could be no "legal justification for a teacher under inquiry to set an arbitrary date beyond which he will not speak on the ground of conclusive irrelevancy," appellant set such a date at June,

1953. He advanced no reasons for its selection other than that he had answered in previous interviews to that time and this would, therefore, continue to be his cut-off date. Nor did appellant avail himself of the opportunity suggested by the Court "to make his own statement to the interviewer, by way of explanation or otherwise, to attempt to explain away any claim or suggestion of wrongdoing or of unfitness to continue in his position." Instead of assisting the administration to clear up whatever doubts of his loyalty had been created by his conduct before the Congressional Committee and in subsequent interviews, appellant blocked those efforts by his resort to a claim of individual privilege and his failure to make "full and frank disclosures." Because appellant has not met the burden placed upon him on the remand before the Newark Board of Education, the Commissioner is of the opinion that he has forfeited his claim to reinstatement in his position.

There remains the question of the effective date of appellant's dismissal. In modifying the action of the Board from May 20, 1955, when appellant was first suspended from his employment as a result of his conduct before the Congressional Committee, to May 16, 1957, the date of the refusal of appellant to answer pertinent questions in the inquiry conducted by the Superintendent as a result of the initial remand, the Commissioner reiterates the opinions already expressed on this subject in his decision in the prior case, dated June 1, 1959. In that decision, he noted that "our Supreme Court has already held that the petitioner's conduct before the House Sub-Committee was not *per se* just cause for dismissal, and no further evidence has been presented to prove that this conduct before the House Sub-Committee was unbecoming that of a teacher." He found that appellant was properly dismissed as a result of his conduct in the interview before the Superintendent in 1957 and stated "that the dismissal should not revert to a time prior to the acts justifying same."

The Commissioner finds further support for this position in the fact that the original charges made against appellant immediately following the Congressional inquiry in 1955 have now been dismissed. The Supreme Court, in its decision of July 18, 1960, made mention of the fact that the Board, at its first hearing, erred in not granting an application to dismiss the original charges. Accordingly, at its meeting held on September 15, 1960, the Board granted the request to dismiss the original charges. The result of this action is that no charges against appellant now exist prior to those filed following the interview of May 16, 1957, and, therefore, his dismissal cannot be effective before that date. The Commissioner holds that appellant should be paid by respondent Board of Education the salary which became due him between May 20, 1955 and May 16, 1957.

In summary, the Commissioner finds and determines that the action of the Newark Board of Education in dismissing Robert Lowenstein as a teacher in its schools for just cause was warranted by reason of appellant's refusal to answer pertinent questions properly asked by the Superintendent of Schools and should, therefore, be maintained with the exception of the effective date of dismissal. The action of the Newark Board of Education is hereby modified by making the dismissal effective as of May 16, 1957, and, as so modified, the decision of the Board is affirmed.

COMMISSIONER OF EDUCATION.

October 24, 1960.

DECISION OF THE SUPREME COURT OF NEW JERSEY

Argued January 9 and 10, 1961.

Decided May 22, 1961.

Mr. Morton Stavis and Mr. John O. Bigelow argued the cause for appellant and cross-respondent.

Mr. Jacob Fox argued the cause for respondent and cross-appellant.

The opinion of the court was delivered by

HALL, J. This case is before us for the third time. The prior occasions are reported in *Laba v. Newark Board of Education*, 23 N. J. 364 (1957) and *Lowenstein v. Newark Board of Education*, 33 N. J. 277 (1960). The appellant now challenges the affirmance by the State Commissioner of Education of his third dismissal as a teacher by the respondent Newark Board of Education. This result ensued from further proceedings after our reversal of the earlier similar action in the last-cited opinion. The Board's cross-appeal concerns only the effective date of the dismissal, fixed by it as of the inception of the controversy in 1955, but modified by the Commissioner to relate to the date in 1957 when the charges involved in the second case were preferred following the remand directed by the *Laba* decision. The Commissioner consequently awarded back pay for the two year interim. The appeals are here pursuant to our retention of jurisdiction. 33 N. J., at pp. 291-292.

To bring into focus the precise issues now presented, some retelling of old soil becomes necessary. The controversy stems from the refusal of appellant and two other Newark teachers to answer questions concerning past and present Communist membership and association propounded by a Congressional investigating committee in May, 1955. The declination was grounded on the Fifth Amendment privilege against self-incrimination and was made on the advice of counsel. They were never cited by the committee for contempt of Congress. Dr. Lowenstein at the time was a high school language teacher with about 20 years' service, of acknowledged academic and pedagogical competence and protected from dismissal by the tenure provisions of the school law, N. J. S. A. 18:13-17, "except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause" after notice and hearing on written charges. He had also been prominent for many years in the local and state branches of a national teachers' union.

The city superintendent of schools suspended appellant and the other two on the day of the committee session. Appellant has not taught or received any salary from the Newark school system since. Four days later each of the three was formally charged with conduct unbecoming a teacher based solely on the invocation of the constitutional privilege and consequent refusal to testify before the committee. The Board sustained the charges by a vote of 5 to 4 and ordered dismissal as of the date of suspension. The Commissioner reversed the dismissals and this court, in *Laba*, affirmed by reason of the decision of the United States Supreme Court in *Slochower v. Board of Higher Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1956), rehearing denied 351 U. S. 944, 76 S. Ct. 843, 100 L. Ed. 1470 (1956), handed down after the Board's action. It was there held that violation of the constitutional

safeguard of due process of laws occurs where a discharge from public employment is based entirely upon the exercise of the privilege before a body whose inquiry is not directed at the witness' fitness or conduct in his employment and that no sinister meaning either of confession or presumption of perjury can be imputed from the exercise of this constitutional right. The privilege is designed to protect the innocent who nonetheless may have a reasonable fear of prosecution as well as to preclude a revolting inquisitorial system of justice permitting the prosecution to trust habitually to compulsory self-disclosure as a source of proof. *Slochower, supra* (350 U. S., at pp. 557-558, 76 S. Ct., at pp. 640-641, 100 L. Ed., at p. 700); 8 *Wigmore, Evidence*, 307-309 (3d Ed. 1940); *Griswold, The Fifth Amendment Today* (1955); *Chafee, The Blessings of Liberty*, ch. vii, *The Right Not to Speak*, 179-235 (1956). We therefore held in *Laba* that the invocation of the Fifth Amendment could not constitute *per se* conduct unbecoming a teacher and just cause for dismissal. The California Supreme Court, prior to *Laba*, and the Pennsylvania Supreme Court since, have held to the same effect. *Board of Education of San Francisco Unified School District v. Mass*, 47 Cal. 2d 494, 304 P. 2d 1015 (Sup. Ct. 1956); *Board of Public Education School District of Philadelphia v. Intille*, 401 Pa. 1, 163 A. 2d 420 (Sup. Ct. 1960), *certiorari* denied 364 U. S. 910, 81 S. Ct. 273, 5 L. Ed. 2d 225 (1960).

Laba went on to say: "In the light of our controlling legislation it is clear that in this State any person who is now a member of the Communist Party or who is now subject to its ideologies and disciplines is unfit to teach in our public schools and should be dismissed under R. S. 18:13-17." (23 N. J., at p. 388.) State policy forms the basis of this declaration, as found in the educational oath statute, N. J. S. A. 18:13-9.1 and 9.2, sustained and interpreted in *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498 (1951), judgment vacated as moot, 342 U. S. 803, 72 S. Ct. 35, 96 L. Ed. 608 (1951). Consistent with this legislatively-fixed policy of conclusive emphasis on the present, the Board has quite properly agreed throughout that no right to dismiss exists merely because a teacher was a member of the Communist Party in the past when it is clear he is not presently. See *Lowenstein I, supra* (33 N. J., at pp. 284-285). At no time has appellant been charged with either past or present party affiliation or subjection and such cannot in the present proceeding furnish a basis for dismissal, directly or indirectly.

Laba did not order immediate reinstatement but affirmed the action of the Commissioner in remanding the matter to the Board for appropriate inquiry by the supervisory school authorities. The theory was that, because "of the acknowledged need for keeping sensitive areas, such as the public school systems, wholly free from subversive elements which seek the overthrow of our free society" (23 N. J., at p. 373), the action of the teachers before the Congressional committee gave the school authorities the right of private inquiry of them to determine or assist in determining whether they were presently members or subject to the ideologies and disciplines of the Communist Party and, if so, subject to direct charges of unfitness to teach for that reason. The inquiry approach was premised on the obligation of a teacher to respond fully, without any right to rely on the constitutional privilege, to *relevant* questions of the employer, acting through the superintendent of schools, relating to continued fitness to teach, whether the reason giving rise to the

inquiry be a matter of possible Communist allegiance, moral turpitude or any other unbecoming conduct. *Laba* pointed out (23 N. J., at p. 389) that a willful refusal to answer pertinent questions fairly submitted by administrative superiors at such an interview could also afford an ample basis for dismissal charges under N. J. S. A. 18:13-17. Our further comments in *Lowenstein I* are appropriate at this point:

“The right to interrogate is only for the purpose of enabling the employer to judge whether there is a reasonable ground for the bringing of dismissal charges on the basis of the employee’s answers to relevant questions and of any other information at hand. It is not a broad investigation such as a legislative committee conducts, a trial or an adversary proceeding in the usual sense. Nor is it to be considered an end in itself or as a primary method of dismissal, absent clear lack of cooperation or willful refusal to answer pertinent queries.” (33 N. J., at p. 284.)

“In protecting democratic government we ‘must do so without infringing the freedoms that are the ultimate values of all democratic living,’ *Wieman v. Updegraff*, 344 U. S. 183, 188, 73 S. Ct. 215, 97 L. Ed. 216, 220 (1952). While the opprobrium of dismissal from public employment for true disloyalty is deserved if fully and fairly proved, the stain is so deep and the consequences so devastating (the same holds true where the dismissal is for refusal to answer questions relating to loyalty) that the very fibre of every constitutional right we seek to preserve, as well as every consideration of civilized human decency, dictate that this brand of infamy shall never be implanted without complete understanding on all sides of applicable principles, abundant proof and every requisite of due process. Such grievous guilt can never be found from mere association or simply on suspicion, by innuendo or through alleged inference from truly non-relevant facts. Cf. *Wieman v. Updegraff*, *supra*; *Kutcher v. Housing Authority of the City of Newark*, 20 N. J. 181 (1955). A back door or indirect approach cannot be approved to disguise the real basis not directly and properly proved.” (*Id.*, at pp. 290-291.)

Another possible avenue of the inquiry and basis of disciplinary action was also outlined in *Laba* (23 N. J., at pp. 388-389), namely, whether the refusals to answer before the committee were patently contumacious or frivolous rather than in good faith. This was quite properly not later pursued when it appeared at appellant’s subsequent interview that the privilege had been exercised on advice of counsel. As we noted in *Lowenstein I* (33 N. J., at pp. 282-283), this phase was thereby permanently removed from the case and nothing remained of the original charges preferred in 1955. They were finally dismissed by the Board at the hearing after the decision just referred to, as we had there indicated should be done.

Following the *Laba* remand, the superintendent and the Board, in May 1957, pursued the inquiry procedure which that decision had authorized. Its outcome—charges based on his refusal to respond to allegedly pertinent questions of the superintendent, dismissal based thereon by unanimous vote of the Board and affirmance by the Commissioner—brought the matter before us again in *Lowenstein I*. The issue there involved was the relevancy of those questions which appellant had declined to answer. They related primarily to *past* associations and conduct as distinct from the present. Appellant denied

any Communist membership or activity at the time of the inquiry and for a period of something less than two years prior to his 1955 appearance before the Congressional committee. We were convinced that both sides had misapprehended the import of what was said in *Laba* about the scope of the inquiry with the result that neither the approach nor the course conformed to what we had intended, despite our belief that all involved undoubtedly made every effort to comply with the mandate as they conceived it. We were therefore impelled, in the cause of both the public interest and the certainty of fairness to all parties involved, to reverse the dismissal and remand the matter again to the local level, but without reinstatement in the interim, so that a new inquiry might be pursued in the way *Laba* contemplated.

The trouble was, as we saw it and spelled it out in an opinion in which every member of the court joined (33 N. J., at pp. 285-287), that both sides somewhat lost sight of the only proper subject of the inquiry, *i. e.*, present membership or subjection to the ideologies and disciplines of the Communist Party. On the one hand there was overlooked the essential that questioning as to past affiliations and activities is not automatically relevant and always permissible, but only so in the event of rational and reasonable doubt of the truth of denials as to the present in order to test such statements (33 N. J., at p. 289). On the other hand, the appellant equally misconceived the concept in insisting on conclusive irrelevancy by reason of time alone and of alleged invasion of privacy (33 N. J., at pp. 287-289).

There followed the second interview of appellant by the superintendent in September 1960 which grounds the present appeal. Again appellant, after thoroughly attesting to his present loyalty and belief in Americanism, declined to answer questions which related to views and events back of 1953. Charges were preferred on the basis that the questions were pertinent and the refusal to reply thereto impeded a fair inquiry to determine if he was presently subject to Communist ideology. He was found guilty of conduct unbecoming a teacher grounded thereon and the Board ordered dismissal—this time by a 5-4 vote. The Commissioner affirmed.

We are willing to assume that, under the circumstances of the interview, its pattern sufficiently followed that outlined in *Lowenstein I*. Questioning as to past events, which led to the refusals, for the most part followed exploration of the present and the interrogator's claim of doubt with respect to appellant's assertions of current allegiance. There was some disagreement as to whether "the present" meant 1960, 1957 or 1955. The difference is of no real significance in considering the issue before us. We think it fair, over-all, to presume that the two participants sought, in good faith, to adhere to the principles laid down by our prior decisions as well as could realistically be expected. Since both parties were advised throughout the interview by reputable and capable counsel (the superintendent's counsel was not the attorney for the Board) whose first endeavor had to be to see that the mandate of this court was followed, the deviations on both sides that appear to exist on the face can well be attributed to the fact that the actual participants were laymen and cannot be strictly held to a standard of precise legal expression. There is apparent, however, a formalism and strictness of attitude and position throughout which we would like to have seen otherwise, but which we must recognize as probably unavoidable after over five years of litigation and local public interest in an area in which convictions are bound to be strong and feelings run high.

Consequently the interview became actually an adversary proceeding, with appellant as a witness under cross-examination in a pervading atmosphere of legal rigidity. Numerous objections to questions as being outside the limitations discussed in *Lowenstein I* on the one hand, and insistence thereon on the other, fill the transcript. They were, of course, not resolved at the interview and the conflict resulted only in refusals to answer on the advice of counsel.

The precise, and concededly the only, issue before the Board, very painstakingly and correctly explained by its counsel at the hearing on the charges, was indeed a simple and a narrow one. It resolved itself into whether the superintendent was justified, as a matter of objective rationality and reasonableness, in doubting appellant's denials of present Communist affiliation and subservience and his affirmations of loyalty and allegiance to the American democratic system solely by reason of answers he gave to certain other questions concerning related aspects, and so was entitled to probe into appellant's past views and associations with respect to Communism. If the superintendent was so justified, Dr. Lowenstein was bound to answer, on penalty of dismissal, the four refused questions forming the basis of the charges. The particular queries may be summarized as whether he was a Communist or a member of any Communist front organization or subject to or a believer in Communist ideology, discipline or principles at any time from 1950 to July 1953. If there was no such justification, the charges could not stand.

We state the issue as we have because of the nonjudicial nature of the proceedings before the superintendent. But fundamentally the matter is one of law, *i. e.*, the legal relevance of the disputed queries to the object of the superintendent's inquiry. If the proceeding had been before a judge, the matter would have been ruled upon at once as a legal question determinable by the court and not as an issue to be decided by the trier of the facts. Judges do this constantly in every trial in passing on the propriety of a particular interrogation and the admissibility of evidence. Appellant would then immediately have known where he stood. But here, because of administrative mechanics, no court could enter the picture to decide this legal question until the case reached us. So the question had to be put to the Board and the Commissioner—lay administrative agencies—in the way in which it was and appellant had to guess before the superintendent what our ruling would finally be and take his stand accordingly. See the discussion in *Chafee, The Blessings of Liberty, supra*, at pp. 210-212. Our subsequent discussion of relevancy in review of the action of the lower tribunals is therefore undergirded by this legal point of view as if we were sitting as a trial court having to rule on the pertinence of the questions. While a matter of relevancy must be considered in the full factual setting and a certain amount of leeway must be allowed, nonetheless it must be affirmatively clear to a court that the disputed queries have some objective "tendency in reason" relating to the object of the inquiry. See N. J. S. 2A:84A-3.

We should make the picture more concrete by a brief resume of the pertinent parts of the interrogation. It commenced with appellant's responses to inquiry of his views on Communism and "Americanism." They were clear and unequivocal. In stating that he was against Communism as he understood its philosophy and in the course of telling why, at some length, he commented:

“I don’t think it is good for our people to any extent that any regime or party or organization favor and condone the violent overthrow of the Government, and I am hostile to that attitude and approach. Wherever I notice suppression of free formulation of individual unfettered opinion, restrictions of any of the institutions that people have labored over centuries to evolve or the improvement of the material or spiritual life, I am hostile to anything that threatens these hard won attainments of civilization.”

His testament of allegiance to the American system may well be quoted:

“I could not imagine that any human being on this earth would rather be anything but an American citizen if he could. I certainly would not want to be anything but an American citizen. There are some institutions of ours, historically involved, that I consider so inequitable, so inadequate to the needs of our national life today in what the world looks to America for, but on the whole I think we have got a better set of institutions, a better framework of Government founded on our Constitution and on our bill of rights than any other people can boast of.

I think we have in our form of government the maximum opportunity granted any people so far in the history of the world to strive for individual and social betterment.”

He then positively denied he was a Communist or a member of any Communist front organization and asserted that he was not subject to and did not believe in Communist ideology or discipline. He also said, in response to a specific question relating to 1955, that he had not attended any Communist organization meetings or met and engaged in discussions with known Communists. (All of these views were reiterated at the end of the interview and also when appellant testified on his own behalf at the subsequent Board hearing.) On his own motion he related the effect of all his answers back to the summer of 1953 since, as he said, he had been willing to speak as of that date at the superintendent’s 1957 inquiry.

Then came a series of questions, the answers to which evolved at the Board hearing as the basis of the superintendent’s claim of doubt in the truth of the affirmations and denials just outlined. While no basis was set forth in the formal charges preferred by the superintendent, the interrogation now to be summarized was pointed out by the Board’s counsel at the hearing as the source of the claim and was specified as such in the Board’s written findings sustaining the charges. The first few of them sought the extent of appellant’s knowledge in 1955 of the Communist party and its program in the United States and this state, to which the reply was in effect that he knew nothing. Next was a query as to whether he believed in 1955 that the Communist Party advocated the violent overthrow of the United States Government, to which he responded that he did so believe because the United States Supreme Court had said so. The subject matter was extended to the international sphere by a question inquiring as to his views whether the Communist Party was merely advocating political beliefs or was an international conspiracy one of whose objects was to overthrow this government by force. The answer was that he scrupulously tried to avoid arriving at opinions and conclusions about matters not within his special sphere of competence as a citizen, that he did not think

the Supreme Court had spoken on this phase, so that he really did not know what international communism was today.

The appellant was then interrogated whether in 1955 he believed a Communist was a fit person to teach in the Newark public schools. He replied:

“The question of fitness to teach I interpret differently from many people. In my opinion, in a free society a person who meets the legal requirements in whatever capacity he chooses to engage in, the professional requirements for the position, is entitled to teach, provided of course that he is not abusive of his position and conforms to all legal and professional requirements and maintains his status of competence in those areas.”

The next question was whether in 1955 he believed a person could be a Communist and also a loyal American citizen. He said he probably thought so; one could and could not; it depended on the individual. When the question was enlarged to include his belief today, he answered: “* * * I would so drastically modify what I think my view was in 1955, that I would probably say fewer and fewer people today could be loyal American citizens and Communists at the same time.” He ascribed his change in view to the course of events and international relations in the past five years.

Then came a rather double-edged question: “Does the general universal knowledge that a Communist is required to deceive and cheat, and generally break the rules of a game as we know it, does this in any way enter into, in your opinion, into their inability to be loyal American citizens?” He replied he knew nothing about this and wondered what element of truth there might be in the premise.

The final queries in the series related to appellant’s beliefs as to whether a teacher who was a Communist could have the required scholarship and teaching methodology requisite for his position in a public school system as well as respect for the individual. His answer was in the affirmative, prefaced by a statement that he had studied the matter in some detail, including differing views held on it by educators in other democratic countries as well as our own, and that there was no generally accepted position.

It should also be mentioned that just prior to the superintendent’s claim of doubt, he asked Dr. Lowenstein whether he had attended a picnic at Midvale, New Jersey, in September, 1956. The reply was that he had not and when further asked if he knew anything about a picnic at that location on that date, he explained that he had driven to the area to deliver a life insurance policy to a customer that day, had been surprised as to heavy traffic conditions in the vicinity, inquired as to the cause and was told there was a picnic nearby. He never even saw the spot and did not know the nature of the affair.

At this point the superintendent stated his doubts. He put them this way:

“The fact is that I do have information that you were an active militant Communist; not just passive or lukewarm. And in this capacity you were a representative of the State of New Jersey; you represented the teachers’ groups in the State, and particularly in Newark. You represented particularly in that capacity the Newark Teachers’ Union of which you were at one time president.

This information which I have, together with further information regarding the picnic or gathering in Midvale [which the superintendent amplified to the effect that appellant and his car were seen at a point near the spot of the gathering—a labor press picnic at which several Communist members were recognized] * * *, together with the fact of your indirect answers to some of these questions * * *, together with your general attitude and demeanor in many of the answers that you have given me, that frankly I am skeptical as to some of the things you said about the present, and in view of these I do have sincere and honest doubts. Therefore it seems to me that I have no choice, no alternative, but to question you as to some of your activities and some of the persons involved in the past * * * .”

The information as to prior Communist activity was stated to be from an admitted former Communist, but not further identified beyond the fact, specified at the request of appellant’s counsel, that it “covered a period up to and including some time in the year 1944, 1945.” (The information referred to obviously was testimony given by Dr. Bella Dodd in a hotel room in Newark to two members of the Congressional committee the night before the May 1955 committee hearing and referred to in the Board proceedings prior to *Laba*. The session was a closed one, with no outsiders present and, of course, no cross-examination. Needless to say, such testimony would never be considered by any court of law.) The terminal date had significance since it was established before the Board that Dr. Lowenstein was in military service from 1942 until November 1945, much of the time overseas, thus placing any party activity of the nature suggested prior to 1942 and at least 15 years before “the present.” Incidentally, the testimony of his commanding officer before the Board at the hearing after the *Laba* decision was highly complimentary of his services when stationed in Italy on behalf of Americanism both among our own troops and the civilian population.

Note should also be made that it was agreed that the phrase “general attitude and demeanor in many of the answers that you have given me” had reference only to the content of the answers and not to physical manifestations while testifying.

The questions which followed the expression of doubt dealt largely with appellant’s acquaintance, association and activity with or with respect to certain named individuals, principally people affiliated with the New York Teachers’ Union. In *Lowenstein I* (33 N. J., at p. 289) we raised the matter of the materiality of the same line of questioning, but that matter need not further concern us here. The scope of the queries was generally without limit of time. As soon as they dealt with matters back of 1953, appellant’s counsel objected on the ground that the reasons asserted by the superintendent as grounding his claim of doubt of the truth of the prior denials of present Communist affiliation or subjection and of the affirmations of current loyalty “do not come within the language of the Supreme Court authority and does not justify your inquiry into the so-called past.” We believe the objection can fairly be read to mean that the reasons given by the superintendent could not validly amount to doubt as a matter of objective rationality and reasonableness and therefore inquiry as to the past was not relevant. Consequently appellant was advised not to answer most of such queries and did not. The superintendent specified in his charges only the refusal to respond to the last four ques-

tions which, as we have indicated, inquired as to Communist membership and subjection to or belief in Communist ideologies and discipline between 1950 and 1953.

Appellant's counsel did advise him to answer one question without limit of time. This inquired whether he had ever in any fashion personally promoted the communistic point of view in the classroom or had been instrumental in soliciting other teachers to do so. He replied that he had not.

At the Board hearing on the charges, the only evidence in support was the transcript of the superintendent's inquiry. Beside Dr. Lowenstein's own testimony as to his beliefs and loyalty, several witnesses testified to his high reputation for integrity and veracity. In fact, the Board's counsel was willing to stipulate that the only evidence in the case was that of good reputation on all scores. After the argument of counsel, in which we have said the issue the Board had to decide was most clearly pointed out, the hearing adjourned for five days, on which continued date the vote to dismiss was taken after several members had made statements giving their reasons for their individual decisions, of which more will be mentioned shortly. A week after the vote the Board met again and adopted a formal resolution of dismissal as of May 20, 1955. The resolution set forth at length the answers to the questions previously detailed which it found "reasonably justified the doubts asserted by the Superintendent and the additional inquiry which he believed to be necessary by reason thereof." It further recited that it was appellant's duty to answer the four questions we have previously referred to "and that his refusal to do so and to give any information as to Communist affiliations prior to the July 1, 1953 'cut-off' date fixed by him, unduly obstructed" the effort to ascertain "all of the relevant facts which would serve to establish whether or not he is now a member of the Communist Party or subject to its ideologies and disciplines."

The Commissioner, in his decision of affirmance on the appeal, concluded that appellant was not justified in his refusal to answer the questions put. In reaching that result, the language of the opinion uses a much broader brush than was indicated by the precise issues before the Board and so before him on review. Of course, under familiar principles, if the result is right for other reasons, we need not be overly concerned with the articulation of the process by which it was reached. However, particular reliance appears to have been placed on one aspect upon which we should comment. The Commissioner strongly took the view that appellant had, contrary to the principles laid down in *Lowenstein I*, again arbitrarily fixed a date (June 1953) beyond which he would not speak on the ground of conclusive irrelevancy. Stress was laid in the opinion on this and practically nothing was said about the primary question of whether there was a rational and reasonable basis for the superintendent's claim of doubt based on the content of the answers to certain of his questions. We believe the view taken is not warranted since we do not read the appellant's refusals to answer as arbitrary. As we have already pointed out, his counsel promptly objected to exploration of the past on the ground that the reasons advanced by the superintendent for his doubts were not legally valid as a matter of objective rationality and reasonableness and stated he would advise appellant not to answer. The latter consequently refused and said he was doing so on the advice of his counsel. Any further statements by him about not going beyond 1953 must be read in that context and in the light of our earlier observation that the lay participants should

not be held to a standard of legal precision in their language. We think it fair to infer that appellant, in his declinations to answer, was in effect, though inarticulately, adopting the ground previously asserted by his counsel. Moreover, if counsel is correct in his objection, there was no sufficient basis to permit "past" inquiries at all and so it also seems to us that it really matters not what else appellant may have said when he thereafter refused to respond to particular queries.

Before returning to the reasons given by various members of the Board prior to casting their votes, perhaps we should amplify our earlier statement that the only issue before the Board was whether there was rational and reasonable basis for the superintendent's claim of doubt of the denials of present Communist allegiance solely by reason of the answers appellant gave to the questions concerning related aspects which we have detailed. It will be recalled that when the superintendent expressed his claim of doubt during the interview, it was also grounded on information he said he had of Communist activity up to 1944 or 1945 and concerning the Midvale picnic. Neither of these bases was advanced before the Board by its counsel as justifying excursions into the past. As to the first item he specifically told the Board it was insufficient to ground a doubt and he placed no reliance on the second. In the Board's brief in this court it is expressly conceded that neither is enough, factually or legally, to generate reasonable doubt as to the present. This is eminently correct. Neither matter could have any proper place in the Board's determination of the issue before it.

Six of the nine Board members volunteered their reasons before they voted. Three were in favor of dismissal and three against. Understanding of the issue to be decided and expressions of a proper basis for the individual's decision are sufficiently evident in the case of four, considering each statement as a whole as we must since made by laymen. But we are greatly concerned about the comments of the other two, who were, respectively, the maker and seconder of the motion to dismiss and the subsequent motion to relate the dismissal back to May, 1955. Their votes were numerically decisive in the 5-4 results. Appellant urges the reasons they gave resulted in a failure by the Board to abide by our decision in *Lowenstein I*. The Commissioner did not pass on the point. Our study convinces us, upon fair consideration of the total remarks of these two, that, though persons of undoubted sincerity, honesty of purpose and understandably strong convictions in the whole matter, they did not decide the issue so plainly presented, but instead voted for dismissal on grounds with which appellant had not been charged and for reasons which had no valid place in the matter. We must therefore conclude, apart from anything else, that the dismissal cannot stand.

The first of these two prefaced his remarks by saying that "I am looking at this from a viewpoint more or less as a father and perhaps even more as a spectator" and concluded:

"* * * I am not making any decision so far as to what the Supreme Court has said or hasn't said. I am making my decision on the fact that I am a father with children who go to school and the type of person that I would like to have teach my children."

Leading up to the latter statement he spoke strongly that he was "awfully sure" appellant had lost "his respect," had grave doubts that "he was a normal American teacher" and as a father could not see "where he has any effectiveness in our school system." He appeared to have based his views only on the substantive matter of appellant's refusal to answer whether he had been a Communist before a certain time. Accepting at face value his statement that he could not absorb the "legal implications * * * in the time allotted" (he was one of three new appointees to the Board since the 1957 case), it is nonetheless perfectly clear that he did not consider at all the plain and simple problem whether the superintendent, by reason of appellant's answers to other questions, was reasonably justified in his doubt of present allegiance. Rather he found appellant guilty of the uncharged substantive offense of present unfitness to teach by reason of refusal to reveal past Communist affiliation. This is analogous to a jury convicting a defendant of murder when he had been indicted and defended himself on a charge of larceny.

The second member whose remarks especially concern us also did not attempt to pass judgment on the basis of the issue before the Board. His decision, he said, "is based on the moral issue that is involved." It is, of course, elementary that vague and personal ideas of moral right and wrong cannot be a determinant of a specific issue of the kind the Board had to decide. Apart from that, the moral issue he apparently had in mind he defined as the unwillingness of appellant "to bend backwards to give us some information to help us decide some of the issues for the years preceding 1953." We can only interpret that to mean, not so much skepticism as to present loyalty, but a view in this member of a right to dismiss if appellant had been a Communist prior to the year mentioned. Not only was there no such charge involved but it had been made as clear as anything could be by the Board's own concession that such was no valid ground for dismissal even if true.

It further seems reasonably inferable that these two members at least, if not the entire majority, also had in their minds a vestige of guilt because of appellant's exercise of the Fifth Amendment privilege before the Congressional committee in 1955. It is difficult to find any other reason for their motion to relate the dismissal back to that date, especially after we had spoken so directly in *Lowenstein I* that nothing whatever remained of the original invalid charges preferred on that basis.

It may be noted in passing that the state of mind of these two members is sharply pointed up by contrast to the comments of two other members on the same subject matter. In articulating the distinction between broad questions not before them and the precise issue they had to decide, these two both indicated that, while they thoroughly understood appellant had the right to stand on a legal position as this court had defined it in the prior decisions and they had to decide the matter accordingly, they were nonetheless unhappy that he had chosen to so limit his responses. They expressed their thought that he had thereby impaired his value and usefulness to the school system and that it would have been better for the community and the profession had he not been so adamant. This was a natural viewpoint and at the same time a very proper recognition that an issue arising out of valid insistence on legal right cannot be judged—by the Board, the Commissioner or this court—on

whether it was the wise course for the individual to pursue under the circumstances.¹

Our conclusion that the dismissal must fall for the reason given rests upon most fundamental principles. "Administrative action is of necessity judged by the grounds from which it proceeded according to the record." *In re Plainfield-Union Water Co.*, 11 N. J. 382, 395-396 (1953). A court should readily interfere where the action is illegally grounded, as distinct from a situation where there is involved only the reasonableness of the administrative result reached on a proper basis. Cf. *Borough of Fanwood v. Rocco*, 33 N. J. 404, 414-415 (1960); *Bivona v. Hock*, 5 N. J. Super. 118 (App. Div. 1949); *South Jersey Liquor Dealers Ass'n v. Burnett*, 125 N. J. L. 105 (Sup. Ct. 1940). And where, as here, the power of the agency (the Board) to act and the extent of that power are prescribed and delineated by a prior judicial opinion in the matter and the court's mandate on remand, the appellate judgment becomes the law of the case and the agency is under a peremptory duty not to depart from it. *In re Plainfield-Union Water Co.*, 14 N. J. 296, 302-303 (1954); cf. *Flanigan v. McFeely*, 20 N. J. 414, 420-421 (1956); *Reinauer Realty Corp. v. Borough of Paramus*, 34 N. J. 406 (1961). When it affirmatively appears on the face of the record below as clearly as it does here that the two decisive votes were based on extraneous issues not before the body for decision, fundamental unfairness results. *Reinauer Realty Corp. v. Borough of Paramus*, *supra*. In the face of the record it would be a travesty to suggest that the defect was somehow cured by the letter-perfect formal resolution of dismissal and findings prepared by the Board's counsel and adopted some days later. In this kind of situation the standard of judicial review must be the fundamental premise of substantial justice. *Russo v. The Governor of the State of New Jersey*, 22 N. J. 156, 168 (1956).

The question that now presents itself is what disposition we should make of the case. Ordinarily where an administrative agency decides a matter improperly, a reviewing court will remand the proceeding to the erring tribunal for redetermination on a proper basis. But here, as we have said, a question of law is what is fundamentally involved. Moreover, even if we look at the matter as if we were standing strictly in the shoes of the Board and the Commissioner, this court does have undoubted power to make independent findings

¹ In this connection there comes to mind the observation of the late Professor Zechariah Chafee, Jr., one of the nation's greatest defenders of civil rights, in his last work (*The Blessings of Liberty*, *supra*) where he said, with reference to invocation of the self-incrimination privilege, but which seems equally applicable to insistence on strict legal limitation of questioning by an employer:

"If I were consulted by a prospective witness who contemplated the possibility of claiming the privilege or wanted to keep silent for any other reason, I should give him two pieces of advice:

First. 'It is not only a legal requirement, but also by and large a principle of wisdom and good citizenship for an individual called before a court, a grand jury, an administrative commission, or a legislative investigating committee, to answer questions frankly and honestly. The constitutional privilege to keep silent is an exception to your legal obligation to testify; but even when the legal privilege is available, there are times when it is best not to exercise it. For one thing, although the law is plain that you do not admit guilt by claiming this right to silence, the law cannot control the effect on public opinion. The fact that you feel it necessary to refuse information to a government agency on the ground that it will incriminate you, inevitably casts a shadow on your reputation, whether fairly or not. Also you hurt the enterprise where you work, and you will perhaps imperil your job there' * * *." (at p. 217)

of its own and will exercise that right where the interests of justice require. R. R. 4:88-13; 1:5-4(b). *Borough of Park Ridge v. Salimone*, 21 N. J. 28, 39 (1956); *Greco v. Smith*, 40 N. J. Super. 182 (App. Div. 1956); cf. *Rushin v. Board of Child Welfare*, 64 N. J. Super. 504 (App. Div. 1961). The considerations that usually dictate the opposite course are not present here. Again we repeat that the only issue is whether objective, rational and reasonable doubt of appellant's denials of current Communist affiliation and subjection can be grounded on his answers to the questions earlier detailed so as to make inquiry into the past legally relevant and permissible, as we spelled it out in *Lowenstein I*. An essential of the factual setting is the matter of appellant's veracity. And by concession, there is not involved the matter of demeanor or other physical manifestation during the questioning, so the element of due regard for the personal opportunity of the interrogator to judge credibility is absent. See R. R. 1:5-4(b). Also it is not a question of any particular expertise in the field by either the Board or the Commissioner. *Russo v. The Governor of the State of New Jersey*, *supra* (22 N. J., at p. 169); *Connolly v. Jersey City Housing Authority*, 63 N. J. Super. 424, 428 (App. Div. 1960). All in all, the question is peculiarly one for court determination, which can fairly be done on the printed record.

Moreover, and of greater significance, this controversy has already lasted six years and it is in the interest of essential justice that it be finally concluded. A remand by reason of the fundamental error mentioned would have to be to the Board. (It may be observed that very recently the Legislature has changed the procedure for the hearing of charges against tenure teachers. Such matters are hereafter to be determined in the first instance by the Commissioner and no longer by the local board. L. 1960, c. 136; N. J. S. A. 18:3-23 *et seq*. The statement annexed to the bill gave as one reason for the change that "publicity attendant on the local hearing often 'tears the community apart' and disrupts the orderly conduct of local school affairs.") If dismissal were again the result, another appeal to the Commissioner would undoubtedly follow. In light of the latter's view expressed in his present decision, a further review would ensue. And the meritorious question on which the case finally must turn then at last before us would be no different than it is today. All considerations clearly indicate that we should now determine it once and for all and we shall do so.

In *Lowenstein I* we pointed out that while an employee may not rely on the fundamental privilege against self-incrimination in refusing to answer questions in an interview by his employer with respect to fitness, "[p]rior event queries may not be posed just for their own sake and one cannot be compelled involuntarily to bare one's soul as to the past for that reason alone. Relationship to the object of the inquiry must appear." (33 N. J., at p. 285.) In other words, there is a qualified right not to speak which may be insisted upon even in such a setting, worthy of protection in the interests of the primary objects and benefits of a free society and not to be lost sight of. So the requirement, where as here the purpose of the inquiry is to shed light upon and ascertain an employee's present beliefs and motivations, that rational and reasonable doubt as to the truth of current professions must objectively exist before more than the immediate past can be explored, and then only to aid the interrogator in coming to a conclusion as to the truth of a response concerning the present. Although we must deal with the somewhat theoretical

concept of rational and reasonable doubt, it is nonetheless a standard well known and constantly applied by courts in many areas of the law. If, then, we are thoroughly convinced there is no sound basis in reason or logic for such a doubt on the basis assigned for it, we must conclude the questions which appellant refused to answer were not legally relevant and the Board could not properly find that they were. We are so convinced.

The Board concedes that there is not a shred of fact in this record tending to indicate in any way that Dr. Lowenstein was a Communist or subject to the ideology and discipline of that party, from at least 1953 on. And, even if the question were before us, we cannot reasonably infer from the record any prior membership unless the Dodd information is considered and that admittedly did not extend beyond 1944 or 1945. Moreover, those accusations are conceded to be too remote in themselves and there seems to us to be no sufficient supporting bridge between then and the present. It is also agreed, as we have said, that the only conceivable basis for any doubt of the truth of his assertion as to the present is the content of the answers given to certain other questions. These answers can fairly be characterized as "unorthodox" in the sense that they differed in many respects from those that would probably be given to the same questions by most citizens in this country today, *i. e.*, that they were not the popular or expected responses. It is not suggested that they were not true and sincere answers, but rather that they were "queer." In fact, at oral argument, counsel for the Board expressly stated that if the replies had been "orthodox," the superintendent would not and could not have had any doubts as to the professions of present loyalty and non-Communist adherence.

The particular queries and responses relied upon by the Board and earlier set forth in detail herein fall into two general categories. The first dealt essentially with appellant's belief and understanding in 1955 and since about objectives and methods of the Communist Party here and internationally. The replies were to the effect of lack of precise, personal knowledge sufficient to form and express an opinion except where, to his understanding, the United States Supreme Court had spoken on the subject in which instance he adopted its conclusion. Appellant is obviously a person of independent mind, not given to forming or expressing opinions without being conscientiously convinced of the soundness and accuracy of the underlying facts. His mental processes appear to be those of the scholar who does not jump to conclusions or accept a popularly held viewpoint without question and study. These answers clearly seem to be intellectually honest ones from a man who is reluctant to talk of matters about which he does not feel thoroughly qualified. We fail to see where they could possibly indicate any preference for Communism or induce a rational skepticism of his professions of loyalty.

The second category of questions related to appellant's views as to the fitness of a Communist to be a teacher and ability to be a loyal American citizen. With respect to his expressed belief of teaching fitness, he frankly stated that he held different views from many people. As much as most persons would not agree, Communists are permitted to teach in other democratic nations and appellant's view is held by many eminent members of the teaching profession in this country whose loyalty cannot be suspected in the slightest. See *Academic Freedom and Tenure in the Quest for National Security*, Report of a Special Committee of the American Association of

University Professors, 42 *Bulletin* (of the Association) 49 (1956). The many varied writings on the subject are listed in 2 *Emerson and Haber, Political and Civil Rights in the United States* 1084-1085 (2d ed. 1958). Again we say, as much as this group of answers may well be dissented from by the vast majority of our people, they appear to represent honest views which appellant has every right to hold and express and which cannot in any way cast doubt on his allegiance or the truth of his assertions thereof.

Moreover, further reflection makes it crystal clear to us that these "un-orthodox" answers buttress the truth of his professions of American belief and denials of Communist affiliation and subjection rather than detract therefrom. It must not be forgotten that he was not just a participant in a discussion between two people but a sworn witness under cross-examination in what amounted to a rigid and tense adversary proceeding with a long history of hard fought litigation behind it. No one in his position could help but know the kind of answers which would satisfy and end the whole matter favorably. If he had lied about his present beliefs and affiliations, it is safe to say he would have followed by giving popular and, as to him, dishonest answers to the subsequent questions under discussion. So the very fact that he responded to them the way he did is the strongest kind of proof of the veracity of expressions of his basic tenets and of the unreasonableness of any doubt thereof.

From a deeper aspect we, as a free people, can never reach the point where the loyalty of a man can only be established by his giving one set of "stock" answers to such questions or where he can be deprived of his position as a teacher because he dares express an unpopular view, no matter how wrong many may think that view to be. Although the immediate battle might be won, surely the war would ultimately be lost if the contrary were to prevail. There is just not enough in this case to warrant a dismissal for refusal to answer the four questions. It is therefore set aside and reinstatement directed. If the school authorities had any sound basis to believe that appellant is a Communist member or subject to party ideologies and disciplines, we assume there would have been a specific charge to that effect by which that question would be directly, fully and fairly tried out and determined.

There remain the interrelated questions of back pay and the Board's cross-appeal from the Commissioner's modification of its action whereby he set aside that portion which had made the dismissal effective as of 1955 instead of as of the date of the 1957 charges. By reason of this reversal he awarded back pay for the two year period between 1955 and 1957, at the same time sustaining the dismissal as of the latter date.

We see no merit in the Board's position in this respect. As was indicated by *Laba* and clearly said in *Lowenstein I*, there being no legal warrant for the 1955 charges, they completely fell. By the same token, suspension accompanying them also lost all legal efficacy. The mere fact that we directed in *Laba* and *Lowenstein I* that appellant not be reinstated pending pertinent inquiry and final outcome under the procedure we outlined as appropriate did not revive that suspension. The case had to rest after *Laba* only on the charges preferred in 1957 and since. The Commissioner was correct in finding that it was error to relate the dismissal back to 1955, although the matter is somewhat academic in the light of our decision that the dismissal cannot stand at all.

While the Commissioner gave practical effect to his change of the dismissal date by awarding back pay for the two year interim period, our holding that he was correct is not intended to settle the right to salary for that time or, for that matter, for any subsequent period. Appellant appears to claim his full salary since 1955 although only the last sentence of his brief mentions it: "Back pay will follow pursuant to R. S. 18:5-49.1 (Laws of 1948, c. 241)." The Board has not argued the question beyond the point in its brief contesting the Commissioner's determination as to the effective date of dismissal in which it did not refer to the back pay aspect at all. So we do not know whether it thereby intended to concede it was liable for full salary between 1955 and 1957 if this court sustained the dismissal but agreed with the Commissioner as to the effective date or for full salary from 1955 to date if, as is the result here, we set aside the dismissal and ordered reinstatement.

Under the circumstances we feel we should not attempt to make any disposition of the question now. The statute referred to (N. J. S. A. 18:5-49.1) provides that if a dismissal or suspension by a local board of education "shall upon appeal be decided to have been without good cause," the person involved "shall be entitled to *compensation*" for the period covered, provided written application therefor be filed with the local board "within thirty days after such judicial determination." (Emphasis added.) (Note also L. 1960, c. 136, sec. 6 (N. J. S. A. 18:3-28), effective October 5, 1960, the statute directing charges against tenure teachers to be heard and determined by the Commissioner rather than the local board, which provides that a board may suspend the person against whom a charge is made upon certification thereof to the Commissioner, but that if the charge is ultimately dismissed, immediate reinstatement shall follow with "*full pay*" as of the time of the suspension.) N. J. S. A. 18:5-49.1 seems to contemplate that the matter of back pay should be disposed of separately and subsequent to the determination of the substantive charges. It therefore appears to us that appellant should follow the course laid down in the statute and make application to the Board within 30 days of the coming down of our mandate for such sum as he deems he is legally entitled to. If the amount cannot be then settled and agreed upon, the Board should certify the question to the Commissioner for determination pursuant to the procedure prescribed by the 1960 act (N. J. S. A. 18:3-23 et seq.) after full hearing including the presentation of such evidence as may be material. In the interest of expeditious disposition of this final phase of the controversy, we will retain jurisdiction to the extent that either party may appeal directly to this court from the Commissioner's determination by filing a notice of appeal within ten days thereafter. Without intending either to indicate issues which should be raised or to circumscribe counsel in their contentions, we might call attention to the discussion of the various aspects of the problem of back pay in our recent opinion in *Miele v. McGuire*, 31 N. J. 339, 347-352 (1960), particularly with reference to the question of reduction of the amount thereof by sums which were actually earned or could have been earned during the period (possibly less appellant's costs and attorney's fees of the litigation) in the light of the actual language of and legislative intent evidenced by N. J. S. A. 18:5-49.1 and 18:3-28 (if substantively applicable since enacted after this controversy arose). Compare R. S. 40:46-34, as amended.

The determination of the Commissioner of Education affirming, as modified, the action of respondent Newark Board of Education in dismissing appellant is reversed and respondent is ordered to reinstate appellant to his position as a teacher.

FRANCIS, J. (dissenting). In *Laba v. Newark Board of Education*, 23 N. J. 364 (1957), Justice Jacobs, speaking for this court, noted that Dr. Lowenstein had pleaded the Fifth Amendment on being interrogated by a Congressional committee with respect to present or past membership in or association with the Communist Party, and that his reliance thereon had resulted in dismissal by the Newark Board of Education from his teaching position in the public school system. The opinion, representing the unanimous view of the court (on this phase of the problem) agreed with the State Commissioner of Education that a plea of that nature could not of itself provide a basis for the action taken by the local board. In approving the Commissioner's remand for a further hearing, certain observations were made with respect to the course and scope that the inquiry might properly take.

The court said that assertion of the constitutional privilege against self-incrimination does not justify automatic dismissal, but it "does call for a full and conscientious inquiry as to whether [such a person] is qualified to continue in the discharge of his teaching responsibilities at a place dedicated to the advancement of democratic ideals." 23 N. J., at pp. 393, 394. In an inquiry of that character Lowenstein had a "duty of cooperation and an affirmative burden in the establishment of [his] fitness." *Id.*, at p. 392; and in examining him the school authorities could with propriety interrogate "with respect to [his] present and past association with the Communist Party and affiliated organizations" and they were "entitled to frank and full disclosures." *Id.*, at p. 388.

At the rehearing on May 16, 1957, before Dr. Edward F. Kennelly, Superintendent of Schools, the information justifying the inquiry was not limited to the assertion of the Fifth Amendment privilege before the Congressional committee. The record shows additional material of varying degrees of probative force (for purposes of this type of interview) concerning Lowenstein's alleged Communist connections and activities. The information came largely from statements of one Dr. Bella Dodd, a former Communist, apparently given in her testimony before the Congressional committee. For example, at the interview of June 21, 1955, counsel for Lowenstein placed in the record the following excerpt from her testimony:

"Q. The Committee's purpose in calling you at this time is to ask you whether or not you knew, as a member of the Communist Party, an individual by the name of Dr. Lowenstein?

A. Yes, I did."

Moreover, in the appendix of Lowenstein's brief on the second appeal in this court further questions and answers of Dr. Dodd were included:

"Q. Will you tell the committee whether or not Mr. Robert Lowenstein was in frequent attendance at the fraction meetings of the Communist Party in New York, which you have just described?

Dr. Dodd: Mr. Lowenstein was the individual who came to any meeting held by the top committee of the Communists in the American Federation of Teachers, when held in New York.

* * * * *

Q. Will you tell the committee whether or not Mr. Robert Lowenstein played any part in the accomplishment of that objective?

Dr. Dodd: Mr. Lowenstein was regarded as the most important member of the Communist group in this activity, although the technical leadership was given to the Communist Party member who became the State Chairman of the American Federation of Teachers. * * * She was the official person, although Mr. Robert Lowenstein was the effective instrument, the person who did the organizing."

At the outset of the rehearing Kennelly informed Lowenstein that he was interested in "only one thing, and that is getting at the truth of this situation"; since the testimony was to be given under oath by consent he anticipated that "we will get at that truthfully and fully."

The interrogation which began on a friendly, informal basis soon reached an impasse. Lowenstein denied present membership in the Communist Party and denied that he subscribed to the aims or disciplines of the Party, but he refused to say (1) whether he had been a member within the past ten years or five years, (2) whether during the same period he had been a member of the "Ralph Fox Branch of the Communist Party in Newark or in Essex County," or (3) whether during the same period he was active in "recruiting teachers in the American Federation of Teachers for communist membership." His reason for the refusal was that the questions were too remote and were not relevant to the issue of present fitness to teach in the school system. In this connection he selected and sought to impose upon the Superintendent a time boundary, July 1, 1953, back of which he announced he would not answer questions as to Communist membership or activities. That date, it may be noted, is less than two years prior to the Congressional committee proceeding, three weeks more than two years prior to the first Board of Education hearing and slightly less than four years before the 1957 rehearing. His position was put in this fashion:

"Dr. Kennelly, I am prepared to tell you that from the summer of 1953 on I have not been and I am not a member of the Communist Party;"

"I will say, Dr. Kennelly, that at no time since the summer of 1953 have I been a member of the Communist Party."

Other illustrations of the nature of his stand are:

"Q. Were you ever a member of the Ralph Fox Branch of the Communist Party either in Newark or in Essex County? A. That is too broad a question for me to answer."

"Q. That 'at any time' would include the period after the summer of 1954, wouldn't it? A. Well, sir, after the summer of 1954 on I have not been a member of nor affiliated with, nor whatever phraseology—

- Q. Let me repeat it. The Ralph Fox Branch of the Communist Party.
A. The answer would be no, sir, as far as anything subsequent to the summer of 1954 is concerned.
- Q. Subsequent to the summer of 1954 you had been aware of the existence of it?
- A. No, sir.
- Q. I will ask you the same question with respect to 1954.
(Dr. Lowenstein consults with counsel.)
- A. I will answer that question, sir, and in the negative.
- Q. That is with respect to 1953?
- A. Yes, sir. And in the negative. But I will not be pushed back year by year."

Although Dr. Lowenstein submitted to some interrogation relating to matters more remote than 1953, he remained adamant in his refusal to answer as to the subjects and times referred to above.

The court's opinion on appeal from the subsequent dismissal recognized that the questions covering the ten-year and the five-year periods would have been proper if the Superintendent in good faith felt that they were necessary in order to satisfy or to remove doubts in his mind as to the truthfulness of the witness' disavowal of present membership in or adherence to the ideology of the Communist Party, and so advised the witness. My impression at that time from the record was that a person of Dr. Lowenstein's education and seeming intelligence would have gathered that such was Dr. Kennelly's motive.

Some of the factors which gave rise to that view should be mentioned. I have already referred to Dr. Kennelly's statement at the inception of the hearing that his purpose was to get at the truth of the situation. In the course of the questioning, when the witness was asked about membership in the Communist Party in the previous ten years and declined to answer, he was then asked:

- "Q. Do you mean that a question, the purpose of which is to determine membership or non-membership in the Communist Party, is not relevant to the purpose of this conference?
(Dr. Lowenstein consults with counsel.)
- A. I have already answered for the present time, sir, and I think membership or non-membership ten years ago is irrelevant.
- Q. All right, then I ask you this: Have you been a member of the Communist Party within the past five years?
- A. I give the same answer to that, sir."

And at another point he said:

"* * * I think anything beyond that [summer of 1954] is rather remote, and in any case I have never felt that anything beyond or this side of that

really is relevant to my fitness to teach. But I would be willing to talk about anything from the summer of 1954 on.”

At the conclusion of the questioning but before closing the hearing, Dr. Kennelly made this observation to the witness:

“Q. Bob, I would like to advise you, and also for the record, that none of these questions that I have asked you are meant to relate to any particular portion of the period of your career prior to the summer of 1953. As I have already said, there is nothing magic to me about the summer of 1953, nor would there be anything particularly magic to me about the fall of 1949 itself. The whole purpose of the questions so framed with respect to the time element was my attempt to get information that would be helpful to me in terms of the progressive steps and an attempt on my part to judge, therefore, your fitness as of May, 1955, and as of now, to continue to be a teacher in the Newark Public Schools. So with that thought in mind I have not been able to share with you the distinctions and the reasons you have used as to any particular magic date determining remoteness on one hand or lack of remoteness on the other hand, and I wish to point out to you that your reluctance to answer all questions prior to the date which you selected, the summer of 1953, does not give me information that I hoped would be helpful in determining what I have the responsibility to determine.

I am saying that to you so that you will understand from my point of view that I was placing no special emphasis on any particular date or season of the year, and it was within that framework that I was exploring those questions. Therefore, I will ask you once more if, in light of this statement or explanation of mine, you wish to change any of your responses to those of my questions that had to do with that broad period prior to the summer of 1953.

(Dr. Lowenstein consults with counsel.)

A. I thank you for the opportunity you have given me, but I will not change my answers.”

Thereafter, following the filing by the Superintendent of the transcript of testimony and his charges against Dr. Lowenstein based upon the refusal to answer the questions, a hearing was had before the Board of Education. In my judgment, this proceeding was marred by an unprecedented action, that is, the calling of Dr. Kennelly to the witness stand for the purpose of permitting Dr. Lowenstein’s counsel to cross-examine him as to the support he found in the testimony taken before him for the charges filed with the Board which were then being heard. The record showed that as an accommodation counsel for the Board consented to this step. All that can be said for such unique procedure is that it was not unfair to Dr. Lowenstein.

From the discussions of counsel and the additional questioning which took place at that hearing in Dr. Lowenstein’s presence, it seemed to have become plain (assuming there was doubt prior thereto) that at least one basis on which the questions were put to Lowenstein by the Superintendent was that

of credibility. For example, during an argument as to the propriety of a question asked Dr. Kennelly, counsel for the Board said:

“* * * I say when you are trying to find out whether a man today is a Communist * * *, when you are conducting an inquiry to determine whether there was a basis for believing whether a man to-day is a Communist, and you are asking him about his past association to weigh his present protestations that he is not to-day, a legitimate question is any question that could throw some light on the veracity of his present bald denial, ‘I am not now a Communist; I have not been since 1954.’ * * *”

Later, Lowenstein resumed his capacity as a witness and made a long statement as to his present loyalty to the United States. At that time he was specifically given the opportunity to add anything he wished to the record. The particular questions which he refused to answer before Dr. Kennelly were again called to his attention and he remained steadfast in his position that anything prior to July 1, 1953 was too remote and not relevant as to his capacity to teach. In fact, he said he was “ashamed” of having answered any questions as to pre-1953 subjects, and that he was “sorry” he had not refused to answer them; that the answers constituted “a permanent blight” against him, and because he had answered he described the record as an “ignominious” one. And when he was asked if he conceived that “it is impossible that any inquiry into affiliations prior to that date, July 1, 1953, could under any circumstances cast light on [his] present employment, as far as communist affiliation is concerned,” he replied that under the Constitution “no inquiry to give that kind of light is authorized.”

The state of the record at that time gave me the impression that it would have made no difference in Lowenstein’s attitude if the Superintendent had specifically proffered the information that the questions as to the past were being put on the issue of veracity. But, thinking that I might be mistaken in view of the majority opinion and because we were acting in such a sensitive area, I joined in the remand in order to remove any doubts. My colleagues felt that Dr. Kennelly might have misinterpreted the sense of the *Laba* opinion and concluded that the reference to present and past affiliation provided a sanction for interrogation without limit into the past. Such misinterpretation, they reasoned, might have been responsible for his failure to advise the witness as to the nature of the light he was seeking. My feeling was that the language of this court in context was perhaps construed too broadly by Dr. Kennelly; that it was properly construed by Dr. Lowenstein, but was misapplied by him in refusing to furnish answers to some of the questions.

As I read *Laba* it authorized an inquiry into present affiliation (as well as affiliation as of the date of the Congressional Committee hearing) with or adherence to the principles and purposes of the Communist Party. It also approved an excursion into such past connection to the point of remoteness. Examination into the past to the point of remoteness would serve two ends: (1) assist in forming a judgment as to the truthfulness of a denial of such existing affiliation or beliefs; and, (2) if membership and disassociation in the reasonably recent past did appear, provide information as to the nature and extent of Lowenstein’s activities while a member, *e. g.*, whether he taught *Party* Communism in his classes, or enlisted others to join the Party and teach

Communism (in the Party sense) to their students. It must be kept in mind that disposition of the charges, if any were made after such an interview, might not result in dismissal in all cases. The Board might not dismiss on a finding involving only past membership in the Communist Party. Mrs. Laba was not dismissed after she admitted membership. Dismissal would rest in the discretion of the Board. It might depend upon the nature and extent of the party discipline the teacher had subjected himself to, whether he had taught the party line in his classrooms or whether he had solicited other teachers to join the Communist Party.

In the first interview by the Superintendent the refusal to answer was based on the ground that the questions were too remote. "Remoteness" in a case of this kind is not susceptible of fixed definition. As my colleagues said, a question whether a teacher was *ever* a Communist is improper. Manifestly, as some case histories reveal, there is a substantial difference between persons who listened to the siren song of Communism in the depression days of the early 1930's and who withdrew on learning of its treasonous motives, and others who joined the Party and subscribed to its disciplines after the Korean conflict. Accordingly, it seemed to me that the Superintendent in that interview incorrectly assumed that unlimited interrogation into the past was approved. On the other hand, Dr. Lowenstein, who said he had made a deep study of the *Laba* opinion, correctly concluded that he was obliged to answer questions as to present connection with the Communist Party and past connection to the point of remoteness. The impropriety of the position he took at the interview and in the testimony before the Board arose from his decision to set July 1, 1953 as the terminal point of relevancy, and the beginning point of remoteness. On the record then before us that arbitrary limitation could not be justified. On the other hand, the paucity of information which resulted from the abortive questioning made it impossible for us to establish a fixed point at which remoteness began.

In part explanation of his refusal to answer, Dr. Lowenstein had stated that he had studied the *Laba* decision under the guidance of counsel and felt that in selecting July 1, 1953 as the date back of which he would not permit questioning, he was making a consistent, sensible explanation of what the court indicated was his legal obligation. He said also that when the Supreme Court says "This is the law," he abides by the law. For that reason he answered questions which he felt obliged to answer as a law-abiding citizen. Accepting these statements as sincere, I assumed that he would make fair and responsive answers at the reinterview to all questions put by the Superintendent which would be proper and relevant.

For the reasons stated and with some misgivings, I concurred in the remand of the matter for the third interview.

The second opinion of this court did not depart from the principles enunciated in *Laba*. Lowenstein's reliance upon the Fifth Amendment before the Congressional Committee, of itself, would not justify his dismissal. But it imposed upon Dr. Kennelly the duty of conducting a full inquiry to determine if Lowenstein is qualified to remain as a teacher at a place dedicated to the furtherance of democratic ideals. Questioning as to his present and past association with the Communist Party and affiliated organizations was approved and the basis for it made more explicit. The opinion said:

"If he answers all questions relating to current status (*i. e.*, association with the Communist Party or subjection to its disciplines) in the negative and the employer has no reason *whatever*, either because of other information in his possession or of skepticism as to whether the answer should be believed from the general standpoint of credibility, to doubt the full truth and sincerity of the denials and *does not feel the need to test them*, the inquiry must * * * end. But if the inquirer has *honest doubts*, or other information at hand seems inconsistent with the present disavowal so as to indicate the need for test and further query, he is privileged to probe backward from the date of the interview, for past conduct then becomes relevant to the present." *Lowenstein I*, 33 N. J., at p. 286. (Emphasis and insertion added)

Lowenstein's role in the inquiry continued to be suggested by *Laba*. He had a "duty of cooperation and an affirmative burden in the establishment of [his] fitness"; and the Superintendent was "entitled to frank and full disclosures." In *Lowenstein I*, however, a ruling was made with respect to a basic controversial position which he had assumed at the previous interview and in his argument in this court. He was told that there is no

"* * * legal justification for a teacher under inquiry to set an arbitrary date beyond which he will not speak on the ground of conclusive irrelevancy." At p. 288.

At this point I must digress momentarily to express sympathy with the difficulty apparently experienced by the parties, the Superintendent and the Board of Education, in understanding and reaching common ground as to the significance of the words "now" and "present" as used by this court. The opinion said that "present" membership in or affiliation with the Communist Party or "present" subjection to its ideology was the test of fitness to teach in the public school system. But it did not elaborate as to just what was meant by "present" membership, affiliation or subjection. Obviously, it did not signify such association by Lowenstein on the date of the interview alone. Naturally that day was to be included but it could not be said to be exclusive. Strictly speaking, today is the present and yesterday is the past, but in a context such as this the period constituting the present must be of broader coverage. Would anyone say that if a teacher withdrew from the Communist Party today he could not be dismissed as unfit or otherwise disciplined by the Board of Education, even though for years up to yesterday he had been teaching his students the party principles and inciting them to overthrow the government by force? So, under ordinary circumstances, "present" must denote at or about the time of the teacher's suspension from active duty in the school system.

Thus, for purposes of this case (except for a circumstance to be mentioned), membership in the Party or adherence to its program at or about the date of Lowenstein's suspension should be the test applied, *i. e.*, May 19, 1955. That date must be the beginning of the "present" and therefore the focal point of the inquiry. The period covered by the "present" would be from May 19, 1955 to the date of any reinterview. Otherwise, if such a controversy went through the courts for ten years and then was sent back to the Superintendent because of some error in the proceeding, the date of the reinterview would be the test date. The strongest partisan of a teacher's cause could not reasonably adopt such a rule.

In the last appearance of the case in this court, the matter in contention centered about the right of the Superintendent to inquire into past connections with Communism, particularly with respect to a time prior to July 1953. It did not seem necessary then to elaborate about the precise connotation of "present" or the date or period which was within its limits. But actually in the factual framework the question of what was meant by "present" association, *i. e.*, whether it meant the date of the reinterview or some earlier date or period, played an unnecessary part and exerted a diversionary influence in the treatment of the case. Lowenstein had testified previously that "from the summer of 1953 on" he had not been a member of the Communist Party "and that after the summer of 1953 on" he had not been a member of the Ralph Fox Branch of the Communist Party. As a consequence Lowenstein himself made the primary issue clear: Was he a member of the Communist Party or subject to its ideology in the summer (or in July, as he also put it) of 1953 or thereafter? If at the forthcoming interview Dr. Kennelly believed the statement of nonassociation or connection on that day or back to July 1953, it was incumbent on him to end the inquiry. But if with the entire record of the case to date in mind he had an honest and reasonable doubt as to the veracity of Lowenstein's denial, he was justified, in his quest for the truth in pursuing his interrogation backward from July 1953 to the point where reasonable persons would not disagree that remoteness had been reached.

Returning now to the main stream of the case, it seems necessary to refer to some deep-rooted principles by which the mental attitude and conduct of all the actors involved in the reinterview should have been guided. The public policy of this State as established by the Legislature is opposed to appointment or retention of teachers in the public school system, who believe in or advocate the overthrow of the State or Federal Government by force or violence. N. J. S. A. 18:13-9.1, 9.2; 41:1-3; *Laba, supra*, at pp. 392, 393. So emphatic is the policy that if Dr. Kennelly, in a situation like the present one, asked a teacher if, within the previous five years, he had been a member of a group which believed in or advocated that type of overthrow of our government and he refused to answer relying on the Fifth Amendment, immediate discharge would be proper. N. J. S. 2A:81-17.1. In fact, the statute says that such refusal shall forfeit his employment, tenure or pension.

This court in *Lowenstein I* agreed with the remarks of Justice Heher in *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498, 513 (1951), that "loyalty to government and its free democratic institutions is a first requisite for the exercise of the teaching function. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualification." The United States Supreme Court in *Adler v. Board of Education*, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952), in discussing the matter of teacher loyalty, indicated plainly that "past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust." It said also:

"A teacher works in a sensitive area in a school room. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the

integrity of the schools as a part of ordered society, cannot be doubted.” 342 U. S., at p. 493, 72 S. Ct., at p. 385.

Another factor to be recalled in the process of orientation for the re-interview, and which the record demonstrates was actually in the minds of the parties throughout the questioning, was the significance of the terms “Communism” and “Communist Party.” *Laba* left no doubt on that score. The opinion said:

“The matter may no longer be viewed simply as one of academic freedom of thought and expression, for it has actually become one of self-preservation; we are convinced that Communism is an alien concept which is dedicated to the overthrowal of our form of government, by force if necessary, and seeks to deprive us of the very basic constitutional liberties which we all hold so dear; recent world happenings furnish further evidence of the futility of its solemn promises and the barbarism of its deliberate actions.” 23 N. J., at p. 388.

That view is not peculiar to this court. Both the United States Supreme Court and Congress have given expression to it; the former referred to it as “the long and widely accepted view.” See *Barenblatt v. United States*, 360 U. S. 109, 128, 79 S. Ct. 1081, 3 L. Ed. 2d 1115, 1129 (1959).

Finally, and of equal importance to an understanding of the nature of the conference about to be held, it was necessary to be mindful that it was not a loyalty hearing. There was no charge by the Superintendent that Dr. Lowenstein was a Communist in 1955 or at the time of the interviews. (This vital circumstance quite obviously was not comprehended by at least one member of the Board of Education who voted to reinstate Lowenstein because the record made at the reinterview failed to sustain the charge that he was then a Communist.) The interviews were precipitated by his plea of the Fifth Amendment before the Congressional Committee which this court had said warranted an inquiry into his present fitness to teach. Their purpose was *to find out* if he was currently (in the sense explained) a member of the Communist Party or a believer in its disciplines.

In view of the background of the case however, there must be some realistic approach to the Superintendent’s problem. If such an interview began with questions as to present Communist Party membership or adherence to the disciplines and purposes of the Party, and a negative answer were received, I do not see how any reasonable judgment could be formed on the issue of the credibility of the denial without some further exploration. A “no” answer can be turned upside down and inside out and it remains the same bare word. Only when it is set up in a pertinent factual perspective, which will reasonably permit the formation of a value judgment of the “no,” can the interview become meaningful.

At the outset of the reinterview now under consideration, Dr. Lowenstein asserted his loyalty to the principles underlying the government of the United States, and his opposition to Communism. Almost immediately, however, he again laid down the time barrier that ran through the 1957 conference, *i. e.*, July, 1953. Upon being asked how long prior to 1953 he held those views, he declined to answer.

As the questioning progressed, he said he did not know if the Communist Party was an international conspiracy, one of whose aims was to overthrow the government of the United States by force. He thought the United States Supreme Court had said that such was the purpose of the American Communist Party, and if the Court did so declare, he accepted it. Then he expressed the belief that in 1955 he probably thought that some members of the Communist Party could be loyal Americans; but he felt that because of changes in international relations in the past five years, fewer of such Party members could be loyal Americans in 1960. He knew nothing about any obligation on the part of Communists to deceive and cheat and generally break the rules of the game, and he wondered "what element of truth there may be in that." He indicated his belief that a Communist could be a fit person to teach in the Newark public schools; that he could have the scholarship, teaching methodology and respect for the individual requisite for the position. He declined to answer whether he believed in 1955 that a Communist could possess and display the ethical standards that fit a person to teach in the public school system.

At this juncture, Dr. Kennelly, who had participated in all previous proceedings and so was thoroughly familiar with them, expressed doubt and skepticism as to Lowenstein's denial of current membership or subjection to its ideology. I repeat that such "current" connection with Communism in the framework of the case covers the period back to July, 1953. The majority opinion does not attempt to define its use of "present" or "current" association; or to express any view as to whether the date fulcrum is May 19, 1955 or July, 1953, or whether the date has moved progressively forward with each interview so that membership or subjection on the precise date of the last interview, September 2, 1960, would be the decisive point. In any event, whether Dr. Kennelly's doubt related to party membership or affiliation as of September 2, 1960, or as of any previous time back to 1953, plainly the doubt was engendered by Lowenstein's answers at the reinterview considered in the light of the previous history and background of the case. Whether the doubt was a reasonable one in that context now emerges as the crucial issue in the case. No one suggests that Dr. Kennelly's skepticism was motivated by bad faith or by anything other than a desire to discharge his responsibility as Superintendent of the Newark public school system. Moreover, neither the Board of Education, nor the State Commissioner of Education, nor this court would be justified in disregarding the statement of doubt as a matter of law, unless it can be said that the minds of reasonable, intelligent and conscientious officials would not differ as to whether the doubt was unreasonable. If that unqualified conclusion cannot fairly be reached, then Dr. Kennelly was justified (in fact obliged, see *Laba*, 23 N. J., at p. 375; *Lowenstein I*, 33 N. J., at p. 283) in pursuing the inquiry progressively backward to the point of remoteness in an effort to resolve his doubt.

The statements of some members of the Board of Education at the close of the argument before them make it advisable to clarify the significance of the retrospective questioning and the possible end results of it. There were three possibilities. The further questions would (1) resolve Dr. Kennelly's doubt as to current (in the sense above indicated) Communist connection and produce a state of belief in Dr. Lowenstein's disavowal, (2) result in a charge of insubordination upon refusal to answer pertinent questions reason-

ably related to the resolution of the doubt, or (3), if the answers revealed sufficient evidence of current membership in the Party or advocacy of its ideology, justify a charge of unfitness to teach on that ground.

After giving voice to his doubt and to his desire to probe further, Dr. Kennelly inquired if Lowenstein had been a Communist, or subject to its ideology or believed in the Communist ideology, or had been a member of any Communist-front organization since 1950. All of these questions were met with a refusal to answer. Lowenstein's position was that the "cut-off" period was July, 1953; his counsel's objection was that such questioning was "out of bounds" under the decision of this court. The refusal resulted in a finding by Dr. Kennelly that Lowenstein was guilty of insubordination, conduct unbecoming a teacher, and that he had substantially impaired his usefulness as a teacher in the Newark school system.

When the matter came before the Board of Education those findings constituted the charge to be decided. It is again emphasized that there was neither charge nor finding that Lowenstein was currently a Communist; further, that to sustain Dr. Kennelly's findings the Board was not called upon to make any determination in that respect. The simple issue was: On the basis of the history and record of the case and the interrogation, was there a reasonable basis for Dr. Kennelly's feeling of doubt as to Dr. Lowenstein's disavowal of current membership in or subjection to the principles of the Communist Party.

After lengthy argument and a second improper calling of Dr. Kennelly as a witness before the reviewing Board for cross-examination by Lowenstein's counsel, and some oral expression of views by some members of the Board, the charge was sustained by a 5 to 4 vote. Whatever may have been the oral utterances of the various members, which, except in the case of one member, plainly appeared to be extemporaneous, seven days elapsed before the final and detailed formal order of discharge was entered. And we were advised at the oral argument in this court that in the meantime counsel for the Board consulted with the members thereof with respect to the form and findings set forth therein and that the order represented their final action. The order says:

"It is the opinion and decision of this Board that the answers given in response to the Superintendent's questions, abstracted in the Schedule annexed, reasonably justified the doubts asserted by the Superintendent and the additional inquiry which he believed to be necessary by reason thereof."

On the basis of that conclusion, it adjudged Lowenstein guilty of unduly obstructing the Superintendent's inquiry by refusing to answer the questions relating to Communist connections between 1950 and July 1953.

The State Commissioner of Education was of the same view. He said:

"Considered against the background of the climate and environment of this case, the answers given by appellant to the Superintendent's inquiries fell short of achieving the purpose of the interview and were such as to raise a reasonable doubt as to appellant's fitness to teach, in the Commissioner's judgment. The need for further testing was thereby adequately established."

The majority of this court have now disagreed with the Superintendent, the Board of Education and the Commissioner of Education. To me the unfathomable aspect of their opinion is the holding *as a matter of law* that the record is barren of any facts or inferences from facts which provide a reasonable basis for Dr. Kennelly's doubt about Lowenstein's current adherence to Communism. In effect, they say that on all the revealed material and the fair inferences therefrom there is no reasonable ground for difference of opinion among intelligent and conscientious officials as to the rationality of Dr. Kennelly's doubt. If the proceeding were a jury trial, the viewpoint of the majority would mean that the issue of whether a doubt was justified could not be submitted to the jury for determination; the question would have to be decided by the trial judge as a matter of law adversely to the assertion of reasonable doubt. Familiarity with past decisions of this court leaves me without doubt that less formidable factual settings have been held to require determination by a jury of the particular problem presented.

Let us look at the record to see if there is any reasonable basis to justify Dr. Kennelly's doubt about the veracity of Lowenstein's disavowal of current Communist Party membership or subjection to its disciplines.

At the September 2, 1960 reinterview, Lowenstein denied current membership in the Communist Party or belief in its ideologies or disciplines. (In this connection, an obvious fact must be kept in mind. In speaking of Communism, both Dr. Kennelly and Dr. Lowenstein meant the Communist Party belief in and advocacy of the overthrow of our government by force.) Likewise, he reaffirmed the position he had taken in that respect at the 1957 interview. He said that in 1955 he probably believed a Communist could be a loyal American and he expressed the view also that at the present time some of them could be such Americans. Further and more germane to the present inquiry, he indicated plainly that a Communist can be a fit person to teach in the public schools.

After hearing these answers the Superintendent, being conscious of the background of the case, expressed doubt as to the credibility of the disavowal of Communism. He was uncertain in his own mind as to whether to accept it at face value and felt the need to probe further to resolve the uncertainty. The majority opinion seems to accept the Board's characterization of the answers referred to above as "unorthodox," but suggests that their very unorthodoxy makes "crystal clear" the truthfulness of his current rejection of Communism. My colleagues of the majority contrast what they call "stock" answers, *i. e.*, negative ones to the questions whether a Communist can be a loyal American or a fit teacher in a public school system, with Lowenstein's "unorthodox" ones, and find the latter more indicative of his truthfulness on the main issue. That conclusion in my judgment disregards certain fundamentals as well as the background of the case. The public policy of this State as promulgated by the Legislature and as enunciated by this court, denies a teaching post in the public school system to a Communist Party member. Moreover, Lowenstein's view that such a person can be a fit teacher brings to mind the comment of the United States Supreme Court in *Barenblatt, supra*, in connection with the right of a Congressional Committee to investigate Communism in the public school system and to interrogate teachers in that connection:

“To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II, * * *.” 360 U. S., at p. 128, 129, 79 S. Ct., at p. 1094, 3 L. Ed. 2d, at p. 1130.

Further, in discussing Barenblatt’s claim that the questioning violated the First Amendment of the Federal Constitution, the court said:

“Justification for its exercise in turn rests on the long and widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States by force and violence * * *” *Id.*, 360 U. S., at p. 128, 79 S. Ct., at p. 1093.

What is there in the background which, in association with these “un-orthodox” answers of Lowenstein, might reasonably stimulate a doubt as his denial of Party membership between July 1953 and September 1960? The beginning point is his reliance upon the Fifth Amendment before the Congressional Committee. Such plea is not proof of party membership but, as *Laba* taught, it reasonably called for a fitness inquiry in which he had a duty of cooperation and “an affirmative burden in the establishment of [his] fitness.” Dr. Bella Dodd, a former Communist, had told the Committee under oath that she knew him as a Party member, who came to the meetings held in New York by the top committee of the Communists in the American Federation of Teachers. She said also that he was the most important member of the Communist group in the organization of teachers in the Party interest. Lowenstein denied the latter two portions of Dr. Dodd’s testimony in the 1957 and 1960 interviews. He declined, however, to deny membership in the Party back of 1953.

It is not our function to make a final evaluation of the credibility of those conflicting declarations. They are simply a circumstance which plays a part in the justification for the Superintendent’s inquiry. I do not agree, however, with the contention that in an inquiry of this type the passage of time since the early 1940’s has emptied the circumstance of all significance. The bridging facts and inferences, even though not in great quantity, preserve Dr. Dodd’s testimony as a factor in the total picture open to consideration by the Superintendent. In an investigation of Communist affiliation there must be some awareness that facts are hard to come by.

The phraseology employed by Lowenstein at the 1957 interview in denying membership after 1953 cannot be overlooked: “From the summer of 1953 on I have not been a member of the Communist Party”; “at no time since the summer of 1953 have I been a member . . .”; “after the summer of 1954 [and 1953] on I have not been a member or affiliated with the Ralph Fox Branch of the Communist Party.” These statements did not come from the mouth of an uneducated, unintelligent man. The majority opinion describes him as a person of “acknowledged academic and pedagogical competence”; “obviously a person of independent mind, not given to forming or expressing opinions without being conscientiously convinced of the soundness and accuracy of the underlying facts.” For purposes of our present problem,

the significance of his disavowal of Party membership, "from the summer of 1953 on I have not been a member," etc., must be evaluated in the light of that appraisal of his mental acuteness and competence. On that basis and against the backdrop of Dr. Dodd's testimony, it seems plain that his statements are reasonably susceptible of the inference that he was a Communist Party member some time prior to, and perhaps even until, the summer of 1953. The majority deprecate Dr. Dodd's testimony, saying that it would never be received in a court of law. But we are concerned with an administrative proceeding, not a trial according to the common law. No declaration is made that her sworn assertions as to Lowenstein's active Communism do not supply a proper and competent basis for inquiry by the Superintendent as to present Party connection or belief in forceful overthrow of our government. In fact, the propriety of using information of this and of even less formal type is recognized in *Lowenstein I*, 33 N. J., at pp. 286, 287. Such material is not used, nor could it be used, to prove the fact asserted; its function is limited, as it was here, to providing justification for interrogation of the teacher.

The suggested inference does not have to be drawn and the purpose of this dissent is not to say that it should be drawn. Nor is my purpose to assert that the inference represents the fact. But the inference is one which may reasonably be drawn from the testimony and it was open to the Superintendent to accept it, if in the conscientious discharge of his public responsibility he felt that it was warranted.

It seems quite obvious that when the Superintendent became aware that Lowenstein presently feels that a Communist can be a loyal American citizen and that some of them can be fit teachers for the public school system, a doubt arose in his mind—an uncertainty—as to whether he should accept as truthful Lowenstein's disavowal of present allegiance to the Communist Party or its objective of overthrow of our government. The doubt found its generative force in the totality of the facts and the inferences that were available to him. The investigatory record was in a state akin to that which the United States Supreme Court, in *Konigsberg v. State Bar of California*, 315 U.S. 381, 41 S. Ct. 997 (1961), regarded as of "sufficient uncertainty" to justify questioning with respect to past Communist affiliations. At this point, it was not his burden to prove that Lowenstein is a Communist. The duty he owed to the public school system was to engage in a sincere effort to resolve his doubt as to Lowenstein's credibility. If in his discretion further interrogation was needed to aid him in that purpose, Lowenstein was under the obligation to cooperate in good faith in the endeavor.

In my opinion, the total record provides reasonable basis for Dr. Kennelly's assertion of doubt. Moreover, there is nothing to suggest that his doubt was not the product of good faith. Under the circumstances he was justified in propounding the additional questions as to membership in and activity for the Communist Party in 1950, and Lowenstein was properly subjected to the charge of insubordination and of impeding the investigation as a consequence of his refusal to answer. In the factual setting I cannot escape the conviction that the world would be a much better place to live in if those who assert their rights so vigorously would be equally responsive to their obligations.

The majority opinion does not limit its reversal of the discharge to a finding of absence of any basis for reasonable doubt as to the truthfulness of Lowenstein's disavowal of connection with the Communist Party or belief in its purpose to overthrow the government by force. It holds also that the decision of the Board of Education cannot stand because the oral statements given by two of its members at the close of the argument of counsel show that their votes were cast on grounds which were not within the scope of the charge against Lowenstein.

The criticized utterances came after a lengthy and confusing argument as to what was meant in our previous opinion by "present" Communist membership in the framework of the case. It was in that atmosphere that the first member, who is criticized by the majority of this court, remarked that he was "not making any decision so far as what the Supreme Court has said or hasn't said." Then he expressed his grave doubts as a father of school children that Lowenstein was "a normal American teacher." But those doubts came from this record. They have to mean that he too had doubts about the truthfulness of Lowenstein's disavowal of present Communism.

The second member whose vote to discharge is regarded as invalid said it was difficult for a layman to understand the legal technicalities discussed, and that he was going to base his decision on the moral issue involved. Then he proceeded to ask why, since "our courts have been so lenient as they should be * * * in defending a person, * * * Lowenstein should not be willing to bend backwards to give some information to help us decide some of these issues for the years preceding 1953." Does not that language reveal the mind of a layman who has doubt about Lowenstein's disavowal and who therefore wished to probe into the past?

In analyzing the two votes for dismissal, the majority refrained from commenting on the motivation for the votes for reinstatement as indicated by the oral comment. For example: One such member, who quite obviously came to the meeting with a lengthy prepared statement, said it was the Superintendent's duty to substantiate the charge that Lowenstein was an active militant Communist "beyond any doubt in the minds of this tribunal." Such view can hardly be described as a product of the *Laba* or *Lowenstein I* opinions of this court. Another member who voted the same way obviously felt that Dr. Kennelly was charging Lowenstein with Communism rather than insubordination for refusing to cooperate in answering questions designed to find out if he was currently a Communist. She referred to the portion of our opinion in *Lowenstein I* which, in passing, said that dismissal of a teacher for disloyalty is not deserved unless the proof thereof is "abundant." Then she declared that the "burden of producing abundant proof had not been adequately discharged." She said also:

"I must say, frankly, that I feel Dr. Lowenstein has done irreparable damage to his value and usefulness in this system. While he cannot be judged for demanding his Constitutional rights, still one would rather wish that he had placed his responsibilities to his community and profession before those rights. As Dr. Lowenstein's own attorney stated to us—and I fear our school system will not be better for this display of legal fencing—I believe that such a victory for 'rights' is truly a hollow victory; almost a caricature of the Constitution [*sic*] right."

In the light of the quoted statement and of her misconception of the problem she was being called upon to decide, is it not plain that she too had doubts like those of Dr. Kennelly?

As I have already indicated, after these oral expressions had been voiced, counsel for the Board met with its members to prepare and put in proper form their findings of fact and order of dismissal. That document sustains Dr. Kennelly's finding of reasonable doubt about Lowenstein's credibility. Frequently a trial judge, in ruling on a motion or in deciding a case from the bench in summary fashion, will make statements that do not seem to dovetail with his subsequent written opinion or formal judgment. Yet absent some most unusual circumstance, the written opinion or the final judgment would be treated as decisive on appeal. So, too, in the present situation, should not that course be followed, particularly since the oral statements criticized by the majority opinion on analysis can reasonably be regarded as consistent with and as supporting the basis for Dr. Kennelly's desire to move his interrogation of Lowenstein back to 1950? The oral comments of the two Board members I have spoken about, who voted to reinstate Lowenstein, apparently because they misconceived the issue to be resolved, should not provide any obstacle to the acceptance of the formal findings and order as the judgment to be reviewed by this court. These two members voted against dismissal either because they adhered to their orally announced impressions or because they did not agree with the formal expression of the views and findings of the majority of the Board.

But since such an appraisal of the final order may be regarded as legalistic, I do not rest my dissent upon the refusal of the majority of my colleagues to treat it as the repository of the Board's action. In my judgment, the question as to whether the order represents the final and understanding resolution of the precise issue to be decided ought to be remanded to the Board and not decided by this court. This is particularly so where reinstatement may expose the City of Newark to a liability of between \$45,000 and \$50,000. See N. J. S. A. 18:3-28; 18:5-49.1. In 1957 when *Laba* was written, the contention was made that the remand for further interview ought to be to the State Commissioner of Education and not to the Newark Superintendent and Board of Education. On that occasion the court said:

"There is no substantial reason to believe that the local personnel is not sufficiently equipped to conduct a fair and impartial inquiry, or that it will fail to do so in compliance with the principles expressed by the State Commissioner and this court. The School Laws contemplate that where the general issue of fitness is presented the original determination should be made locally with ample safeguards on review before the state school authorities and the courts." 23 N. J., at p. 384.

That attitude was sound then and it is sound now. And it should represent the limit of this court's interference with the present Board of Education's order dismissing Lowenstein from the Newark public school system. True, the case has taken a long time and has reached this court three times, but there are important public and private rights involved and much as the delay is to be regretted, we should not allow impatience to interfere with proper original determination of the matter at the local level.

Remand need not be to the Superintendent; no further interview is necessary. The existing record should be sent back to the Board with directions to answer two questions:

1. On the basis of the entire record, was there a reasonable basis for Dr. Kennelly's doubt as to the truthfulness of Dr. Lowenstein's disavowal of membership in the Communist Party or subjection to its disciplines subsequent to July 1953?
2. If so, was Dr. Lowenstein guilty of insubordination and improper obstruction of the investigation in refusing to answer questions relating to that subject for the period back to 1950?

If both questions produce affirmative answers, the Superintendent's charge was warranted and the dismissal of Dr. Lowenstein from the teaching staff would be proper.

For the reasons stated, I cannot agree with the majority opinion. Moreover, we must live beyond this case. If, on a record such as it brings to us, a Superintendent of a public school system has no right to press his interrogation beyond the limit now established, the interview formula so forthrightly announced in *Laba* has been emptied of all significant content.

Justice Proctor and Justice Haneman authorize me to say that they join in this dissent.

35 N. J. 94.

VII

TENURE DOES NOT ACCRUE DURING LITIGATION IF PRECISE STATUTORY CONDITIONS HAVE NOT BEEN MET

PERRY ZIMMERMAN,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK AND
EDWARD F. KENNELLY, SUPERINTENDENT OF SCHOOLS,

Respondents.

For the Appellant, Levy, Lemkin & Margulies (Seymour Margulies, of Counsel).

For the Respondent, Jacob Fox.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal by a teacher from an order of the Board of Education of the City of Newark, dated June 24, 1958, which dismissed him from its employ as of May 20, 1955. The appellant prays that the Commissioner direct his reinstatement to his former position as teacher with the Newark Board of Education with back pay from the date of his dismissal.

This case originally came before the Commissioner of Education on an appeal from a dismissal ordered by the Board of Education on June 23, 1955,

which was based solely on the proposition that in a Congressional inquiry into Communism and subversion generally, the appellant had invoked the privilege against self-incrimination in refusing to answer certain questions as to his affiliations and associations, and that such conduct was just cause for his dismissal. Because appellant had not acquired tenure, any dismissal of him would be according to R. S. 18:13-11. However, because two other tenure teachers appealed concurrently to the Commissioner under R. S. 18:13-17, all the parties and the Commissioner at that time did not differentiate appellant's petition from the others. On that appeal, the Commissioner reversed the decision of the Newark Board of Education and remanded the case to the Board for further proceedings not inconsistent with the opinion of the United States Supreme Court in *Slochower v. Board of Education*, 350 U. S. 551. Subsequently, on an appeal to the New Jersey Supreme Court, the decision of the Commissioner was affirmed. *Laba v. Newark Board of Education*, 23 N. J. 364, 394.

On the remand to the local Board, the matter was referred to its Superintendent of Schools for further inquiry consonant with the decision of the Supreme Court. Under date of May 10, 1957, the Superintendent, by letter, requested appellant to appear in his office on May 16, 1957, for an interview relating to his fitness to teach in the public schools. The following is an excerpt from the letter:

"At the interview you will be afforded the opportunity to respond frankly and fully to the questions pertinent to the matters discussed in a recent decision of the New Jersey Supreme Court in connection with the remand of the appeal relating to your previous dismissal by the Newark Board of Education. The sole purpose of the interview is to determine the truth in terms of frank and full disclosures without equivocation or mental reservation."

The interview was held on May 16, 1957. After appellant explained that he had invoked his privilege against self-incrimination before the House subcommittee under the Fifth Amendment on the advice of counsel, the Superintendent did not pursue this subject any further. He was, however, not satisfied with appellant's responses to other questions. As a result, the Superintendent, on October 22, 1957, filed supplementary charges with the Board relating to appellant's fitness to teach. The charges were based on appellant's alleged failure to fulfill his duty of cooperation with the Superintendent with respect to the inquiry into his fitness to teach in that he failed to give frank and full disclosures as to past association with the Communist Party and affiliated organizations and that many of his responses were incredible, indirect, or otherwise inadequate from the standpoint of forthrightness.

The Board of Education held hearings on these charges in November and December, 1957. It decided that the whole truth as to appellant's past affiliation with and his reported withdrawal from the Communist Party was not disclosed by him; that facts called for by pertinent questions were withheld by him; and that the Superintendent and the Board were not accorded the cooperation they were entitled to have from him in their inquiry. The Board drew no inference as to present affiliation with or subservience to the Communist Party but held that the record amply revealed that appellant, at the Superintendent's interview, obstructed a bona fide inquiry into the truth of

whether or not he is now a member of the Communist Party or subject to its ideologies and disciplines. Accordingly, his dismissal was ordered as of May 20, 1955, the effective date of the original dismissal.

The Board of Education stated in the resolution of dismissal:

"The adoption of this resolution is not intended to constitute an acknowledgment that Mr. Zimmerman had any employment or tenure status with the Board, and shall not be deemed to extend to him any status, for any period beyond the 1954-1955 school year, when the period of his probationary employment expired."

It should also be pointed out that a similar statement was contained in the resolution of September 24, 1957, ordering further proceedings against appellant.

The Commissioner will decide first whether the dismissal may be sustained as of May 20, 1955. The Supreme Court, in the case of *Lowenstein v. Board of Education of Newark*, 33 N. J. 277, said that after the teacher told the Superintendent he had claimed the privilege against self-incrimination before the subcommittee on the advice of counsel and that subject was quite properly not pursued further, the matter of contumacious or frivolous refusal to answer as a basis for disciplinary action was thereby permanently removed from the case and nothing remained with respect to the original charges. While no special point was made of it before the Court, it was said in the decision that the motion should have been granted since no basis remained to support a claim of any improper conduct before the subcommittee.

The Court also said that the "supplementary" charges preferred by the Superintendent after the interview were actually new ones. The Commissioner took a similar view in his decision in the same case (*Lowenstein v. Board of Education of the City of Newark*, decided June 1, 1959). In this decision the Commissioner said:

"The proceedings by the superintendent and the board of education on the remand were not addressed to his conduct before the House Subcommittee, but rather to his past activities and associations as these might bear upon subjection to the ideologies and disciplines of the Communist Party. It was in an inquiry on the latter subject that the appellant exhibited his lack of candor which led the respondent Board to conclude that he was unfit to remain a teacher in its schools. Our Supreme Court has already held that petitioner's conduct before the House Sub-Committee was not *per se* just cause for dismissal and no further evidence has been presented to prove that his conduct before the House Sub-Committee was unbecoming that of a teacher."

The Commissioner held that the dismissal should not revert to a time prior to the acts justifying it, that the appellant, therefore, should be dismissed effective May 16, 1957, and, furthermore, that the appellant should be paid by the respondent board of education the salary which became due him between May 20, 1955 and May 16, 1957. More recently, the Commissioner, on October 24, 1960, in the latest appeal of Dr. Lowenstein, reaffirmed this decision as to the effective date of dismissal. *Lowenstein v. Newark Board of Education*, decided October 24, 1960.

The factual situation in the instant case is similar and, therefore, the Commissioner's decision in the Lowenstein case, that the dismissal should not revert to a time prior to acts justifying it, is controlling here. The Commissioner holds that the Board erred in dismissing appellant as of May 20, 1955, and that he is entitled to salary which came due between May 20, 1955, and the end of his employment in June, 1955.

With regard to appellant's prayer that he be reinstated in his position as teacher, the Commissioner is without power to give the relief requested. Appellant had not acquired tenure of position in the Newark schools. His employment, dating from September 1, 1952, was on an academic year basis. He needed employment in the academic year 1955-1956 in order to acquire tenure. The Board did not re-employ him after the expiration of his three-year period of probationary employment on June 30, 1955, and he, therefore, failed to acquire tenure and his employment rights ceased as of that date. At the expiration of his probationary employment appellant lost the protection afforded by N. J. S. A. 18:13-11 and had not acquired the protection of N. J. S. A. 18:13-17. The courts have refused to review the dismissal of non-tenured teachers and have limited their determination to the sole question of whether or not the teacher in fact had tenure status. *Chalmers v. State Board*, 11 N. J. Misc. 781, *Gordon v. State Board of Education*, 132 N. J. L. 356. *Schulz v. State Board of Education*, 132 N. J. L. 345, *Moresch v. Board of Education of Bayonne*, 52 N. J. Super. 105. The statutes (N. J. S. A. 18:6-20, 18:13-5) clearly place the responsibility with the board of education to determine whether or not teachers should be employed or re-employed during the probationary period provided by law. The Commissioner has never attempted to substitute his judgment for that of the board of education in determining whether a non-tenure teacher should be re-employed. For this reason and for the further reason that he is without power to order the re-employment of appellant, the Commissioner will express no opinion on the merits of the case.

Appellant contends that notwithstanding the fact that tenure had not accrued, justice would require that he be reinstated to his position if the charges of the Board were not sustained on this appeal. The testimony of appellant's principal discloses that he had rated him "satisfactory." Usually tenure would have come automatically following such a rating. The principal appended the following statement to his rating:

"This record concerns work at Dayton. Permanent appointment should be deferred until results of trial on June 21st."

In oral argument, counsel for appellant maintained that the Commissioner has the power to reinstate him because the statutes give him complete superintendence over the school system. Appellant also, in his brief, argues that the proceedings before the Superintendent occurring after the expiration of his probationary employment, imply a relationship of teacher and superintendent. Absent the teacher-superintendent relationship on May 16, 1957, he reasons, it would be impossible to predicate charges or supplement the original charges because if appellant was not a teacher as of May 16, 1957, he was under no obligation to appear or speak. If there had been no teacher-board of education-superintendent relationship existing, the whole matter, insofar as appellant is concerned, would have been moot and the time of the court wasted.

Having prosecuted appellant on the basis of a teacher relationship, the Board is now estopped from denying the existence of that relationship, he claims.

Respondent argues that if the suspension of a non-tenure employee causes his employment to continue after the period of employment under his appointment ends, then an employee might acquire, during litigation, a right to permanent status which he did not have when the litigation began. Appellant never had any appointment from the Board for any period after the end of the 1954-55 academic year. Respondent further points out that charges were preferred against appellant in the first instance and formal hearings held thereon, not because appellant was under tenure, but because he had been appointed for the 1954-55 academic year and therefore could not be dismissed before June 30, 1955 "without good cause" (N. J. S. A. 18:13-11). The procedure for charges and hearing is not defined by statute in the case of teachers under contract and the Board, therefore, employed the procedures defined in N. J. S. A. 18:13-17 and 18 for tenure teachers. This, respondent contends, was the only proper course to pursue as there could be no justification for according less procedural safeguards for a teacher under contract than those prescribed for a teacher under tenure.

Respondent further argues that the principle of estoppel is nowhere present because appellant had no tenure which the Board could be estopped to deny. Reference is made to the statements in the brief filed by the Board with the Supreme Court, the resolution for further proceedings, and the resolution of dismissal in each of which the Board specifically disclaimed any tenure rights of appellant. Respondent also cites the decision of the Supreme Court, in the *Laba* case *supra*, where it was said:

"Mr. Zimmerman began teaching in the public school system in 1952 and had not acquired tenure protection when he was dismissed by the Board. However, in view of the terms of R. S. 18:13-11, all of the parties and the State Commissioner have, for present purposes, not differentiated this case from the others."

New Jersey Statutes Annotated, 18:3-7 reads as follows:

"The Commissioner shall be the secretary of the state board. He shall enforce all rules and regulations prescribed by the state board. He shall have supervision of all schools of the state receiving any part of the state appropriation."

Appellant considers the power of the Commissioner under this statute adequate to redress any alleged injustice which might be done to him by reason of the fact that his suspension prevented his fulfilling the conditions prerequisite to the acquisition of tenure pursuant to N. J. S. A. 18:13-16. The Commissioner does not agree. The power granted to him under N. J. S. A. 18:3-7 is general. The conditions for acquiring tenure under N. J. S. A. 18:13-16 are specific. It was held in the case of *Ahrensfield v. State Board of Education*, 126 N. J. L. 543 that one does not gain the protection of tenure procedures upon dismissal until he has fulfilled the precise conditions of the tenure statute. The rule is that where there is any conflict between a general and specific statute covering a subject in a more minute and definite way, the latter will prevail over the former and will be considered an exception to the general statute. *Ackley v. Norcross, et al*, 122 N. J. L. 569, affirmed 124 N. J. L. 1933. Even

if a very broad interpretation were to be given to the Commissioner's powers under 18:3-7, they could not be extended to the area of tenure because there is specific legislation on this subject. If injustice occurs to a teacher because litigation interrupts the continuity of the employment essential to the acquisition of tenure, the remedy must lie with the Legislature.

The Commissioner does not subscribe to the theory that there was an implied teacher-school board-superintendent relationship because of the litigation after the expiration of the academic year 1954-55. N. J. S. A. 18:6-20 provides that no teacher shall be appointed except by a majority vote of the whole number of members of the Board. N. J. S. A. 18:13-5.7 makes further provisions concerning the employment of teachers. In *McCurdy v. Matawan*, 1938 S. L. D. 298, the question was whether employment was valid if the appointee did not receive a majority of the whole membership of the Board of Education as required by law. The Commissioner held at page 299 that full compliance with the statutory requirements as to the formalities of employment is essential to the validity of such employment. In *LaRose v. Board of Education of Egg Harbor City*, 1938 S. L. D. 377, at page 388, the Commissioner said:

"It is probable that the Legislature, in making conditions essential to legal contracts between boards of education and teachers, had in mind many boards of education whose contractual experience might be limited and it desired to protect such boards from incurring legal obligations except in formal contracts or under rules of employment which they definitely adopt."

There is no record nor claim that appellant was appointed by a majority vote of the whole number of members of the Board or that any other formalities of employment occurred for any period of employment after June, 1955. Hence, appellant did not fulfill the conditions for tenure according to N. J. S. A. 18:13-16 and, therefore, he has no claim to tenure. The Commissioner has already decided that he cannot confer tenure by his general powers of supervision and he has also explained that he makes no determinations concerning the employment or re-employment of teachers not protected by tenure. Therefore, the Commissioner can give no relief to appellant beyond ordering the payment of salary due him between May 20, 1955 and the end of the academic year in June 1955. Having reached this conclusion, there is no necessity for considering and deciding other issues raised in this appeal.

The Board of Education of the City of Newark is directed to pay Perry Zimmerman, appellant herein, the amount of salary which would have been due to him from the date of his suspension, May 20, 1955, to the termination of his employment, June 30, 1955. The petition is in all other respects dismissed.

COMMISSIONER OF EDUCATION.

November 9, 1960.

Pending before State Board of Education.

VIII

MEMBERSHIP IN A RECOGNIZED RELIGIOUS GROUP CANNOT BE
REQUIRED AS A CONDITION OF EXEMPTION FROM IMMUNIZATION

HERMAN A. KASSNER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY,

Respondent.

For the Petitioner, Pro Se.

For the Respondent, Charles A. Rizzi.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner is the parent of a pupil of the Berlin Public School Sytem. He says that on October 5, 1959, he filed the following statement with the Board of Education of the Township of Berlin:

"I, as the parent of Karen Kassner, ask to be exempt from the Polio-myelitis Immunization Statute 18:14-64.10 on the ground the proposed immunization interferes with the free exercise of my religious principles."

He further states that on November 9, 1959, he received from the President of the Board of Education the decision of the Board to ask for what he considered amounted to proof of his religion. Petitioner feels that this act of the Board is contrary to Article I.3 of the State Constitution of New Jersey. He was notified on December 14, 1959, that his daughter would not be permitted to return to school until she received the required immunization treatment.

The respondent Board admits that it refused to permit petitioner's daughter to enter its school and bases its refusal upon the alleged failure of the petitioner to comply with the provisions of R. S. 18:14-64.10 which deals with the question of poliomyelitis immunization. Respondent urges that the statute in question requires that any person who desires to be exempt from it must specifically state the name of the religious sect of which such person is a member in order that the Board of Education may determine whether such claim is bona fide and in order that it can further determine whether the claimed sect has as part of its beliefs a requirement that members should not subject themselves to poliomyelitis immunization. By reason of the failure and refusal of the petitioner to furnish the proof demanded, the Board of Education urges that the petition be dismissed.

New Jersey Statutes Annotated 18:14-64.10 reads as follows:

"The board of education of any school district may require all pupils to have received immunizing treatment against poliomyelitis as a prerequisite to attendance at school, and it may at its discretion require or waive proof of immunity, except as hereinafter provided.

“Any pupil failing to comply with such a requirement may be excluded from school, unless the pupil shall present a certificate signed by a physician stating that the pupil is unfit to receive such immunizing treatment.

“A board of education shall exempt the pupil from the provisions of this act if the parent or guardian of said pupil objects thereto in a written statement signed by him upon the ground that the proposed immunization interferes with the free exercise of his religious principles.”

Petitioner points out that this statute contains no provision whereby bona fide membership in any specific church or organization is made a requirement for exemption. He contends, therefore, that he may not be required to prove that he is a bona fide member of a specific sect in order to claim exemption. He further argues that Article I.3 of the State Constitution is for the special benefit of the individual to provide him protection from being regimented into some organization.

It is the position of the respondent Board of Education that N. J. S. A. 18:14-64.10 *supra* requires that a person claiming the benefit of the statute must prove the bona fide nature of his condition by setting forth a reference to the religious sect of which he is a member and that one of the tenets of such sect is the belief that members should not subject themselves to this type of immunization. It is further the position of respondent that unless the Board can make such a requirement, the legislation (N. J. S. A. 18:14-64.10) would actually be rendered completely nugatory since it would give any person the opportunity to use the statute for his own personal purposes by asserting a “personal” belief to be a “religious” belief.

It is the opinion of the Commissioner that respondent erred in requiring that the petitioner establish the bona fide nature of petitioner’s claim for exemption by referring to membership in a sect which holds as one of its beliefs that members should not subject themselves to the type of immunization provided in N. J. S. A. 18:14-64.10. The Commissioner takes the view that the Legislature considered various conditions precedent to exemption which might have been required. If the Legislature had wished to make membership in a sect with religious scruples against immunization a prerequisite for exemption, it would have so provided. The Commissioner believes the Legislature used the words “religious principles” advisedly. These are the words used in Article I.5 of the State Constitution.

In the opinion of the Commissioner he cannot interpret the statute so as to include a requirement not made by the Legislature. *Craster v. Board of Commissioners of Newark*, 9 N. J. 225. If, as respondent fears, the exemption privilege will be abused unless the claimant for exemption may be required to establish the bona fide nature of his claim by proving membership in a sect, a request for statutory modification should be addressed to the Legislature, the appropriate body for such revision, and not to the courts. See *Mountain Lakes Board of Education v. Maas*, 56 N. J. Super. 245 and 262, affirmed 31 N. J. 537.

If the statute were interpreted as desired by respondent, the number of persons who could claim exemption would be restricted. It is well known that in the history of this nation there have been devoutly religious persons

whose religious views did not coincide sufficiently with the tenets of a particular sect to enable them conscientiously to become affiliated with any religious denomination. A most conspicuous example is Abraham Lincoln, who was unquestionably a devout and pious man with strong religious principles and beliefs and yet he never joined a church and steadfastly refused, despite pressure, to affiliate with any particular church group.

As the Commissioner has already indicated, he believes the Legislature did not intend to make as a prerequisite for exemption, affiliation with a sect conscientiously opposed on religious grounds to immunization. In arriving at this conclusion, he has examined other acts of the Legislature dealing with exemption from health services for reasons of religion and notes that the language used and the proof required are much more specific than in the statute pertinent here. For instance, in R. S. 30:11-9, governing Nursing Homes and Hospitals:

“Nothing in this act * * * shall be so construed as to give authority to supervise or regulate or control the remedial care or treatment of individual patients who are adherents to any well recognized church or religious denomination which subscribes to the act of healing by prayer and to principles which are opposed to medical treatment * * * .”

Also, in R. S. 43:21-31, providing for Temporary Disability Benefits under Workmen's Compensation:

“Any person who adheres to the faith or teachings of any church, sect, or denomination, and who in accordance with its creed, tenets, or principles depends for healing upon prayer or spiritual means, in practice of religion, shall be exempt from this act * * * .”

The precise language and the specificity of the grounds for exemption in the above statutes and, by contrast, the general terms in which the requirements in R. S. 18:14-64.10 are stated are significant, in the Commissioner's judgment, and indicate a deliberate intention on the part of the Legislature to avoid a more narrow restriction.

The Commissioner concludes that the respondent Board erred in excluding Karen Kassner from its schools. The action of the Board in excluding her must be set aside. The Commissioner understands that Karen has been permitted to attend school pending the disposition of this appeal. The Board of Education of the Township of Berlin is directed to permit Karen Kassner to continue in attendance in its schools.

COMMISSIONER OF EDUCATION.

November 9, 1960.

IX

TEACHER MAY NOT PERFORM DUTIES OUTSIDE THE
SCOPE OF HIS CERTIFICATE

FRANK T. GRASSO AND FRANCES H. KEYES,

Petitioners,

v.

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

Respondent.

For the Petitioners, Arthur A. Donigian.

For the Respondent, John F. Butler.

DECISION OF THE COMMISSIONER OF EDUCATION

The original petitioner in this case is Frank T. Grasso, who says that (1) he is, and has been, an employee of the respondent since 1945 and is fully qualified for the position of Instrumental Music Teacher and Supervisor of Instrumental Music, (2) that he was notified in writing on December 4, 1953 by the Superintendent of Schools that he was Director of Instrumental Music, (3) that during the school years commencing 1956 and 1957 he was granted additional pay by the Board of Education for this position, (4) that he has received no notice of removal from his position but has received a memorandum stating that Mr. Owen Fleming was made Director of Instrumental Music for the school year 1958-59. Respondent admits these allegations but denies the further contentions of petitioner that Mr. Owen Fleming has, in fact, supervised the instrumental music program and thereby has exceeded the authorization of the "Limited Instrumental Music Certificate" issued to him November 1, 1957. Petitioner prays that an order be issued by the Commissioner directing the Hackensack Board of Education and the Superintendent of Schools to disqualify Owen Fleming from all supervisory work until and unless he acquires the qualifications for the position. It was stipulated by counsel on October 26, 1959, that Frances H. Keyes be added as a party appellant to this appeal and the matters in dispute be determined upon interrogatories propounded by each party to the other and submitted to the Commissioner of Education of New Jersey on the sixth day of October, 1959.

It would appear that the issue in this case is the extent to which a teacher may perform other assignments than classroom teaching and remain within the scope of a limited certificate.

N. J. S. A. 18:13-14 provides that "No teacher shall be entitled to any salary unless he is the holder of an appropriate teacher's certificate." The word "teacher" is used in the comprehensive sense and applies to all persons participating in the educational process. *Davis v. Boonton*, 1938 S. L. D. 288, *McCurdy v. Matawan*, 1938 S. L. D. 298, *Williams v. Madison*, 1938 S. L. D. 552, *Werlock v. Woodbridge*, 1939-1949 S. L. D. 107, *Lange v. Audubon* (Superior Court, Appellate Division) 1952-1953 S. L. D. 83, 26 N. J. Super. 416.

N. J. S. A. 18:2-4 authorizes the State Board of Education to make and enforce rules for granting appropriate certificates to administer, direct, or supervise, the teaching, instruction or educational guidance of pupils. The State Board has exercised its authority to require certification for those who administer and supervise as well as for those who teach.

Mr. Fleming holds only a Limited Teacher's Certificate. According to Rule 5 on page VI under "General Rules Governing Certificates" in *Rules Concerning Teachers' Certificates, Eighteenth Edition* (Revised September 1, 1956), this grade of certificate entitles the holder to teach the subjects or department of school work endorsed upon it, but does not permit administration or supervision.

Therefore, the exercise of administrative or supervisory functions by Mr. Fleming would exceed the authority of this certificate. The Commissioner is asked to include in this decision a statement on administration and supervision in order that these principles may be applied to the specific questions in the interrogatories.

Administration deals with the planning, organizing, and directing of the day-by-day management and operation of the public schools to achieve the objectives of public education in conformance with law, State Board of Education rules, and local board of education rules and policies.

Supervision deals with the development and maintenance of high standards of curriculum, instruction and guidance and the continuous improvement thereof. It includes, among other things, the observing, advising and directing of teachers in their instructional and guidance activities inside and outside the classroom. Through advice, either upon request or otherwise, through programs of in-service training and through curriculum improvement activities, the supervisory staff acquaints the classroom teachers with the aims, materials and methods of education and encourages and assists them to achieve the objectives of the schools. The supervisory staff is also available to the administrative staff as consultants on educational problems. The Commissioner has also looked to the statements of the leading authorities and finds definitions of supervision in current texts as follows:

The *Dictionary of Education* by Carter V. Good (McGraw-Hill, 1945) defines supervision as:

"all efforts of designated school officials toward providing leadership to teachers and other educational workers in the improvement of instruction; involves the stimulation and professional growth and development of teachers, the selection and revision of educational objectives, materials of instruction, and methods of teaching and the evaluation of instruction."

In *Fundamentals of Instructional Supervision*, by Fred C. Ayer, the following appear:

"Supervision is a planned program for the improvement of instruction. Adams and Dickey, 1953. *Basic Principles of Supervision*, N. Y., Am. Book Co. 1953.

"Supervision is a service activity that exists to help teachers do their job better. Kimball Wiles, *Supervision for Better Schools*, N. Y., Prentice-Hall, 1950, p. 3.

"To supervise means to coordinate, stimulate, and direct the growth of teachers. Thomas H. Briggs and Joseph Justman, *Improving Instruction Through Supervision*, N. Y., MacMillan Co. 1952, p. 4.

"* * * the improvement of instruction lies at the focus of leading definitions and concepts of professional supervision. Supervision in this sense is taken to include all aspects of instruction, such as pupil learning, teaching, curriculum organization, and evaluation. It includes all persons concerned with the instructional program and all efforts to help people to gain and exercise creative ingenuity." *Association for Supervision and Curriculum Development*, Wash. D. C., N. E. A. 1951, p. 16.

Probably the most helpful statement for the purposes here is the following:

"In any school system there are four main groups of employees. First are the doers. They are the teachers, truck drivers, custodians, social workers, purchasing agents, and the like. Their work requires skill in varying degrees. They work directly with children, adults, or things. The second group is composed of the recorders of what is done. They are stenographers, bookkeepers, teachers, social workers, and others. They keep the records of business transactions, educational programs, student growth, and group action. *The third group is made up of those who seek to improve the ways in which others do things. They are the supervisors and consultants whose services are available to the doers and recorders as they seek to improve their skill.* The fourth group comprises the administrators. They bring the skills and abilities of the other three groups to bear directly on the operation and improvement of the educational program. They are head custodians, principals, assistant superintendents, and others in similar positions." Van Miller and Willard B. Spalding, *The Public Administration of American Schools*, Yonkers, N. Y. World Book Company, 1952, p. 495. (Italics added.)

With these principles in mind, the Commissioner will consider first the answers given by the petitioner to the interrogatories submitted by the Board of Education. Item 1 reads as follows: "State with particularity any and all occasions upon which Owen Fleming exercised supervision as musical director including dates and places and acts alleged to constitute supervision." The answer lists a series of 15 instances as examples of Mr. Fleming's exercise of supervisory functions. These include such acts as selecting and directing instructional materials to be used, assigning and reassigning pupils and classes, altering teaching schedules, and approving requisitions and budget requests. There can be little question that such activities represent the exercise of supervisory and administrative functions beyond the scope of the Limited Teacher's Certificate.

Finally, the Commissioner will consider the answers of respondent to the interrogatories of the petitioner. These state that Owen Fleming was appointed Head-Instrumental Music, March 24, 1958, with appointment effective for the school year 1958-1959. He was paid additional compensation in the amount of \$300 yearly for duties as Director of Instrumental Music for the elementary and junior high schools. For this additional compensation he was told orally that he was responsible for developing a music program system-wide using available wind and string instrument teachers to plan a city-wide instrumental music program, to effectually schedule those teachers throughout the city

schools with consideration of principals' requests, to act as consultant to principals in developing the program in the various buildings and to recommend necessary inventory procedures in order to account for the musical instruments owned by the Board of Education. It is the opinion of the Commissioner that these duties are administrative and supervisory and, hence, beyond the scope of Mr. Fleming's certificate. (Item 6 of Interrogatories.) The answers also reveal other areas where it might be held that the activities were of a supervisory nature but more would need to be known of the circumstances before a conclusion could be reached.

The Commissioner would point out that it is not always possible nor is it necessary to make sharp distinctions in categorizing the many duties that a teacher performs. Certainly the intent of the rules governing the licensing of teachers is not to restrict the effective use of each person's particular competencies. Neither is it required that a teacher be limited to the classroom in performing services. Teachers do many necessary and important things in addition to working with pupils in the classroom. For instance, teachers work on committees to improve curriculum and to prepare bulletins, and their suggestions and advice may be sought by supervisors and principals. At times such an activity may border on what might be considered to be supervision or administration. Any conclusion in such a case would have to rest on what the teacher actually did and the degree to which the activity went beyond teaching or clerical work to decision-making and the directing of others. Many of the instances recited in this petition are of the border-line nature and more would have to be known of the actual acts in order to determine whether they went beyond teaching to supervising. Faced with such a problem, the Commissioner would suggest that boards of education rely on the county superintendent of schools and/or the Office of Teacher Education and Certification for guidance.

The Commissioner believes it may prove helpful to illustrate the above in some detail. During the course of the proceedings, respondent Board submitted a "Job Analysis of Owen Fleming" with a request that the Commissioner rule as to whether it included supervisory responsibilities. Without reproducing it in its entirety, the following excerpts are pertinent:

1. To suggest and plan with Miss Wolf's or Mr. DePuyt's permission small experiment with instrumental groups to improve opportunities in music instruction for the pupils.
2. To keep an up-to-date inventory of all instruments owned by the Hackensack School System.
3. To assist instrumental music teachers and principals in preparing instrumental music budget requests.
4. To advice and assist principals, music teachers and the school system purchasing agent in compiling the total order of instrumental materials for the next school year.
5. To advise and assist principals on problems of class scheduling.
6. To advise principals on other instrumental music matters when called upon by Mr. DePuyt or Miss Wolf to do so; or when invited directly by a principal to do so.

Whether the above six items represent supervisory or administrative functions would depend on whether the activities were clerical in nature or whether they involved the exercise of professional judgment, decision-making, or the executing of plans. If under Item 1 above, Mr. Fleming, himself, teaches the groups mentioned, such activities would appear to be permissible. If, however, the implication is that he is to work out plans for other teachers and assist in putting these plans into effect, his activities would at least border on the supervisory or administrative.

In order to help school districts with problems of this kind, the Commissioner has considered this case and made this determination although in his judgment it is more properly a matter of administrative ruling rather than quasi-judicial review. He would point out, therefore, that in similar instances boards of education should consult first with the county superintendent of schools, who may, if he finds it necessary, seek the advice of the Office of Teacher Education and Certification. If the matter remains unresolved, it should then be taken before the New Jersey State Board of Examiners for a ruling. An appeal from such a ruling would then properly come before the Commissioner for adjudication.

After study of the materials submitted in this case, the Commissioner concludes that the evidence is sufficient to show that Owen Fleming has been performing duties beyond the scope of his certificate. The Commissioner directs that Owen Fleming be removed from all administrative and supervisory duties unless and until he obtains the appropriate certificate requisite for the performance of such duties. On particular items, about which there may exist some doubt, the Hackensack Board of Education is directed to seek the guidance of the Office of Teacher Education and Certification through the office of the Bergen County Superintendent of Schools.

COMMISSIONER OF EDUCATION.

January 19, 1961.

X

DELAY OF MORE THAN TWO YEARS IN APPEALING RETIREMENT
FOR DISABILITY CONSTITUTES LACHES

HAZEL HARENBERG,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF NEWARK AND THE BOARD OF
TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND,

Respondents.

For the Petitioner, Samuel H. Nelson.

For the Respondent Board of Education, Jacob Fox.

For the Respondent Teachers' Pension & Annuity Fund, David Furman,
Attorney General (Lee A. Holley, Deputy Attorney General).

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal by a teacher from the action of the Board of Education of the City of Newark and the Board of Trustees of the Teachers' Pension and Annuity Fund in retiring her as of March 1, 1956, for disability.

Petitioner is a teacher who had acquired tenure in the Newark Public Schools. On February 28, 1956, the Newark Board of Education adopted a resolution making application to the Board of Trustees of the Teachers' Pension and Annuity Fund that petitioner be retired for ordinary disability, pursuant to R. S. 18:13-112.41. This application was approved by the Board of Trustees on July 12, 1956, to be effective as of March 1, 1956, and petitioner was so notified. The petition of appeal against this disability retirement action was received by the Commissioner of Education on August 11, 1958. During most of this period of time the petitioner was the moving party in another appeal before the Commissioner, in which she sought to be reinstated in her position from which she had been excluded by the Newark Board of Education because of illness. In that case she was placed on sick leave on October 8, 1954, and directed to submit to psychiatric examination under the provisions of R. S. 18:5-50.5. Her exclusion was continued and on February 16, 1956, she appealed to the Commissioner to direct the Board of Education to reinstate her. A hearing was afforded and on July 16, 1958, the Commissioner dismissed the appeal. Subsequently, on appeal to the State Board of Education, the decision of the Commissioner was affirmed and a further appeal is currently before the Appellate Division of the Superior Court.

Petitioner, in this case, contests the action of respondents in retiring her on the grounds that she was not given an opportunity to be heard and to be confronted with the evidence on which the action was based and she has, therefore, been denied due process of law. She contends that she is entitled to a hearing before the Pension Board in the first instance, or, failing that,

before the Commissioner of Education on his review of the action of the Pension Board. At such a hearing she claims a right to examine the evidence on which her disability retirement was based and to present proofs to refute it. Failure to afford such a hearing, she insists, deprives her of her rights without due process. She contends further that the evidence on which the disability retirement was approved was legally insufficient to sustain such action.

Respondents claim, first, that petitioner is barred from bringing this appeal by laches. They point out that more than two years elapsed between the approval of her retirement and the filing of this petition and, because of this unreasonable delay, the appeal should not be entertained. They argue further that even if she is not barred by laches, the actions of respondents conformed to the requirements of the statute; that the statute does not contemplate a "trial type" hearing such as petitioner claims and any such hearing would have to be afforded to every retirant, a requirement which would be obviously impractical and impossible to administer; that the procedure authorized by the disability retirement statute does not violate due process; that any right petitioner might have had to a hearing before the Pension Board was waived by her failure to make timely request for such hearing; and that evidence on which the action was taken was legally sufficient.

At a conference of counsel and the Assistant Commissioner in Charge of Controversies and Disputes held February 11, 1960, after several questions had been raised, both procedural and substantive, it was agreed that the issue of laches would be considered first. Following the submission of briefs, oral argument was heard by the Assistant Commissioner in Trenton on September 27, 1960, on this issue.

Petitioner takes the position that the mere passage of time, *per se*, is no test as to whether laches was committed; that laches is factual and involves a change of position which would prevent a return to the prior status. Because of the pendency of the earlier proceeding which also involved her competence to discharge the duties of a teacher and because the determination of the facts in that case would be dispositive of the issues in this appeal, on the theory of collateral estoppel, she argues that respondents have suffered no injury by any delay. She also takes the position that in the absence of a due process hearing before the Pension Fund Board of Trustees, any judgment is a nullity and laches cannot run against it.

Respondents' position is that there has been inexcusable delay by petitioner in resorting to any action that could effectively challenge her retirement by the Pension Board. They argue that petitioner was aware that the earlier appeal and the one here were separate and distinct; that she had the advice of counsel during this period; that, although she made some protests, she took no effective action; and that failure to take reasonably immediate action has resulted in a change of position and especially with regard to availability of witnesses and proofs. Respondents also point out that petitioner's contentions are aimed not at their lack of jurisdiction but at the propriety of their procedures, and for that reason there is an important difference in the approach to the issue of laches.

The materials submitted in this matter reveal that the Newark Board of Education applied to the Teachers' Pension and Annuity Fund for petitioner's

disability retirement by a letter dated February 29, 1956; that petitioner was notified of this action on March 13, 1956; that she requested the Pension Fund to table the resolution until her pending appeal was heard; that she was notified by letter of July 23, 1956, that her retirement was approved on July 12, 1956, effective as of March 1, 1956, and in the same letter was advised that the pending appeal, while known to the Board of Trustees, did not affect the application for retirement; that she requested inspection of medical records submitted by her to the Newark Board and reconsideration of the retirement action on July 30, 1956; and that in a letter of January 10, 1957, returning checks to the Pension Fund, she concluded with the following statement:

“Since my retirement is in question, I am authorizing my attorney to file an appropriate action at law. You will be served shortly.”

Despite these complaints and protests, no formal action against either respondent was initiated until August, 1958. There was, therefore, a lapse of approximately 2½ years from the initial action of the Board of Education to retire petitioner and of more than 2 years following the approval of the Pension Board, at which time retirement actually became effective, during which period petitioner took no action which could effectually alter the matter.

The records also show that during this time, on March 21, 1957, petitioner submitted to a further medical examination provided by and at the direction of the Pension Fund, pursuant to R. S. 18:13-112.42. Following the examination, petitioner was notified on May 13, 1957, by the Pension Fund, of the recommendation of its Chief Medical Examiner that she be continued on disability retirement.

The Commissioner cannot agree with petitioner that her then pending appeal against the Newark Board of Education, excluding her from teaching, provides a valid basis for her failure to act in the instant case. That the two matters are separate is evident if for no other reason than that the Board of Trustees of the Teachers' Pension and Annuity Fund was not a party in the first appeal. That this was known to the petitioner and her counsel is also evident. The record shows that at the time of the retirement action, she had the advice of her former counsel who was representing her in the exclusion appeal, that stipulations were entered into in that appeal to the effect that the exclusion action and the retirement action were distinct, and that the question of the retirement was not before the Commissioner to be considered in that appeal. Also, as respondent points out, in the petition of appeal herein, petitioner says:

“Petitioner has at all times denied that said action, in retiring her for disability, was valid, and has always been disposed to contend the validity thereof, but filed no formal appeal therefrom, her aforesaid appeal pending when said retirement action was taken.”

The Commissioner agrees with petitioner that the passage of time, *per se*, does not constitute laches. A study of previous decisions on this issue will show that the Commissioner has considered all the circumstances in each case in which severance of employment was involved and laches was asserted and that he has established no specific period of time after which an appeal is barred. Thus in *Gleason v. Bayonne Board of Education*, 1938 S. L. D. 138,

nine months' delay by a dismissed mechanic was laches, *Carpenter v. Hackensack Board of Education*, 1938 S. L. D. 593, six months' delay by dismissed teacher held laches; *Aeschbach v. Secaucus Board of Education*, 1938 S. L. D. 598, fourteen months between teacher's dismissal and appeal in this case did not constitute laches; *Wall v. Jersey City Board of Education*, 1938 S. L. D. 614 at 618, eleven months' delay of protest by teacher held laches; *Gilling v. Hillside Board of Education*, 1950-1951 S. L. D. 61, nine months' delay by re-assigned janitor was laches. That the period of time constituting laches varies with the nature of the issue is also apparent. Thus, in *Jackson v. Ocean Township Board of Education*, 1939-49 S. L. D. 206, a delay of two months in protesting the award of a transportation contract was unreasonable; while in *Duncan, et al.—In re Annual School Election, East Rutherford*, 1939-49 S. L. D. 89, a delay of only three weeks constituted laches in contesting the results of an election. Furthermore, in *Biddle v. Jersey City Board of Education*, 1939-1949 S. L. D. 49, the State Board of Education differentiated between laches as it applies to appeals involving the holding of public employment and to other questions as follows:

"Laches is an equitable defense and is not available to what is purely legal as differentiated from an equitable demand. The statute of limitations fixes six years as the period within which actions in the nature of actions upon contract without specialty should be brought. The cases cited * * * relate to the propriety of suspension or abolition of positions or offices in the public service. We have been unable to find any such case which denies the right of action for a purely pecuniary demand based upon contract within the period fixed by the statute of limitations."

The issue raised here is one of suspension from public employment. In cases of this kind the courts have stressed the importance of prompt action.

In *Park Ridge vs. Salimone*, 36 N. J. Super. 485, affirmed, 21 N. J. 28, the Court said:

"The courts have long ago recognized the need for prompt action by public employees in seeking judicial review of their discharge. The reason is obvious. It is important that public duties be carried on without interruption or with as little interruption as possible. A governing body must be allowed to fill the employment in the public service with all necessary dispatch free from unnecessary risk of double payment of wages."

The Supreme Court in its affirmation made this further statement at page 46:

"But the time must come when the appointing authority can rely upon the conclusion of the issue and proceed to make arrangements in the interest of the public to replace the dismissed employee without fear that its action will be undone. * * * Although the statutes there involved"—in *Marjon, supra*—"concerned tenure, the principle is the same."

In *Atlantic City v. Civil Service Commission*, 3 N. J. Super. 57 at 61, it was said:

"The law of this State is well settled that in the case *sub judice*, a public employee's rights to reinstatement even assuming, but not deciding,

that his removal or other interference with his rights may be unjust and unwarranted, may be lost by his unreasonable delay in asserting his rights. This recognized principle of law is founded upon considerations of public policy and its application is warranted here.”

Justice Heher said in the case of *Marjon v. Altman*, 120 N. J. L. 16 at page 18:

“While laches, in its legal signification, ordinarily connotes delay that works detriment to another, the public interest requires that the protection accorded by statutes of this class be invoked with reasonable promptitude. Inexcusable delay operates as an estoppel against the assertion of the right. It justifies the conclusion of acquiescence in the challenged action. *Taylor v. Bayonne*, 57 N. J. L. 376; *Glori v. Board of Police Commissioners*, 72 Id. 131; *Drill v. Bowden*, 4 N. J. Misc. 326; *Oliver v. New Jersey State Highway Commission*, 9 Id. 186; *McMichael v. South Amboy*, 14 Id. 183.”

The Commissioner finds some similarity also between the instant case and *Jordan v. Newark*, 128 N. J. L. 469. In both cases, the petitioners carried on discussions and consulted counsel about the matter, but neglected to bring action. On this, the Court said:

“In the instant case, it is urged, in extenuation of the long delay, that prosecutor was lulled by the city into believing that his case was about to receive favorable action. While the unofficial statements of various persons connected with the municipality or the Civil Service Commission may have aroused such a hope, nevertheless, there should have come a time when to a reasonable person, the delay is indicated as mere temporizing.”

With regard to petitioner’s argument that respondents have suffered no injury by reason of her delay, the Commissioner cannot agree. Respondent Board of Education, while denying any claims that petitioner may assert, is at least exposed to an obligation for back salary, accrued pension contributions, and reinstatement to position. Respondent Board of Trustees has considered petitioner as retired and has kept its accounts and made its actuarial and other computations for the more than two years before petitioner acted on this basis and with no thought of challenge. Although no actual proof has been advanced, the Commissioner finds credible the assertion that the State of New Jersey would be required to make a lump sum payment of the accrued liability for its portion of the petitioner’s pension contributions for the years since 1956, if she were to prevail. Even so, the Commissioner considers more serious the prejudicial effect that the lapse of time will have had on respondent’s ability to produce testimony and proofs. An indispensable part of the proofs in any hearing on this matter would involve the testimony of medical practitioners who made the diagnoses on which petitioner’s retirement was approved. It is known that at least one of the key medical witnesses is now retired and no longer resident in New Jersey. To ask that these witnesses be produced to testify more than two years after the event solely because of petitioner’s failure to act promptly, is unreasonable, in the Commissioner’s judgment, and supports a finding of laches.

Petitioner also argues that laches is no bar to administrative review. She states in her brief that "extrajurisdictional action by an administrative agency is a sheer nullity and devoid of due process. Laches, in such instance, is no bar to an attack thereon." The cases cited involve public bodies where jurisdictional power was lacking and support the position that action taken beyond such a body's jurisdictional authority is void and, therefore, in such case, the defense of laches cannot be raised. The Commissioner concurs in this argument, but holds that it is not applicable to the instant matter where there appears no question of the jurisdiction of the Board of Trustees of the Teachers' Pension and Annuity Fund. The Board of Trustees is given explicit authority to retire members of the Teachers' Pension and Annuity Fund. In this connection the Commissioner notes that in *Davaillon v. Elizabeth*, 121 N. J. L. 308, the Court in speaking on the question of laches in an appeal to set aside a void ordinance, said:

"In this regard, there is an obvious distinction between the usurpation of authority and the irregular exercise of a power bestowed."

The Commissioner finds no usurpation of authority in this case. There is, however, a challenge as to the "exercise of the power bestowed" by statute on the Board of Trustees and, therefore, the defense of laches is properly raised.

After careful study of the briefs and citations of authority presented in this case, the Commissioner finds and determines that the petitioner had immediate and full knowledge of the actions of both respondents in retiring her for ordinary disability; that the advice of counsel was available to her; that although she made some protests, she failed to take any action that could be effective for more than two and one-half years after her retirement was requested by respondent Board of Education and more than two years after her retirement was approved by respondent Board of Trustees; that failure to act over this length of time, even considering her pending appeal and any other circumstances in this case, constitutes inexcusable delay; that this inexcusable delay places an unreasonable burden upon respondents; and that petitioner is, therefore, guilty of laches.

Having reached this conclusion, there is no need to determine the other questions raised and argued in this case. The petition is dismissed.

COMMISSIONER OF EDUCATION.

February 16, 1961.

Pending before Superior Court.

XI

DISMISSAL OF JANITOR REMANDED FOR FINDING OF FACT
AT PROPERLY CALLED BOARD MEETING

VICTOR W. DeBELLIS,

Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE,
ESSEX COUNTY,

Respondent.

For the Appellant, Mr. Sam Magnes.

For the Respondent, Mr. Edmond J. Dwyer.

DECISION OF THE COMMISSIONER OF EDUCATION

Appellant was a janitor under tenure at the Park Avenue School in the City of Orange. On June 4, 1959, he was suspended from his position as a result of charges filed against him in municipal court by the parent of a pupil in the school. On July 23, 1959, he was served with a Notice of Hearing before the Board of Education of the City of Orange, wherein it was charged that he had carnally abused a pupil of the Park Avenue School during the last week of April, 1959. Hearings were held on October 29, 1959, and November 16 and 17, 1959. At a meeting of the Board of Education held on December 8, 1959, appellant was found guilty of the charges and his employment was terminated as of June 4, 1959, the date of his suspension. Four members of the five-member Board voted yea on the call for yeas and nays. One member had not participated in the hearings.

Appellant in his Petition of Appeal to the Commissioner prays that the determination of the Board be set aside on the following grounds:

1. The complaint before the Board of Education of the City of Orange is based upon the uncorroborated statement of a twelve-year-old girl whose testimony is full of contradictions, inconsistencies and mis-statements.
2. The appellant did not receive a fair and impartial trial in that the members of the Board of Education of the City of Orange acted as complainants, prosecutors, witnesses, judges and jury.
3. Neither the motion adopted by the Board in dismissing appellant nor the letter notifying him of his dismissal sets forth the factual findings of the Board of Education of the City of Orange to which appellant may refer in properly preparing argument or appeal.
4. The determination of the Board of Education of the City of Orange was illegal, improper, null and void, because said alleged determination was made at a meeting called at 9:15 P. M., following a regular meeting held on December 8, 1959, and adjourned. Appellant contends this meeting was held contrary to the provisions of R. S. 18:5-47,

which provides that all board meetings shall be public and commence not later than eight o'clock in the evening.

5. The determination of the Board was invalid and improper in that it was made by and the discussion relative thereto was participated in by five members of the Board, although only four members heard presentation of the evidence at the meeting.
6. The attempt to dismiss the appellant retroactively to June 4, 1959, by a determination made on December 8, 1959, is contrary to the Janitors' Tenure Law, R. S. 18:5-67, and is improper, invalid and unlawful. Even if a proper determination of guilt had been made by the Board, the appellant would be entitled to be compensated and paid until the date of such a proper and valid determination.
7. The charge before the Board of Education is the criminal charge of "carnal abuse" and is the same charge upon which the September Term of the Grand Jury of Essex County dismissed the indictment. A determination of the Grand Jury should dispose of the entire matter and such determination should not be disregarded by an administrative board without judicial function. The Board of Education cannot usurp the powers of the Criminal Courts. A person charged with a crime is presumed innocent until proved guilty beyond a reasonable doubt. The presumption of innocence remains with a person charged. The alleged determination of the Board of Education would seem to indicate a finding of "guilt beyond a reasonable doubt," although the evidence adduced at the hearing shows conclusively that the act complained of never occurred. The Board was duty-bound to determine whether such an act occurred. If it did not occur, the appellant is entitled to be cleared of all such charges.
8. The testimony taken before the local Board of Education does not substantiate the charges made, and improper and prejudicial questions were asked, intended to impugn the reputation of appellant as to moral character. Appellant prays that the determination of the Board of Education of the City of Orange be reversed and that the Board be directed to reinstate him and pay the compensation due to him since June 4, 1959.

In its answer, the respondent Board contends that it was not required to comply with the provisions of R. S. 18:5-47 with respect to public meetings commencing not later than 8:00 P. M., in determining what disciplinary action should be invoked against appellant. Respondent relied upon R. S. 18:5-67 and there is no requirement in that statute that the hearing shall be public or that the hearing shall commence not later than eight o'clock in the evening. Respondent further denies that the evidence was insufficient to substantiate the complaint; that improper and prejudicial questions were asked intended to impugn the moral character of the appellant; or that a fair and impartial trial was denied for the reason that Board Members acted as complainants, prosecutors, witnesses, judges and jury. Respondent also denies that the action of the Essex County Grand Jury was *res adjudicata*. It contends that a board of education may find an employee guilty of misbehavior and dismiss him pursuant to R. S. 18:5-67 upon the basis of independent findings of fact,

without awaiting the action of a Grand Jury in finding him indictable or guilty of a criminal offense.

The following questions require answers:

1. Did the Board of Education exceed its function in making a determination that appellant was guilty of the charges, in view of the fact that the Grand Jury of Essex County did not return an indictment for the crime of carnal abuse?
2. What was the measure of proof necessary for a finding of guilty by the Board of Education?
3. Did appellant receive a fair trial by reason of the fact that the Board members acted as complainants, prosecutors, witnesses, judges and jury?
4. Did any member of the Board of Education who had not heard any testimony participate in the discussions and determination of the issues presented at the hearing?
5. Could the Board of Education make a valid determination at a special meeting which commenced after 8:00 P. M.?
6. Should the Commissioner weigh the evidence below to reach an independent conclusion, or should he confine himself to a search to determine whether there was substantial evidence to afford a rational basis for the Board's determination?
7. Were the findings of fact adequate?
8. Assuming that the determination of "guilty" was proper, is appellant entitled to his salary from the date of suspension to the date of the determination of guilt?
9. Was the trial fair?
10. Does the record substantiate the charges? Was corroboration necessary? Was proof of penetration necessary to convict?

The questions will be answered in order:

1. This question has been answered in court decisions in this State. It has been held that acquittal in a criminal case does not prevent a departmental trial. In *Borough of Park Ridge v. Salimone*, 36 N. J. Super. 485, affirmed by the Supreme Court, 21 N. J. 28, the Court said:

"The second charge arises from substantially the same factual matter as the indictment. But the acquittal in the criminal case does not stand in the way of the departmental trial. The proceedings are entirely independent of each other."

Proceedings under R. S. 18:5-67 are disciplinary in nature. "Such proceedings are civil in nature and not criminal." *Kravis v. Hock*, 137 N. J. L. 252, at 254. In *Schwarzrock v. Board of Education of Bayonne*, 90 N. J. L. 370 at 371, the Supreme Court said:

“The proceeding could only result in either affirming or reversing the removal. It could not result in any binding judgment as to his guilt or innocence of the charge of attempting bribery; the finding that he was guilty or innocent could only be a finding for the purpose of action by the board, not for the purpose of criminal law. Whether in such case the board should act before action is taken by the criminal courts is a matter resting in the discretion of the board.”

The Commissioner holds that the Board of Education was not precluded from finding appellant guilty because of the failure of the Grand Jury to indict him.

2. The second question has also been passed upon in court decisions. In *Borough of Park Ridge v. Salimone, supra*, at page 498, the Court said:

“The quantum of proof (in a departmental trial) necessary to convict is different. The proof might not be sufficient to demonstrate guilt of a crime to a jury beyond a reasonable doubt but it might indicate clearly and by the preponderance of the credible evidence an employee’s guilt of conduct unbecoming a police officer or subversive of good order and discipline of the force.” *Beggans v. Civil Service Commission*, 10 N. J. Misc. 1142 (Sup. Ct. 1932); *Smith v. Carty*, 120 N. J. L. 335, 343 (E. & A. 1938).

In *Kravis v. Hock*, 137 N. J. L. 252, at page 254, the Supreme Court said:

“Under the disciplinary proceedings instituted against petitioner, to justify her conviction, respondent was only required to establish the truth of said charges by a preponderance of the believable evidence and not to prove her guilt beyond a reasonable doubt.”

The same view was taken by the Court in *Hornauer v. Division of Alcoholic Beverage Control*, 40 N. J. Super. 501 at page 503.

It should be pointed out that in a tenure proceeding, a defendant is not being tried for offenses of which a conviction might result in his imprisonment. In such a proceeding his fitness to retain tenure in public employment is being determined. In *Reilly v. Jersey City*, 64 N. J. L. at page 510, the old Supreme Court said:

“It is not intended by this legislation that the trial prescribed shall be conducted with the formality required in the trial of criminals for minor offenses in courts, or by magistrates, nor that the evidence produced at the hearing shall be such as would support a conviction upon all indictments.”

The Commissioner holds that for a finding of guilt the majority of the Board members must believe that the proofs support the charges by a fair preponderance of the believable evidence.

3. The third question has been presented to the Commissioner many times. Appellant charges that he did not receive a fair and impartial hearing before the Board of Education of Orange because the members of the Board acted as complainants, prosecutors, witnesses, judges and jury. There is nothing in

the record to indicate that the board members testified. The tenure statutes in effect at the time of these proceedings (now amended by Chapter 137 of the Laws of 1960, requiring the Commissioner to conduct the hearing and decide the question of guilt) empowered members of boards of education and even made it their duty at times to be investigators, accusers, prosecutors, triers of facts and jurors in the same case. In nearly every case which came before him under these statutes, the Commissioner was asked to reverse dismissals because the board members performed both prosecuting and deciding functions and prejudged the case.

The Commissioner summarized his views on this question in the case of *Schroeder v. Board of Education of the Township of Lakewood*, decided July 22, 1960, as follows:

"It would seem to the Commissioner that it is unrealistic to expect board members to investigate and bring charges without forming any judgment concerning them. It should be pointed out that the courts have refused to disqualify members unless a personal interest is shown or unless evidence of malice, ill-will, passion or prejudice appears in the record. *Mackler v. Board of Education of the City of Camden*, 16 N. J. 362; *White v. Wohlenberg*, 84 N. W. 1026; *Reimer v. Essex County Board of Chosen Freeholders*, 96 N. J. L. 371; *Crane v. Jersey City*, 90 N. J. L. 109; *Freidenreich v. Borough of Fairview*, 114 N. J. L. 290; *Clawans v. Waugh*, 10 N. J. Super. 605; *Hamilton v. Board of Education of the Town of Irvington*, 1938 S. L. D. at 352.

"The Board of Education members are charged with the proper conduct of the schools. When evidence of inefficiency, incapacity, or unfitness is found, there is not only the power but the duty to bring charges. If board members are to be disqualified for bringing charges within the line of their duties, then the efficiency of the schools will be seriously impaired."

The Commissioner holds that there is no ground for reversal *per se* because board members act as complainants, prosecutors, judges and jurors.

4. The Commissioner examined the record carefully and took testimony to determine whether any board member, who had not heard the evidence, participated in the discussion and determination of the issues presented at the hearing. Mrs. Clare Murray, a board member, testified before the Commissioner in Trenton on May 17, 1960, that she did not participate in any discussion with her colleagues on the Board of Education relative to the guilt or innocence of appellant. She further testified that she did not participate in the second meeting of the Board on December 8, 1959, at which time four members voted him guilty of the charges preferred against him. (Tr. 34) The Commissioner finds that no member who had not heard the testimony participated in the discussion and determination.

5. The testimony discloses that the Board of Education convened its regular meeting at 7:30 P. M. on December 8, 1959. After transacting a series of business matters, the meeting was adjourned at 9:00 P. M. (Tr. 10 and 11). The following excerpts are taken from the Minute Book:

"On December 8, 1959, at 9:15 o'clock in the evening by agreement of a quorum of the Board members present, a meeting was called to con-

sider arriving at a determination in the Victor DeBellis case. A roll call was made the following members present: Ippolito, president, Mr. Braun, Mr. Davis, Mr. Engel (4). There was considerable discussion involving the evidence in this case and a motion was made and seconded that Victor DeBellis be found guilty of the charge as made to this Board and that on the basis thereof his employment with the Orange Board of Education be terminated as of June 4, 1959, the date of his suspension. The vote was unanimous. There being no further business, on motion, the Board adjourned." (Tr. 15, 16.)

Mrs. Murray was not present but knew this meeting was to take place. (Tr. 36.)

R. S. 18:5-47 reads as follows:

"The meetings of every board of education in the State shall be public and shall commence not later than eight o'clock in the evening."

Respondent in its brief argues that a board acts "by law in two capacities (a) purely administratively, and (b) when so required, quasi-judicially. Its purely administrative acts must be at the fixed time. The public has an interest therein, and may be heard. If we assume that its quasi-judicial hearings must be in public, at times fixed by law, this cannot apply to its deliberations after the case is in. No member of the public has a right to be heard or to participate in such judgment deliberations any more than he has to be present when the Supreme Court Justices are debating the nature of a decision which it is to render after a case or hearing has been concluded. To be subject to such attendance might interfere with proper quasi-judicial deliberations and would, indeed, establish a novel if not dangerous precedent."

Dismissal is an action of the Board and all actions of a board of education must be held at a properly called meeting. Regardless of whether the Board of Education was within its rights in discussing the case in private, it is the opinion of the Commissioner that final action had to be taken at a public meeting held pursuant to R. S. 18:5-47. In *Cullum v. Board of Education of the Township of North Bergen*, 15 N. J. 285, the Supreme Court held at page 294 that while it is required that final decision must be made at a public meeting "this in no wise precludes advance meeting during which there is free and full discussion, wholly tentative in nature; it does, however, justly preclude private final action such as that taken by the majority in the instant matter."

In *Milliken v. Board of Education of the City of Camden*, 1957-1958 S. L. D. 53, in which the Commissioner decided that a meeting commencing after 8:00 P. M. did not comply with the requirements of R. S. 18:5-47, he quoted the following from *Frank H. O'Brien v. Board of Education of West New York*, 1938 S. L. D. 31:

"At four o'clock in the afternoon of the 30th the Board met and adjourned at 8:15 P. M. It was at this adjourned meeting that the Board resolved that Mr. O'Brien had forfeited his membership. No question has been raised as to the legality of this meeting, which commenced after 8 P. M., contrary to law, and in view of the conclusion which we have

reached, it is not necessary for us to rule on it. Needless to say, if a board can convene at four and then lawfully take recess to 8:15, there would seem to be no reason why it could not do so until 9:15, 10:15, 11:15, or even midnight, and the spirit, if not the letter, of the law would be just as clearly broken if a meeting was called for any such hours. The law is very clear. Meetings of the Board of Education shall be public, and shall commence not later than 8 P. M. The object of the law, viz., full publicity, can be defeated almost as well by holding meetings when the great majority of the public is asleep as by a star chamber proceeding."

The Commissioner does not charge that it was the purpose of the respondent Board of Education to hold star chamber proceedings, but if the practice of adjourning a regular meeting and convening a special meeting later in the same evening were upheld, it would make it possible for any board of education to hold such star chamber proceedings and thereby evade the intent of the Legislature to require actions of boards of education to be taken in public.

The Commissioner finds that the meeting at which appellant was dismissed commenced after 8 P. M. He holds that a valid determination could not be made at such a meeting. This holding makes it unnecessary to decide whether the 9:15 P. M. meeting was called in accordance with legal requirements.

6. In preparing an answer to the question whether he should weigh the evidence to reach an independent conclusion or whether he should confine himself to determining whether there was substantial evidence to support the board's findings and whether there was a rational basis for its determination, the Commissioner was guided by the decision of the Appellate Division in the case of *Hornauer v. Division of Alcoholic Beverage Control*, *supra*. In the *Hornauer* case, as in the instant case, the testimony was conflicting. The following quotations from this case dispose of the question, in the Commissioner's judgment:

"The scope of judicial review upon findings of fact continues to be variously limited. The substantial evidence rule is applied vigorously in literally hundreds of cases. . . . The courts continue to apply the usual corollaries to the rule, i. e., that it is the function of the administrative agency and not the courts to weigh the evidence, to determine the credibility of witnesses, to draw inferences and conclusions from the evidence and to resolve conflicts therein." (Quoted from the writings of former Chief Justice Vanderbilt at page 503.)

"The now generally accepted gauge of administrative factual finality is whether the factual findings are supported by substantial evidence. *In re Larsen*, 17 N. J. Super. 564, 576 (App Div. 1942)" p. 504. At page 506: "The choice of accepting or rejecting the testimony of witnesses rests, therefore, with the administrative agency. Where such choice is reasonably made, it is conclusive on appeal. The scope of appellate review does not possess such breadth as shall permit a disturbance of the administrative finding unless the court is convinced that the evidence permits of no reasonable latitude of choice. The court canvasses the record, not to balance the persuasiveness of the evidence on one side as against the other, but in order to determine whether a reasonable mind might accept the evidence as adequate to support the conclusion, and, if so to sustain it.

To the same point is *Mackler v. Board of Education of the City of Camden*, 16 N. J. 362 at 371. Furthermore, the record must be searched to find whether there was a rational and reasonable basis for the dismissal. *Reichenstein v. Newark*, 139 N. J. L. 115. Cf. also *Laba v. Newark Board*, 23 N. J. 364, and *In re Massiello*, 25 N. J. 590.

The nature of the instant case is such that such reliance must be placed on the Board members who had an "opportunity to observe the witnesses and to evaluate their credibility." *In re Massiello*, *supra*. The Commissioner concludes that in reviewing the instant case he should examine the record to determine whether there was substantial, competent and relevant evidence to support the finding of guilt and whether there was a rational basis for the determination of the Board of Education.

7. The answers to questions 3 and 6 bear on the question of whether adequate findings of fact were made. The Commissioner has already held herein that there is no reason to reverse *per se* because board members may be at the same time investigators, prosecutors, triers and jurors. Because of the danger that board members may base their judgment on factual knowledge in their possession but not in the record, the Commissioner must examine the record with great care to make certain that the members have not been silent witnesses. In *New Jersey State Board of Optometrists v. Nemitz*, 21 N. J. Super. 18, it was said:

"Factual knowledge * * * of the triers of the facts is not evidence and cannot form the basis in whole or in part of the ultimate judgment."

"Generally in an adjudicatory proceeding before a public administrative body, nothing may be treated as evidence which was not introduced as such; * * *" 73 C. J. S. page 123.

The necessity of the Commissioner to scrutinize this element of the proceedings carefully emphasizes the need for adequate findings of fact.

In his answer to question 6, the Commissioner pointed out that, because of the nature of the case with its conflicting testimony, he must of necessity place reliance upon the members who observed the demeanor of the witnesses. This again, emphasized the need for findings. If the Commissioner is to give so much weight to the Board members' observations of the demeanor of witnesses and their resolution of conflicting testimony, it would seem that he would be entitled to know how the Board resolved the conflicting evidence and the basis on which it made its final determination.

The reasons for requiring findings of fact are stated in *Mackler v. Board of Education of Camden*, *supra*, as follows:

"The two chief reasons for requiring findings of fact are that the case shall be decided according to evidence rather than arbitrarily and so that the parties and reviewing authorities may determine whether it has been."

The Court pointed out that if there had not been a full finding of fact, it would have remanded. In *New Jersey Bell Telephone Company v. Communications Workers*, 5 N. J. 354 (Sup. Ct. 1950) it was said on page 377:

"The most reasonable and practical standard is to require that findings of fact be sufficiently specific under the circumstances of the particular case to enable the reviewing court to intelligently review an administrative

decision and ascertain if the facts upon which the order is based afford a reasonable basis for such order.”

The Commissioner does not consider the findings in the instant case adequate for a proper review of the Board’s determination.

Despite the holdings of the Commissioner that a valid determination could not be made at a special meeting which commenced after 8:00 P. M., and that an adequate finding of facts is lacking, the Commissioner will not reverse the judgment below and reinstate the appellant. He will, instead, remand the case to the Board of Education for a full finding of facts with any action thereon to be made at a properly called meeting to commence not later than 8:00 P. M.

It is equally the duty of the Commissioner in the instant case to safeguard the rights of appellant and to protect the school pupils from harm. If there is a judgment of guilt based on an adequate finding supported by a fair preponderance of substantial, relevant and competent evidence, appellant should be dismissed; if not, he should be exonerated. It is the opinion of the Commissioner that this case is of too serious an import to be disposed of by technicalities. The commissioner’s duty to see to it that the school laws are obeyed and the schools properly conducted is made abundantly clear in *Laba v. Newark, supra*, and *in re Masiello, supra*. It is also clear in *Laba v. Newark* that it is within the authority of the Commissioner to remand. The court said:

“The State Commissioner acted well within his authority in remanding the proceedings to the Board for further inquiry and, if necessary, for the amendment and supplementation of the charges against the teachers. The power to amend and supplement is widely applied in the courts (R. R. 4:15) and may be given even broader scope in this administrative proceeding where the traditional judicial problems of limitations and new causes of action have no bearing whatsoever. See *Gudnestad v. Seaboard Coal Dock Co.*, 15 N. J. 210, 233 (1954) Cf. *Welsh v. Board of Education of Tewksbury, Tp.*, 7 N. J. Super. 141 (App. Div. 1950). And we find no error in the State Commissioner’s refusal to order reinstatement of the teachers pending further inquiry and determination. While the individual interests concerned are of great importance, society’s interest is also of great importance and undoubtedly the State Commissioner balanced them conscientiously in reaching his conclusion that the public interest will best be served by a remand for further proceedings without interim reinstatement. On the record before us we cannot say that he erred in his judgment or exceeded his authority. We find nothing of merit in the teachers’ point that the further inquiry called for by the State Commissioner should be held before him rather than the Newark school authorities. There is no substantial reason to believe that the local personnel is not sufficiently equipped to conduct a fair and impartial inquiry or that it will fail to do so in compliance with the principles expressed by the State Commissioner and this court. The school laws contemplate that where the general issue of fitness is presented the original determination should be made locally with ample safeguards on review before the State school authorities and the courts. See *Russo v. Meyner*, 22 N. J. 156, 168 (1956). In the instant matter there has never been any suitable inquiry and deter-

mination at the local level and the State Commissioner, soundly believing that there should be, took the appropriate action.”

The Board of Education is authorized herewith to make such further inquiry as it may deem advisable, amend and supplement the charges, if necessary, call additional witnesses and take such other steps as may be appropriate for the proper determination of this matter. The Commissioner in accordance with *Mackler v. Camden, supra*, would remind the Board that only Board members who heard the evidence may participate. If, for any reason, other members participate, it would be necessary to rehear the testimony as was done in *Mackler v. Camden* (See p. 369). The Board of Education is directed to prepare a finding of facts in accordance with this decision and to adopt the same and take any appropriate action thereon at a properly called meeting of the Board of Education, commencing not later than 8:00 P. M.

The determination of other questions raised should await the final outcome of the matter.

COMMISSIONER OF EDUCATION.

February 17, 1961.

XII

RESUBMISSION OF REJECTED BUDGET ITEMS IS RESPONSIBILITY OF OUTGOING BOARD OF EDUCATION

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE SCHOOL
DISTRICT OF THE BOROUGH OF CLAYTON, GLOUCESTER
COUNTY, ON FEBRUARY 28, 1961.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this matter contest the legality of a referendum resubmitting the rejected budget items in the annual school election in the School District of the Borough of Clayton, Gloucester County. They allege failure to comply with the statutory requirements in holding such a referendum and certain other irregularities and petition the Commissioner of Education to declare the election invalid. In particular, they claim that the duties assigned to the Secretary of the Board of Education by law were usurped and performed by unauthorized persons and that the public notices of the election and the ballots used did not meet the requirements of law.

In order to establish the facts of the allegations, a hearing was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the Office of the Gloucester County Superintendent of Schools on March 7, 1961. The factual matters established at this inquiry were not contested or refuted.

At the annual school meeting held February 14, 1961, the voters rejected a resolution authorizing the raising of \$323,530.80 for current expense by a vote of No—395 and Yes—286. A second resolution appropriating \$3,127.25 for equipment was also defeated by a vote of No—370 and Yes—330. Following this rejection, the Board of Education met on February 16 and adopted a motion to resubmit the current expense and equipment questions in the same

amounts at a second referendum to be held February 28, 1961. The Board's secretary was directed "to post the public notices in the same places as the previous election." The secretary testified that he performed the following duties to prepare for the second referendum:

1. On February 18 posted seven public notices, each of which stated the proposals to be submitted as the raising of \$323,530.80 for current expense and \$3,127.25 for furniture and equipment.
2. On February 19 wrote to the Woodbury Times Newspaper ordering the insertion of a notice of the election to appear in the newspaper on Tuesday, February 21, containing the same proposals.
3. On February 19 wrote to the Clayton Press, ordering a similar newspaper notice and also the printing of ballots for the election.

On February 20, the newly elected board of education met and organized. At this meeting a motion was made as follows:

"Resolved that the amount to be raised by taxation for current expenses of \$283,530.50 and the amount to be raised for capital outlay of \$3,127.25 to be submitted to the voters of the School District at the special election to be held for that purpose on February 28, 1961; and be it further

"Resolved, that the notices of said election be posted and advertised according to law."

The secretary protested the legality of this action, refused to alter the notices already posted, and submitted his resignation effective immediately or as of March 1. The Board acted to accept the resignation effective March 1.

The next night, February 21, the Board again met and adopted a resolution rescinding the previous Board's motion of February 16 under which it had been determined to resubmit the budgetary items without change. A motion was adopted to approve the resolution of the previous night's meeting (February 20) reducing the current expense appropriation to be submitted. Subsequent action of the Board is revealed by its minutes, as follows:

"Frame reported that he had rescinded the Secretary's instructions to the Woodbury Daily Times about printing the notice of the election in the paper on February 21, 1961. He further stated that he would like the Secretary to make the necessary changes to the election notices, et cetera. The Secretary stated that he had made his position very clear the night before, that he still believed the actions to be illegal in spite of what had been brought out at this meeting and that he would not handle it. Frame then appointed Kuchlak as Temporary Secretary and instructed him to do the following: (1) change the amounts on the already posted public notices; (2) call the Woodbury Daily Times before nine o'clock the following morning to have the amounts changed in the election notices and have it printed that day; (3) contact the Clayton Press and have the amounts changed in the election notice and to change the ballots; (4) sign his name as Acting Secretary over the signature of the Board Secretary on the public notices, election notices and ballots."

One of the posted notices, the newspaper advertisement, as it appeared in the Woodbury Times of February 22, 1961, and a ballot were submitted.

The notice shows that it was altered by a typewritten paster in the reduced amount placed opposite Current Expense and the insertion of "Acct. Secy." in typewriting followed by the signature of Michael Kuchlak under the signature of the Secretary. The newspaper notice is in the reduced amount and carries the name of Michael Kuchlak, Acting Secretary, under the name of Chester L. Hildebrand, Secretary, Clayton Board of Education. The ballot shows the name of Michael Kuchlak, Acting Secretary, printed in regular type under the printed facsimile signature of Chester L. Hildebrand, Secretary, and the current expense question is in the reduced amount.

The referendum was held February 28, 1961, with the following announced results:

Current Expense	Yes 204	No 63
Equipment	Yes 201	No 63

R. S. 18:7-81 provides for the resubmission of items rejected at the annual school election as follows:

"If the voters in a district shall reject the entire budget or any items of appropriation necessary to meet the annual cost of education in the district submitted at the annual district school election, the board shall within fifteen days submit again at a special district school election called for that purpose, the items rejected at the annual district school election. The items to be submitted at this special district meeting may be in the same or less amounts than those submitted at the annual election."

R. S. 18:7-78 authorizes the raising of a tax for school purposes by referendum:

"The legal voters of each district may, at any annual or special meeting by the vote of a majority of those voting upon the proposition, raise by a special district tax such sum or sums, not exceeding the sum or sums designated in the notices calling such meeting, as a majority of the legal voters voting upon such proposition may agree upon"

R. S. 18:7-15 directs the manner in which notices of the election are to be given:

"Notices of the election shall specify the day, time and place thereof, and whenever two or more polling districts have been established, shall also contain the boundaries of the several polling districts and the location of the polling place in each of such districts.

"At least ten days before the date of the election the district clerk shall post not less than seven notices of the election, one on each schoolhouse within the district and others at such other public places therein as the board shall direct. A district clerk who shall fail to post notices in accordance with this section shall pay a fine of twenty dollars, to be recovered in a court for the trial of small causes by any resident of the district.

"The district clerk shall also cause such election to be advertised at least one week before the holding of such election in a newspaper circulating in the district."

R. S. 18:7-69 sets forth the powers and duties of the board secretary. The pertinent excerpt is as follows:

“A secretary appointed under the title of district clerk, or of secretary as provided in this chapter, shall have all of the powers and perform all of the duties provided by law to be exercised or performed by a district clerk including the following:

* * * F. Post notices of the annual and of any special elections of the legal voters, and insert in the notices the object or objects for which the election is called.”

R. S. 18:7-30, which describes the ballot, provides among other things, that it shall contain “the printed facsimile signature of the secretary.”

That these statutes are in *pari materia* and must be read together is obvious. *Pondelick v. Passaic*, 111 N. J. L. 187 at 193 (1933); *Farrell v. State*, 54 N. J. L. 421 (1892); *Modern Industrial Bank v. Taub*, 134 N. J. L. 260 at 263 (E. & A. 1946); *Lynch v. Borough of Edgewater*, 14 N. J. Super. 329 at 333 (App. Div. 1951). When this is done, it becomes apparent that the newly elected board of education chosen at the annual school election cannot act upon the question of rejected items to be submitted at a second referendum and meet the requirements of the statutes. R. S. 18:7-81 requires that the resubmission must occur within 15 days of the annual school election and R. S. 18:7-15 provides that notices of such referendum must be posted at least 10 days before. As the newly elected board is not legally constituted until its organization meeting, which cannot take place sooner than the sixth day following the annual meeting (R. S. 18:7-53), the time required for the posting of the public notices has expired before the incoming board has any legal existence. It is obvious that the notices can be posted only by the board of education in existence 10 days prior to the second election. As this election must be held within 15 days after the annual meeting and the new board cannot come into being until there is less than 10 days before these 15 days expire, it follows that only the outgoing board can post the notices. As the statutes require that the notices must set forth the object or purpose of the referendum, it follows that this question must be determined by the outgoing board of education.

It is the opinion of the Commissioner that the specific items set forth in these statutes indicate a deliberate intent of the Legislature to place the responsibility for the decisions in regard to the budget items to be submitted to the voters upon the board which had been in charge of the schools for the past year rather than upon a board newly come into office which might not be as well prepared to make such decisions. It must be presumed that the Legislature acted with knowledge when it adopted these statutes.

“In construing statutes, it is to be assumed that the Legislature is thoroughly conversant with its own legislation and special construction placed thereon.” *Barringer v. Miele*, 6 N. J. 140 (1951); *Eckert v. N. J. State Highway Dept.* 1 N. J. 474 (1949).

It is the Commissioner's belief that the times and requirements of these laws represent a specific purpose by the Legislature to insure that the second election remained in the control of the outgoing board of education. This

has been the unvarying interpretation given to the statutes by the Commissioner and boards of education have been consistently advised to this effect.

“Long continued administrative interpretation is entitled to great weight in construction of statutory provisions, in absence of constitutional objections.” *Travers v. Fogarty*, 187 Md. 348, 50 A. 2d 238.

“Contemporaneous construction of a statute by those charged with its execution and application especially when it had long prevailed is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it is clear that such construction is erroneous.” *Federal Deposit Insurance Corporation v. Board of Finance and Review*, 368 Pa. 463 (Supreme Court 1951) 84 A. 2d 495.

The Commissioner concludes then that the new board of education was without authority to determine the items to be resubmitted to the electorate at the second referendum.

The Commissioner takes the position that school elections conducted by local boards of education are no less important than other elections and they are to be conducted with careful regard and strict compliance to every requirement of the law. That this was not done in the instant matter is evident and is to be deplored.

The actions of the board president and the so-called “acting secretary” cannot be supported either by law or implied authority. There is no authority for the appointment of an acting or temporary secretary by the president of the board. The only circumstance under which an acting secretary may be appointed is “during the temporary absence, disability, or disqualification” of the secretary (R. S. 18:5-49.2), and then only by designation by the board. There was no such circumstance in this case.

Nor can any authority be found for altering the legal public notices, the newspaper advertisement, and the ballots already posted or ordered by the secretary who had performed his duty in accordance with the law. In this connection, it is to be noted that the secretary’s signature was used without his authorization. The newspaper notice and the ballots that were printed bearing his signature were not those he authorized. The fact that the secretary refused to make the changes when directed to do so does not validate the acts of the president and his appointee. Indeed, the stand taken by the secretary is to be commended. It is well established that the secretary is an officer of the board who has a statutory duty and responsibility to perform certain acts. Those acts cannot be enlarged, diminished, nor delegated except where the express power to do so is given by law. The secretary, in this case, performed those duties which are assigned to him. His refusal to alter those acts was correct in every respect. The acts of the president and the board member he designated usurped the powers and duties assigned by law to the secretary and were without any authority whatsoever.

That the alteration of the items to be resubmitted was in a lesser amount and, therefore, might be held to have favored the voters, does not correct the illegality of the board’s action, in the Commissioner’s judgment. There would be no question that had the outgoing board decided to resubmit at the lower figure and the incoming board changed the notices and ballots to a higher

one, the referendum would be held to be invalid. The Commissioner believes that this holds true also in this instance where the amounts were reduced. To hold otherwise would be to say that illegal acts which reduce appropriations are proper, but that those which increase them are wrong or, in other words, that the end justifies the means. The Commissioner cannot accept such a philosophy for the conduct of the public's business by boards of education and will not support them in attempts to circumvent the law or the expression of the public will.

Another notable defect in this election was the failure to give the required notice by newspaper. By delaying publication of the notice until the edition of February 22, the requirement that such notice appear at least one week before the election was not met.

The Commissioner concludes, for all of the reasons stated above, that the board of education exceeded its authority and conducted the election in question in an illegal manner. Having reached this conclusion, it must then be decided whether the results of the election should be set aside or allowed to stand.

Although it might be argued that the results of the balloting in this election were decisive and, therefore, represent the will of the people freely expressed, the Commissioner cannot take this position. While the courts have said that effect should be given to an election wherever possible (*Love v. Board of Chosen Freeholders of Hudson County*, 35 N. J. L. 269) (1871) and that an election will not be upset for violation of directory provisions of the election laws by election officials, (*In re Smock, et al.*, 5 N. J. Super. 495 (Law Div. 1949); *Petition of Clee*, 119 N. J. L. 310 (1938)) the irregularities in the instant case were not confined to directory matters but violated mandatory requirements as well. In such case

“* * * the courts consider the nature of the irregularity, its materiality, the significance of its influence and consequential derivations in order to determine whether the digression or deviation from the prescribed statutory requisitions had in reasonable probability so imposing and so vital an influence on the election proceedings as to have been repressed or contravened a full and free expression of the popular will, and thus deduce the legislative intent reasonably to be implied.” *Sharrock v. Keansburg*, 15 N. J. Super. 11 at 17 (App. Div. 1951).

When all of the irregular and illegal acts in the instant case are considered in this light, the election results, in the Commissioner's judgment, must be set aside.

Even though the result of this election may appear decisive, it is not at all certain that it presents the will of the people freely expressed. The Commissioner has received written communications signed by more than 150 persons stating that many citizens decided not to vote because of the confusion created by the actions of the board of education and the generally held belief that the referendum was not legally constituted. While it cannot be determined that the number of those who abstained from voting in what they consider to be an illegal referendum would have in fact altered the result, the addition of this question to those already raised lends weight to the decision to set the results aside.

Finally, it must be noted that this was not an election for the purpose of choosing representatives on the board of education, but was a matter of the authorization of a tax to be levied for the maintenance of the schools. To support such a tax there must be a clear mandate from the voters at an election called in strict accordance with the requirements of law. The secretary of the board of education is required to certify under oath that such authorization was properly made. His certification includes a statement as to the posting of notices of the election. In the Commissioner's opinion the secretary cannot lawfully make the statements required to execute a valid certificate of taxes to be raised, under the circumstances of this case, and that being so, no rate can be struck by the county board of taxation. The courts have spoken as follows on this question:

"* * * only at a meeting legally convened can authority be given to levy a tax * * * and to support such a tax it must appear that the meeting * * * was duly summoned. *Apgar v. VanSyckel*, 46 N. J. L. 492 (1884).

"* * * the vote of a meeting legally convened is essential to the validity of * * * a tax.

"A tax levied to raise a sum of money * * * whereof 10 days' notice was not given, must be set aside." *Canda Manufacturing Co. v. Woodbridge*, 58 N. J. L. 134 (1895).

The Commissioner finds and determines (1) that the Board of Education of the School District of the Borough of Clayton exceeded its authority in altering the current expense item to be resubmitted to the voters following its rejection at the annual meeting and in changing the arrangements made for such resubmission; (2) that the statutory powers and duties of the secretary of the board were usurped by unauthorized persons with the consent of the board; (3) that both statutory and directory requirements for the conduct of the referendum were ignored or violated; (4) and that the irregularities were of such a nature and degree that the election should be set aside.

The referendum of February 28, 1961 is hereby set aside and the announced results are declared invalid, void, and of no effect.

The Commissioner further finds and determines that, because of the acts of the board of education, the voters of the School District of Clayton Borough have been denied the right which is theirs by the authority of R. S. 18:7-81, to express their will in regards to the appropriations for the support of their schools at a second referendum. The Clayton Board of Education is directed, therefore, to call and conduct a legal referendum resubmitting the items rejected at the annual meeting on February 14, 1961, in the same amounts of \$323,530.80 for Current Expense and \$3,127.25 for Equipment as determined by the resolution of the board of education at their meeting of February 16, 1961. Such referendum is to be called forthwith in order that whatever procedures may be necessary to arrive ultimately at the amount to be appropriated may be accomplished and timely certification made to the Gloucester County Board of Taxation. The referendum is to be called on due and proper notice and is to be conducted in every respect in strict compliance with every requirement of law.

COMMISSIONER OF EDUCATION.

March 14, 1961.

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal from a decision of the Commissioner of Education to the effect that a resubmission of a school budget to the voters of the Borough of Clayton on February 28, 1961, was not in compliance with law, and that another election must be held. That determination on March 10, 1961, arose out of a hearing held March 7, 1961. Appellants took issue with the rapidity with which the Commissioner acted, and argued that his decision was based on a hearing which did not comply with the requirements of law, and, furthermore, that he based his decision in part on facts outside the record.

Appellant's brief, citing *In re Masiello*, 25 N. J. 590, 138 A. 2d 393, contends:

"The court held "The mandate of the Legislature is that the Commissioner 'shall decide * * * all controversies and disputes.' 'Decide' in such context means decision after hearing on the facts presented to him."

The oral argument stressed further the proposition that the "investigation" conducted by the Commissioner was "not a hearing at all." Although there appears to be no dispute about the essential facts, appellant would have us set aside the decision of the Commissioner, because his "investigation" was "not a hearing." This is an argument which sets up a denial of the due process of law, and merits an analysis of how and to whom it may have been denied.

Appellant's citation of *In re Masiello*, *supra*, invokes a Delphic Oracle. In that decision, at page 398 as reported in 138 A. 2d 393, we encounter the following:

"Assuming that there was an infirmity in the type of proceeding before the Commissioner because of his failure to afford an independent review of the original agency action, it cannot be said that prejudicial error resulted. This is so because the facts are undisputed * * * and therefore, the dispositive issue was one of law and not of fact."

On that basis, in that case, the Supreme Court affirmed the Commissioner.

Appellant urges us that we should set aside the Commissioner's decision because it did not have notice, or adequate notice, of the hearing he held on March 7, 1961. At that hearing none of the members of the appellant board were present, but, their solicitor attended by their direction. After being questioned he was asked whether he had anything to add and said that he had not. The necessity for the Commissioner's acting with dispatch was so that figures could be certified for tax purposes. A swift determination of the validity or invalidity of the special election of February 28, 1961, had to be made so that if it were invalid, a new election could be held in time for the certification of the figures. Furthermore, this was not such a controversy or dispute as affects the status or rights of an individual, or individuals. The rights or status of the appellant board have not been challenged, and are not in issue. If due process was involved, it was involved only in the question of whether the voters of Clayton had received proper notice of an election. The

sole question decided by the Commissioner was that the special school election held February 28, 1961 did not conform to the requirements of law.

The Clayton Board argued, also, that the Commissioner's decision was erroneous because he considered and gave some weight to a petition purportedly signed by some one hundred and fifty voters of the Borough claiming doubts and confusion were produced by the changes in the notices of the election. In the first place we do not accept the implicit doctrine of this argument that the Commissioner may not take notice of such information; the basic facts in the petition were matters of common knowledge in the community and were the same facts brought out in the record. Secondly, if the Commissioner's findings be based on substantial evidence within the record and there is nothing within the record nor in the protested evidence which would support a contrary result, the State Board, on review, should affirm the Commissioner's decision, and so we do. Once the Commissioner came to the conclusion that the requirements of the statutes had not been met, he had no choice but to direct that a new election be held, regardless of what other evidence, proper or improper, was brought to his notice.

The State Board of Education finds:

1. there is sufficient evidence within the record to sustain the finding of the Commissioner that the powers and duties of the Secretary were usurped, and
2. his findings that the public notices of the special election did not conform to the requirements of law.
3. that nothing was adduced at the hearing before the State Board to persuade it that the Commissioner's decision was erroneous in law, and, therefore is hereby AFFIRMED.

July 26, 1961

XIII

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF FLORHAM PARK, MORRIS COUNTY, ON FEBRUARY 14, 1961

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for members of the Board of Education at the annual meeting of the legal voters of the School District of Florham Park, Morris County, held February 14, 1961, were as follows:

Ronald L. Faber	206
John J. Myers	172
L. Edwin Backer	173

John J. Myers appealed to the Commissioner for a recount of the ballots on the grounds that ballots were voided because they were marked in blue ink, that such ballots should have been counted, and had they been counted the results would have been other than announced.

A recount was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes on March 9, 1961, at the office of the Morris County Superintendent of Schools. At the conclusion of the recount, with 23 ballots referred for further consideration, the tally of uncontested ballots was as follows:

Ronald L. Faber	205
John J. Myers	169
L. Edwin Backer	173

Of the 23 ballots referred, 17 were voted by agreement. Sixteen of these had not voted for any candidate and 1 had voted for all three candidates when only 2 were to be elected. Two other referred ballots were counted by agreement, resulting in 2 additional votes for Mr. Myers. The remaining 4 ballots were referred to the Commissioner for determination. These 4 ballots in dispute are marked with a cross in the appropriate squares before the names but in various shades of blue or blue-black ink. Three of the 4 were voided and not counted by the election officials, while the last 1, which is in a slightly darker shade of ink, was counted. It is the opinion of the Commissioner that all 4 of these ballots must be counted.

It appears that 3 of these ballots were rejected by the election board in the belief that they did not conform to the requirements of the School Law, specifically R. S. 18:7-31, which states in part as follows:

“To vote for any person whose name appears on this ballot mark a cross (×) or plus (+) or check mark with black ink or black pencil in the place or square at the left of the name of such person.”

The Commissioner has always held that this is directory and not mandatory legislation and, therefore, ballots which are marked in other than black ink or pencil are to be counted unless the use of the color was intended to identify or distinguish the ballot. In the Commissioner's judgment there was no such intent in the marking of the 4 ballots in question which are marked in colors of ink ordinarily found in pens in common use. Support for this position is found in the General Election Law which, although not binding upon school elections, is relied upon by the Commissioner in deciding school election disputes. The relevant section is R. S. 19:16-4, as follows:

“* * * No ballot shall be declared invalid by reason of the fact that the mark made with ink or the mark made with lead pencil appears other than black * * *”

The Commissioner concludes that the 4 ballots referred to him are to be counted. Three of these are voted for Faber and Myers and the other is voted for Myers and Backer.

The following is the final tabulation of the ballots:

	<i>Uncontested Ballots</i>	<i>Counted by Agreement</i>	<i>Referred</i>	<i>Total</i>
Ronald L. Faber	205	---	3	208
John J. Myers	169	2	4	175
L. Edwin Backer	173	---	1	174

The Commissioner finds and determines that Ronald L. Faber and John J. Myers were elected to the Board of Education of the School District of the Borough of Florham Park, Morris County, for the term of 3 years.

COMMISSIONER OF EDUCATION.

March 21, 1961.

XIV

WHEN TEACHING-PRINCIPAL REVERTS TO TEACHER, LOSS OF ADMINISTRATION COMPENSATION DOES NOT CONSTITUTE REDUCTION OF SALARY

MILDRED W. POTTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERKELEY,
OCEAN COUNTY,

Respondent.

For the Petitioner, Ruhlman & Ruhlman (Mr. Cassel Ruhlman, Jr., of Counsel).

For the Respondent, Camp & Simmons (Mr. Roy G. Simmons, of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is under tenure in the Berkeley Township School System. On July 30, 1956, she was appointed teaching-principal in the Bayville School which position her Permanent Elementary Teacher's Certificate entitled her to hold. Subsequently, the teaching staff increased beyond the number which she was authorized to administer under the terms of her certificate with the result that the position of teaching-principal was discontinued and a non-teaching principalship was created for the school year 1959-60. Petitioner was not able to qualify for the certificate required for the position and was, therefore, assigned as teacher. For the school year 1958-59 when she was a teaching-principal, her salary was \$6,100. For the school year 1959-60 when she became a teacher only, her salary was fixed at \$5,800. Petitioner maintains that this action of the Board resulted in a reduction of salary which is contrary to the statutes. She prays that the Commissioner issue an order declaring the action of the respondent Board in setting her salary at \$5,800 to be void and of no effect and that the Board be directed to establish and pay petitioner a salary in the amount of \$6,100 for the school year 1959-60.

Respondent, in its answer, says that beginning with the school year 1956-57, petitioner became a teaching-principal and, during that school year,

was granted an additional compensation of \$500.00 per annum for administrative duties she was to perform as principal in addition to her duties as teacher. Accordingly, the \$500.00 administrative salary, which the petitioner was to receive for acting as principal, in no way was granted to her for the duties she was to perform as a teacher. Respondent contends, further, that while she actually received \$6,100 for the school year 1958-59, her salary as teacher in no way exceeded the total sum of \$5,700 per annum. For the 1959-60 school year petitioner received a pay raise, bringing her salary up to \$5,800 per annum. Since the beginning of the school year 1959-60, she has performed no administrative duties other than those performed by any teacher.

The case is presented to the Commissioner on a stipulation of facts and briefs of counsel.

Petitioner contends, in her brief, that N. J. S. A. 18:13-16 protects her against a salary reduction except upon charges and a hearing. No charges have been preferred and, therefore, the sole inquiry is the amount of her salary which is so protected against reduction. She maintains that the entire salary of \$6,100 is protected because her salary has always been fixed as a lump sum for the school year and there never was any designation or setting apart of any portion of her salary as being attributable to teaching and the balance to her duties as principal. She further contends that she was first and primarily employed as a teacher and subsequently assigned to principal's duties without any indication of a separate additional amount being paid therefor.

Petitioner argues that since the Board did not fix an additional amount for her services as principal, it cannot remove any portion of her salary now that she has ceased to perform those services. All of her salary, she contends, was apparently paid to her as a teacher and she is still employed in that capacity. This is not a case, she argues, of the abolition of a position in which it might be found that the salary was abolished with the job. The position of principal in the school in question still exists and petitioner is still employed as a teacher, which position she has held and for which she has been paid by the respondent for many years. She contends that the change of her assignment because of an increase in the size of the school does not constitute legal justification for a reduction in salary.

Respondent, in its brief, concedes that petitioner is a person of high repute and a competent teacher. No charge has been made as to her ability, fidelity, or character. It is not denied that petitioner is under tenure and that N. J. S. A. 18:13-17 forbids salary reductions. Respondent, however, contends that the law appears to be clear that when a tenure teacher or employee has received additional compensation for the performance of duties in addition to his regular assignment, there should be a corresponding cessation of the increase in pay when the additional duties are no longer performed. In such a case there is no violation of the provisions of N. J. S. A. 18:13-17. In support of this contention, respondent refers to the reasoning in *Reed v. Board of Education of Trenton*, 1938 S. L. D. 437, 441 and *Deily v. Board of Education of the City of Jersey City*, 1950-51 S. L. D. 44.

It has been established in previous decisions that a person performing services in a distinctive classification or category cannot be transferred *illegally* to a different classification or category paying a lower salary. It has also

been established that paying less salary to a person who is assigned legally to another position with a lower salary does not amount to a salary reduction within the intent of the tenure law. (For a summary of principles established in previous decisions, see *Deily v. Jersey City, supra*, 45.)

The Commissioner finds without merit the contention that petitioner's salary must remain the same when she returned to teaching because the principalship was not abolished. This argument misses the point that the classification of teaching-principal which she held was discontinued and a new classification of non-teaching principal was established which, it is admitted, she was not legally qualified to fill. She does not charge that she was illegally removed from the principalship. Therefore, according to previous decisions, the Board may legally pay petitioner less salary as a teacher, if it can be established that she received a greater salary for serving as principal.

The crucial question is whether petitioner actually received as principal more salary than she would have received as a teacher. It is the opinion of the Commissioner that there are sufficient facts in the stipulation to support the conclusion that she did receive more salary as principal. The stipulation reveals that at the meeting of July 19, 1955, the salary of her predecessor as principal was fixed at \$4,800. Petitioner and another teacher, Gertrude Lippincott, were paid the next highest salary of \$4,050. At the meeting of July 30, 1956, petitioner was appointed principal of the Bayville School and her salary fixed at \$4,800; the same salary paid to her predecessor. Thus, it would appear that her salary was more as a principal. At the meeting of July 16, 1957, petitioner asked for an increase in salary because of her increased work load. This increase was granted. This seems to be further evidence that she was paid additional salary as a principal.

At the meeting of April 15, 1958, a salary guide was adopted by the Board. A motion was also adopted that the administration salary for petitioner's school be fixed at \$500. It will be remembered that as teacher, petitioner's salary and that of Gertrude Lippincott were the same. In the list of salaries fixed at this meeting, petitioner's was set at \$6,100 and Gertrude Lippincott's, the highest teacher's salary, was set at \$5,250. This is added evidence that petitioner was paid a higher salary for serving as principal.

In the salary lists in the stipulation, the salary of petitioner always appears as one lump sum. There is no apportionment of any specific amount for the performance of duties as principal. Therefore, petitioner contends that an attempt to apply only a portion of her salary to her teaching duties constitutes a reduction in salary contrary to the tenure laws. The Commissioner cannot agree. He is satisfied that petitioner received more salary as principal than she would have received as a teacher. While it might have been much simpler to fix her salary after she ceased to be principal if the Board in its minutes had apportioned on each salary list the amount paid for services as principal, its failure to do so does not require it to continue to pay a principal's salary to petitioner after she relinquishes the position. The point is that when she ceased to be principal, the salary paid to her as principal went out of existence. It then became the duty of the Board to fix a salary for the teaching position fairly in accordance with the salary scale of the district.

The Commissioner finds and determines that the salary of \$6,100 paid to petitioner in the school year 1958-59 was for service as a teaching-principal

and that the Berkeley Township Board of Education was not required to continue to pay petitioner the same salary when she relinquished the position of teaching-principal and reverted to teacher.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

March 27, 1961.

XV

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE
ANNUAL SCHOOL ELECTION IN THE BOROUGH OF
WATCHUNG, SOMERSET COUNTY

For the Petitioners, Mr. Sanford C. Vogel.

For the Board of Education, Mr. Robert J. T. Mooney.

DECISION OF THE COMMISSIONER OF EDUCATION

At the annual school election held in the School District of the Borough of Watchung, Somerset County, on February 14, 1961, a public question was submitted to the voters authorizing the issuance of bonds in the principal amount of \$950,000 for purposes of land acquisition and school building construction and equipment. Petitioners allege that ballots sufficient in number to alter the results of the voting on this question were voided improperly and a recount is requested to establish the correct tally. A recount of the balloting on the public question was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Somerset County Superintendent of Schools on March 21, 1961.

The announced results of the election were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
YES	324	3	327
No	301	0	301

At the conclusion of the recount, the tally of the uncontested ballots was as follows:

YES	313
No	299

Sixty-one ballots were set aside for further consideration. Included in these were the 24 ballots which were voided and not counted by the election officials. After further consideration it was agreed to count one of these ballots, adding one to the "YES" tally. There was further agreement that 14 ballots could not be counted. Nine of these were marked for both YES and No and on the other five no vote of any kind was made. The remaining 46 ballots were referred to the Commissioner for determination. These 46 counted ballots may be grouped in categories and are determined as follows:

EXHIBIT A—20 ballots on which the proper mark has been made in the appropriate square in blue ink. These ballots will be counted.

Although R. S. 18:7-32 refers to the use of black ink or black pencil in making the required kind of mark, the Commissioner in his determination of election contests has always held that this is directory and not mandatory legislation. Support for this holding is found in Title 19, which, while not binding in school elections, has been looked to for guidance by the Commissioner in deciding disputed elections. The relevant excerpt of R. S. 19:16-4 states: "No ballot shall be declared invalid by reason of the fact that the mark made with ink or the mark made with lead pencil appears other than black."

In re Recount of Ballots Cast at the Annual School Election in the Borough of Stratford, 1955-56 S. L. D. 119. *In re Clementon Annual School Election*, 1938 S. L. D. 180.

- EXHIBIT B—9 ballots on which the required mark has been made in the space in which the word YES or NO appears with no mark in the square to the left and before either of these words. These ballots cannot be counted. The statutory prohibition in this instance is specific and is stated in R. S. 18:7-32 as follows: "In case no marks are made in the square to the left of and opposite either the words YES or NO it shall not be counted as a vote either for or against the proposition."

In re Clementon Annual School Election, supra. In the Matter of the Recount of Ballots Cast at the Special School Election in the Township of Tewksbury, 1939-49 S. L. D. 96.

- EXHIBIT C—5 ballots on which a proper mark is made in the appropriate space but with an additional similar mark or circle around the word in the space containing the words YES or NO. These ballots will be counted. The additional marks are of a kind that are found frequently and such ballots are counted unless it appears that the extra marks were intended to identify or distinguish the ballot. In the Commissioner's judgment no such intent appears here and the ballots will, therefore, be counted.

In the Matter of the Recount of Ballots Cast in the Annual School Election in the Township of Union, 1939-49 S. L. D. 92. *In re Annual School Election in the Borough of North Caldwell*, 1954-55 S. L. D. 110.

- EXHIBIT D—5 ballots on which there is a mark in the appropriate square but the mark is not clearly made as either a cross, plus or check. These ballots will be counted. In the Commissioner's judgment the marks on these ballots approximate the conventional cross, plus, or check mark closely enough to be acceptable and any variations represent individual idiosyncracies of insufficient degree for invalidation. Neither is there apparent any intent to identify or distinguish these ballots.

In re Special School Election, Tewksbury Township, supra.

- EXHIBIT E—4 ballots on which the word YES has been circled but no mark appears in the space before the word. These ballots cannot

be counted. Although it may be argued that the intent of the voter is expressed, the statute clearly mandates that no vote can be recorded unless the required mark is made in the square to the left and in front of the word YES or NO. For the same reason as in EXHIBIT B above, these ballots must be discarded. *In re Annual School Election in the Borough of Wallington*, 1951-52 S. L. D. 46.

EXHIBIT F—1 ballot on which the word YES is written in the blank space before the word YES. This ballot cannot be counted since the mark required by statute does not appear in the appropriate space. R. S. 18:16-3 (g) states in part as follows: "No vote shall be counted for . . . or against any public question unless the mark made is substantially a cross, a plus, or a check."

In re Morristown Annual School Election, 1954-55 S. L. D. 107.

EXHIBIT G—1 ballot on which there are 3 cross marks in the appropriate space. This ballot will be counted. The required mark is in the proper space and there is no reason to believe that the duplicate marks were for purposes of identification.

EXHIBIT H—1 ballot with a cross in the space before the word YES and a diagonal line which has been partly erased in the space before the word NO. This ballot will be counted. It appears evident that the voter intended to erase the mark made in the one space. Unless intended to distinguish the ballot, erasures do not invalidate the vote.

In re East Rutherford Annual School Election, 1938 S. L. D. 185. *In re Annual School Election in the Borough of Sayreville*, 1951-52 S. L. D. 47.

The Somerset County Board of Elections certified that 3 absentee votes are to be added to the tally of YES.

The final tally of all votes is as follows:

	Yes	No	Void	Total
Uncontested	313	299	0	612
Counted by Agreement	1	0	0	1
Voided by Agreement	0	0	14	14
EXHIBIT A	8	12	0	20
B	0	0	9	9
C	4	1	0	5
D	2	3	0	5
E	0	0	4	4
F	0	0	1	1
G	0	1	0	1
H	1	0	0	1
Absentee	3	0	0	3
Total	332	316	28	676

Although a total of 674 ballots were reported cast at the polls, a careful check revealed only 673 in the sealed packages transmitted to the County Superintendent of Schools. The Commissioner makes note of this discrepancy but determines that it could not alter the result of the election.

The Commissioner finds and determines that the special question submitted to the voters at the annual school election in the Borough of Watchung, Somerset County, on February 14, 1961, authorizing the issuance of bonds in the principal amount of \$950,000 for purposes of school plant expansion was approved.

COMMISSIONER OF EDUCATION.

April 4, 1961.

XVI

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION IN THE CITY OF CAMDEN, CAMDEN COUNTY

For Mrs. Mary Baybo, Mr. Joseph T. Sherman.

For Frederick H. Martin, Mr. David Novack.

For Board of Education, Mr. A. Donald Bigley.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual school election held February 14, 1961, for three full three-year terms on the Board of Education of the City of Camden, Camden County, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
John J. Horn	4,942	2	4,944
Stella R. Cimino	4,681	0	4,681
Frederick H. Martin	4,627	6	4,633
Mary Baybo	4,601	0	4,601
Louis F. Capelli	4,071	4	4,075
Sylvia Safran	3,883	5	3,888
William G. Baughman	989	1	990
Frank J. Caprice	752	0	752

A petition was filed by Mary Baybo, alleging that errors were made in counting the votes and in respect to the tally sheets and poll lists and requesting a re-check of the votes cast for herself and Frederick H. Martin. A re-check of the voting machines was conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes on February 28, 1961, at the storage depot of the Camden County Board of Elections. Petitioner and Frederick H. Martin were both represented by counsel at this recount.

The result of the recount showed no change in the results as announced.

Petitioners further requested a check of the poll lists in certain districts. With the concurrence of counsel for Mr. Martin, the Assistant Commissioner agreed to conduct a spot check of the poll lists in two districts against the

signature copy registers. The check failed to disclose any irregularities of significance.

The Commissioner finds and determines that John J. Horn, Stella R. Cimino, and Frederick H. Martin were elected to full three-year terms as members of the Board of Education of the City of Camden.

COMMISSIONER OF EDUCATION.

April 14, 1961.

XVII

IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF WASHINGTON, MERCER COUNTY

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the Annual School Election held in the Township of Washington, Mercer County, February 14, 1961, were as follows:

	<i>At Polls</i>		<i>Absentee</i>		<i>Total</i>	
	Yes	No	Yes	No	Yes	No
Current Expenses \$166,036	100	103	2	0	102	103
Capital Outlay \$840	106	95	2	0	108	95

For the three full three-year terms on the Board of Education:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Gordon Higgins	134	0	134
John M. Ciaccio	124	2	126
Kathleen A. Dwyer	110	2	112
Frank A. Mayer, Jr.	108	2	110
Daniel Mondios	47	0	47

A request for a recount of the votes cast for and against the appropriation for current expenses was filed with the Commissioner and was granted. On February 21, 1961, the Assistant Commissioner in Charge of Controversies and Disputes conducted a recount of the balloting on the current expense question at the Sharon School in the district. This recount failed to alter the results of the election as announced.

A second petitioner, Frank A. Mayer, Jr., appealed for a recount of the tally of votes cast for membership on the Board of Education, which request was also granted. This recount was also conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Mercer County Superintendent of Schools in Trenton on March 14, 1961. At the conclusion of the recount with 3 votes voided by agreement and 2 ballots referred, the tally sheet showed:

	<i>Counted</i>	<i>Absentee</i>	<i>Total</i>
Gordon Higgins	132	0	132
John M. Ciaccio	122	2	124
Kathleen A. Dwyer	109	2	111
Frank A. Mayer, Jr.	107	2	109
Daniel Mondios	47	0	47

As the 2 ballots referred would not have altered the relative standing of the candidates, there was no necessity to make a decision with regard to them.

The Commissioner finds and determines (1) that the public question to appropriate \$166,036 for current expenses failed of approval, and (2) that Gordon Higgins, John M. Ciaccio and Kathleen A. Dwyer were elected to full three-year terms on the Board of Education of the Township of Washington, Mercer County.

COMMISSIONER OF EDUCATION.

April 14, 1961.

XVIII

BOARD OF EDUCATION REQUIRED TO MAKE SPECIFIC FINDING AND CERTIFICATION IN APPLICATION FOR DISABILITY RETIREMENT

CHARLOTTE F. DEGEN,

Petitioner,

v.

BOARD OF TRUSTEES OF THE TEACHERS PENSION AND ANNUITY FUND AND
BOARD OF EDUCATION OF THE TOWN OF BLOOMFIELD, ESSEX COUNTY,

Respondents.

For the Petitioner, Skeffington & Haskins (James A. Robottom, of Counsel).

For the Respondent Pension Fund, David D. Furman, Attorney General (Lee A. Holley, of Counsel).

For the Respondent Board of Education, John A. Errico.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was for many years a school teacher in the employ of the Board of Education of the Town of Bloomfield. She says that during this period of employment she suffered injuries as the result of accidents arising out of and in the course of this employment, particularly on November 3, 1955, January 29, 1957, March 11, 1957, and September 20, 1957. These injuries, she alleges, left permanent effects which so disabled her that she was unable to continue to perform her duties as a teacher.

Petitioner further says that thereafter she applied for accident disability retirement in accordance with the provisions of the applicable statutes and the rules of the Teachers' Pension and Annuity Fund. The respondent Board had caused notices of the accidents to be filed with the respondent Teachers' Pension and Annuity Fund and on October 15, 1958 adopted the following resolution:

1. That accidents to Charlotte F. Degen in the Bloomfield Senior High School on November 3, 1955, January 29, 1957, and March 11, 1957, and September 20, 1957, have been reported to us as having occurred to her in the course of her employment.

2. That a court of competent jurisdiction has made an award to her for disabilities resulting from such accidents, such award being based on the causal relationship between said occurrences and the disability.

3. To the best of our knowledge and belief there has been no willful negligence on the part of the employee.

Petitioner further says that the respondent Board of Trustees, by letter dated October 15, 1958, advised the petitioner that it had on October 14, 1958, denied her application for accident disability retirement, but did approve ordinary disability retirement, effective September 1, 1958. The respondent, Board of Trustees, thereafter, on the application of petitioner, reviewed her claim for accident disability retirement on June 11, 1959, and advised her by letter dated July 7, 1959, that it rules to uphold its original decision of October 14, 1958, and to continue petitioner on ordinary disability retirement.

The prayer of the petition is that the Commissioner (1) order the Teachers' Pension and Annuity Fund to grant petitioner's application for accident disability retirement, and (2) order the Board of Education of the Town of Bloomfield to certify to the Teachers' Pension and Annuity Fund such additional information as may be required to establish her application for accident disability retirement.

In its answer, the Board of Education contends that it is not a proper party to the present proceedings, that the action is one which affects only the rights of the other respondent, the Teachers' Pension and Annuity Fund, and moves for an order for dismissal of the proceedings against it. The respondent, Teachers' Pension and Annuity Fund, in its answer denies the allegations that the petitioner suffered injuries as the result of accidents arising out of and in the course of her employment, and that the injuries left permanent effects which so disabled petitioner that she was unable to continue to perform her duties as a teacher.

By agreement of all parties, this matter is submitted for the Commissioner's determination on briefs of counsel.

Petitioner claims that she is entitled to a service-connected (accident) disability retirement allowance even though her disability is the result of several accidents in the course of her duties, superimposed upon a systemic disorder. She argues that the statute should be construed liberally and the principles governing Workmen's Compensation should control the issue of causal connection.

Petitioner's position is that it was the duty of the Board of Education to certify that she either did or did not meet the requirements of the statute and, since the resolution failed to say she did not, it can only be construed to mean that she did. She argues, further, that since the Board of Trustees accepted the resolution and arranged a medical examination for her, they are estopped from denying her application on the grounds that the certification of the Board of Education is not in proper form. Such action, she contends, amounts to the enforcing of an administrative requirement upon the statutory provision, contrary to the ruling in the case of *Frigiola v. State Board of Education*, 25 N. J. Super. 75 (App. Div. 1953).

Respondent Board of Education contends that it has fulfilled its duty, both to petitioner and to the Board of Trustees, by the transmission of its resolution of certification of October 15, 1958. The merits of the application, therefore, are matters solely between the Board of Trustees and petitioner, and the Board of Education should, therefore, be dismissed as a party to these proceedings. The position is also taken that as layman members of a Board of Education, they are not qualified to determine, in an involved case such as this, whether the entire disability is the result of the accidents. Therefore, where a competent judicial tribunal such as the Workmen's Compensation Division had made a determination, certification of such findings by the Board of Education properly certifies the facts within its knowledge and complies with the requirements of the law.

Respondent Board of Trustees argues that accident disability retirement cannot be granted until the statutory requirements are met and that the resolution of the Board of Education fails to meet these requirements. It maintains that there is an absolute void of certification that petitioner's employment accidents were the real cause of disability and that it would be impossible to do so on the basis of the findings of the Workmen's Compensation Division.

Accident disability retirement is provided under R. S. 18:13-112.41, the relevant excerpt reading as follows:

"A member shall, upon the application of his employer or upon his own application * * *, be retired by the board of trustees, if said member is disabled as the result of personal injuries sustained in or from an accident arising out of and in the course of his employment, on an accident disability allowance. No such application shall be valid or acted upon unless a report of the accident, in a form acceptable to the board of trustees, is filed in the office of the retirement system * * *

"Before consideration of an application for accident disability allowance by the board of trustees, the physician or physicians designated by the board shall have first made a medical examination of the member at his residence or at any other place mutually agreed upon and shall have certified to the board that he is physically or mentally incapacitated for the performance of duty, and should be retired, and the employer shall have certified to the board that an accident arising out of and in the course of his employment was the natural and proximate cause of the disability, the time and place where the duty causing the disability was performed, that the disability was not the result of his willful negligence and that the member should be retired."

After examining the records and considering the briefs of counsel, the Commissioner has reached the conclusion that full compliance with the provisions of N. J. S. A. 18:13-112.41 is a condition precedent to the granting of an accident disability allowance. Therefore, it would be premature for the Board of Trustees to grant such an allowance before the Board of Education had made its certification set forth in the last paragraph of N. J. S. A. 18:13-112.41, *supra*. *Rosenthal v. State Employees' etc. System of New Jersey*, 30 N. J. Super. 136, 141, 142 (1954) ; *Frigiola v. State Board of Education, supra*; *Abelsons, Inc. v. New Jersey Board of Optometrists*, 5 N. J. 412, 423 (1950).

It is the opinion of the Commissioner that the Board of Trustees did not and could not waive this requirement. *Rosenthal v. State Employees*, *supra*; *O'Keefe v. Board of Trustees of State Employees' Retirement System*, 131 N. J. L. 502, (1944) affirmed 132 N. J. L. 416 (E. & A. 1944); *Application of Howard Savings Institution of Newark*, 32 N. J. 29 (1960). However understandable may be the Board members' feelings of inadequacy with regard to making a determination to form a basis for the certification required by the statute, it is the opinion of the Commissioner that the Legislature in its wisdom has imposed this duty upon the Board of Education. Neither the Board of Education, the Board of Trustees of the Teachers' Pension and Annuity Fund nor the Commissioner may question the wisdom of the Legislature. *Dacunzo v. Edgye*, 19 N. J. 443, 454 (1955); *State v. Monahan*, 15 N. J. 34 (1954); *Reingold v. Harper*, 6 N. J. 182, 194, 195 (1951); *Beronio v. Pension Commission of Hoboken*, 130 N. J. L. 620, 625 (E. & A. 1943); *Belfer v. Borrella*, 6 N. J. Super. 557 (Law Div. 1949); *Application of Howard Savings Institution of Newark*, *supra*. Nor can the Board of Education delegate its responsibility. *Horsman Dolls, Inc. v. Unemployment Compensation Commission*, 134 N. J. L. 77, 82 (E. & A. 1945); *State, Danforth, Pros. v. Paterson*, 34 N. J. L. 163; *Nixon v. Pleasantville Board of Education*, 1938 S. L. D. 56.

It is further the opinion of the Commissioner that the resolution of October 15, 1958, cited above, does not satisfy the requirements of N. J. S. A. 18:13-112.41. In considering the certification, the Board is called upon to make a determination of four questions:

1. Did the accident arise out of and in the course of petitioner's employment?

The Board made no determination. It simply stated in its resolution that accidents "have been *reported* to us as having occurred to her in the course of her employment." In the opinion of the Commissioner, the Board was required to make its own determination as to whether the accidents occurred in the course of petitioner's employment.

2. Was the accident a natural and proximate cause of disability?

The Board merely reported that a court of competent jurisdiction had made an award to petitioner for disabilities resulting from such occurrences, such award being based on the causal relationship between said occurrences and the disability. Here again the Commissioner must hold that the Legislature has imposed upon the Board of Education the duty of making its own findings on this question. The Workmen's Compensation Division is an administrative agency of the State. The judgments of one administrative agency are not binding upon other agencies.

3. Was the disability the result of the petitioner's willful negligence?

The Board determined that there was no willful negligence to the best of its knowledge and belief. The Commissioner does not object to the qualifying words "to the best of our knowledge and belief." Determinations have to be made subject to the best of knowledge and belief.

4. Should the member be retired?

The Board expressed the opinion that she should.

The Commissioner cannot agree with petitioner's contention that, since the resolution of October 15, 1958 does not state that petitioner did *not* conform to the requirements of N. J. S. A. 18:13-112.41, it can only be construed to mean that she did conform. The view of the Commissioner is quite the opposite. If the record showed that the Board of Education weighed and considered the facts in order to reach its own independent conclusion, any failure to certify might have been construed as a finding that the facts did not justify a certification. However, it is clear that the Board did not consider the facts for the purpose of making an independent determination; indeed, the Board insisted it lacked the qualifications to pass on such an involved question and, as has been pointed out above, limited itself to reporting the judgment of the Workmen's Compensation Division.

Nor can the Commissioner agree that the action of the Trustees amounts to imposing an administrative requirement upon the statutory provision contrary to the ruling in the case of *Frigiola v. State Board of Education*, *supra*. This case does not help petitioner's cause. It held that an administrative agency could not impose, by regulation, conditions contrary to the legislative policy expressed in the statute. The Commissioner has already held that any action prior to receiving a proper certification would be premature. It seems that, if the Board had granted an accident disability allowance before receiving the proper certification, it would have been acting contrary to the ruling in *Frigiola v. State Board of Education*, *supra*.

The Commissioner also does not agree with the argument that the Board of Trustees is estopped from claiming that the resolution is not in correct form, because the Board received it and required a medical examination of petitioner. The record shows that the Board of Trustees gave adequate and repeated notices of its requirements to the school board and to the petitioner and that statutory certification would be required (R. 19, 22, 29). The Commissioner has already held that the Board of Trustees could not waive a statutory requirement. The Supreme Court in *In re Masiello*, 25 N. J. 590 (1957) made plain the duty of the Commissioner to see to it that the school laws are effectuated. Therefore, the Commissioner cannot hold there is estoppel where to so hold would be to countenance a violation of a statute.

The same is true of the argument that pension legislation is beneficial in nature and requires a liberal construction. It may well be that in applying the statute to the facts, after all conditions precedent have been met, liberal construction is required. The Commissioner does not believe that the doctrine of liberal construction calls for the by-passing of conditions precedent in a statute. *Commissioners of Fire District No. 12 in Woodbridge Twp. v. Ziegenbalg*, 16 N. J. Super. 607 (Law Div. 1951).

It is the opinion of the Commissioner that the Board of Education is a proper party to these proceedings. He has already held that no accident disability allowance may be granted until a complete and proper certification is received by the Board of Trustees, and that no such complete and proper certification has been made by the Board of Education. The petitioner is aggrieved by the failure of the Board to make this certification. Therefore, the Board is a proper party and the Commissioner so holds.

It has been established that the Commissioner is authorized to remand when there has not been suitable inquiry and determination at the local level.

Laba, et al. v. Newark Board of Education, 23 N. J. 364 (1957). Since the Board of Education has made no findings, the Commissioner finds it necessary to remand this case to the Board of Education to make an independent determination and certification in the manner provided in N. J. S. A. 18:13-112.41.

The Commissioner is confident that Board members will not find this task as onerous as they suspect. It is his opinion that they place too low an estimate on their qualifications as laymen to make the determination required by the statute. Lay judgment on technical matters is not unknown in the conduct of public schools; indeed, lay control of public schools is fundamental in the public school tradition of this State. Board members by law and by custom are called upon continually to pass on technical proposals in the field of school administration, supervision and instruction and in such areas as public school finance and school construction.

While, as a rule, Board members are not, and may not be expected to be working experts and practitioners in the above field, they are experienced in weighing and considering various and conflicting technical proposals and making sound lay judgments thereon. It is basic to our democratic faith in governmental affairs that such sound lay judgments can be made. In discharging responsibility under this remand, the Board may, of course, seek the advice and help of its counsel, school physician and such other help as it may choose. It must be emphasized, however, that although the Board may seek assistance, the final determination and certification must represent its own best judgment.

The Board of Education should make clear-cut and definite findings on each question and should embody these findings in a resolution to be adopted and forwarded to the parties and to the Commissioner. The Board should then make a certification in accordance with its findings. If it fails to certify on any one of the requirements, the Board of Trustees of the Teachers' Pension and Annuity Fund is entitled to construe the failure to certify as unfavorable to petitioner.

The Commissioner will reserve decision on other questions presented and argued. He will retain jurisdiction until the Board of Education has acted on this remand and the Board of Trustees of the Teachers' Pension and Annuity Fund has acted on the certification from the Board of Education of the Town of Bloomfield. This case is remanded to the Board of Education of the Town of Bloomfield for determination and certification in accordance with this opinion.

COMMISSIONER OF EDUCATION.

April 14, 1961.

XIX

IN ABSENCE OF CLEAR SHOWING THAT IRREGULARITIES AFFECTED THE RESULT, ELECTION WILL STAND

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION IN THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY

For the Petitioners, Mills & Doyle (Mrs. John H. Mills, of Counsel.

For the Board of Education, Mr. Aaron Dines.

DECISION OF THE COMMISSIONER OF EDUCATION

At the annual school election held February 14, 1961, in the School District of the Township of Jefferson, Morris County, the announced results were as follows:

Member of the Board of Education for a full term of three years—
three to be elected.

William G. Leach	727
Robert E. Neitz	662
Robert Drummond	660
Arthur A. Reichardt, Sr.	568
Louis E. Conti	519
Alfred F. Schotter	501
Ellsworth W. Brown	155
Patrick J. Callaghan	93

Member of the Board of Education for an unexpired term of one year—
two to be elected.

R. Thomas Gibbs, Jr.	683
Franklin F. Blundell	667
Robert H. Jones	584
Harry B. Villiers	533

	<i>Yes</i>	<i>No</i>
Current Expense	468	376
Capital Outlay	443	363

A petition of appeal was filed with the Commissioner of Education on February 20, 1961, by five of the unsuccessful candidates requesting that the election be set aside on the grounds that the will of the people was suppressed and was not fairly determined by the announced results of the election. They allege that failure to provide more than one voting machine at the polling district No. 2, the Milton School, resulted in delays which either prevented or discouraged many voters from casting their ballot and that had the persons voted the results of the election would have been altered. They pray the Commissioner to order a new election in order that the will of the people may be freely expressed and determined.

Testimony was heard by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the office of the Morris County Superintendent of Schools on March 9, 1961. At this hearing sworn affidavits of 33 voters in addition to those of petitioners were received and made part of the record. The testimony and documentary evidence submitted disclose the facts to be as follows:

In planning for the election the Board set up three polling places: the Consolidated School, the Milton School, and the Briggs School. It was decided to continue use of voting machines, first used in the 1960 election, and the Secretary so notified the Morris County Board of Elections, requesting three voting machines, the same number used in the prior year's election.

Shortly after the opening of the polls at the Milton School, a line of voters developed and it became apparent that one machine was not adequate to serve the number seeking to cast a ballot. The Secretary of the Board of Education, reached by telephone, stated that additional machines could not be procured on such short notice and such a line of voters had not been anticipated. Various estimates were made of the number of persons in line at different times of the day. The testimony disclosed that shortly after the opening of the election it took 35 minutes' wait in order to vote and at the close, the time required was 90 minutes. It was also stated that there was confusion in the polling place and also outside the school where there was difficulty in finding auto parking because of the large number of people at the polls at one time. All voters in line at 9:00 P. M. were permitted to vote, the last one casting his ballot at approximately 10:20 P. M.

Petitioners and those filing affidavits allege that many voters, estimated by some as high as 250 persons, left the polls before voting and did not return later to do so. They state that some of those were employed persons who had to leave in order to get to work, some were mothers who needed to return to their children, and others were elderly, infirm, ill, or otherwise unable to stand for a long time. Still others were discouraged by the lack of parking facilities and the statements by those who had been to the polls of the conditions there. Petitioners contend that had all those who left without voting remained, the delays would have been even longer. In any event, they argue, the lack of adequate facilities deprived many persons of their right to vote. It is their belief that had all those who intended to vote had a reasonable opportunity to do so, the results of the balloting would have been changed as to members of the Board of Education and the public question. They point to the fact that a large majority of the votes for the successful candidates were cast at the other polling places and that the margin of difference could have been overcome by 93 votes.

The Commissioner has repeatedly stressed the importance of school elections and the need for boards of education and their officers to make complete and careful arrangements for holding them and with regard to every requirement of law. School elections are no less important than other elections and every effort should be made by those charged with conducting them to see that every qualified voter has an opportunity to cast his ballot without delays, inconvenience, or any kind of deterrent. In the Commissioner's judgment school elections should be held in such a manner as to encourage and not discourage voters from coming to the polls.

In the instant case, it is apparent that such was not the case. It is admitted that one voting machine was not able to serve the number of voters who appeared, with consequent delays, the gradual increase of those waiting to vote, and resultant confusion both within and outside the polls. The Commissioner notes that at the Consolidated School it required 30 minutes to vote and that in the 1960 election an hour's delay existed there, according to the testimony. Conditions such as this are to be deplored and in the Commissioner's opinion, place an unreasonable burden upon the voter who seeks to exercise his franchise.

Regrettable as the circumstances were, however, the Commissioner finds no grounds on which he can grant the petition for a new election. There is no statutory provision for the holding of a second election except for the resubmission of rejected appropriation items provided under R. S. 18:7-81. The only relief which could be afforded would be to set the election aside and declare a failure to elect if the Commissioner is satisfied that because of fraud or irregularities in the conduct of the election the will of the people was suppressed and could not be fairly determined.

In this case there is no evidence of fraud or misconduct nor of any intent to hold other than a proper election. Petitioners themselves absolve the Board of any wrongful intent, and the Secretary ordered a single machine for each polling place as had been done the previous year. That some delays had occurred at polling place No. 1 the year before and that the ballot contained the names of 12 candidates, which would tend to slow the voting and would also indicate increased interest and probable larger turnout of voters, seems not to have occurred to anyone beforehand. Nor is there any evidence that petitioners or anyone else raised the question or protested in advance of the election when a remedy could have been provided.

The Commissioner has consistently declined to set aside contested elections unless it can be clearly shown that the irregularities affected the result of the election. *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Township of Ocean, Monmouth County, 1949-50* S. L. D. 53, the Commissioner said:

"It is well established that irregularities which are not shown to affect the results of an election will not vitiate the election. The following is quoted from *15 Cyc.* 372, in a decision of the Commissioner in the case of *Mundy v. Board of Education of the Borough of Metuchen*, 1938 S. L. D. 194:

'Where an election appears to have been fairly and honestly conducted, it will not be invalidated by mere irregularities which are not shown to have affected the result, for in the absence of fraud the courts are disposed to give full effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.' "

See also *Application of Wene*, 26 N. J. Super. 363 (1958); *Sharrock v. Keansburg*, 15 N. J. Super. 11 (1951); *Love. v. Freeholders of Hudson County*, 35 N. J. L. 269 (1871).

Nor has it been clearly established, in the Commissioner's judgment, that had there been no delay the results would have been altered. Several persons,

by testimony or affidavit, expressed the opinion that petitioners would have been elected and the public questions rejected if all those who intended to vote had remained to do so. After weighing the testimony carefully, the Commissioner holds that it does not sustain the need for a clear showing that the results would have been altered. The situation here bears some similarity to *In re Contest of Annual School Election in Brick Township, Ocean County*, decided March 16, 1960, in which the Commissioner said:

"In this case, although the sequence of unfortunate irregularities is distressing and voters were undoubtedly inconvenienced by delay, there is no evidence of fraud, misconduct or illegality in the conduct of the election. Accepting as true the statement that many persons failed to cast their ballot rather than wait . . . the delay cannot be ascribed to deliberate actions intended to deprive citizens of their right to vote . . . Nor is there any evidence by which it can be concluded that those voters who left the polls by reason of delay and did not return to vote, would have cast their ballots in such a way that the whole results of the election would have been changed. For these reasons and in accordance with the weight of authority, it is the Commissioner's judgment that the election cannot be held invalid."

See also *Hackett v. Mayhew*, 62 N. J. L. 481 (1898) ; *In re Hunt*, 15 N. J. Misc. 331 (1937).

The Commissioner urges all boards of education to exercise careful forethought in the planning for school elections. In the Commissioner's judgment boards of education should be able to anticipate the amount of interest in a forthcoming election at least to the degree that sufficient preparations are made to obviate delay and other inconvenience to the voters. With regard to the number of voting machines to be requisitioned, attention is called to the ratio of 1 to 750 registered voters as set forth in R. S. 19:51-1, to which reference is made in R. S. 18:7-47.3.

The Commissioner finds and determines that there are no grounds upon which a new election can be ordered and that no sufficient reason has been established for the voiding of this election. The results of the Annual School Election held on February 14, 1961, in the Township of Jefferson, County of Morris, stand as announced.

The petition is dismissed.

COMMISSIONER OF EDUCATIONS

April 18, 1961.

XX

LOCAL TRAFFIC HAZARDS DO NOT CONSTITUTE REMOTENESS
FROM SCHOOL IN DETERMINING NEED FOR TRANSPORTATION

HOWARD SCHRENK, *et al*,

Petitioners,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD,
BERGEN COUNTY,

Respondent.

For the Petitioners, Mr. Milton T. Lasher (Robert S. Krause, of Counsel).

For the Respondent, Mr. Bennett H. Fishler, Jr.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners are parents of children who reside in an area of Ridgewood, New Jersey, which is bounded on the west by State Highway No. 17, on the north by the Borough of Ho-Ho-Kus, and on the east and south by Saddle River. The parents have requested transportation for their children to the Glen School, to which they are assigned, on the grounds that they reside in a remote area and that the present routes to the school are hazardous for young children.

They say that the Board of Education refused their request on the grounds that the children are not remote from the school and any hazard is not within their jurisdiction. The parents further say that the children in this area on the east side of State Highway No. 17 are being transported to the Benjamin Franklin Junior High School which school is located on the west side of State Highway No. 17 and less than two miles away. High school children, they say, are transported from east of State Highway No. 17 to Ridgewood High School, which school is located on the west side of State Highway No. 17 and is less than 2½ miles from the homes of the children so transported. The parents contend that the Board of Education is discriminating against their children.

The petitioners ask that an order be issued by the Commissioner compelling the Board of Education of the Village of Ridgewood to provide bus transportation for the children of the petitioners to and from Glen School and to desist from discriminating against their children.

Respondent Board of Education denies that the children of petitioners are remote from the Glen School or that they have been discriminated against with regard to school transportation.

This case is presented to the Commissioner by a Stipulation of Facts, briefs and oral argument of counsel. In addition, the Assistant Commissioner of Education in Charge of Controversies and Disputes traversed all the routes and inspected all the areas in question.

Two questions require answers:

1. Are the residences of petitioners' children remote and inconvenient of access from the Glen School?
2. Has the Board of Education abused its discretion in that it discriminated against these children?

The first question must be answered in the negative. It is stipulated that the minimum distance of the children from Glen School via West Saddle River Road and State Highway Route No. 17 is .5 miles and the furthest distance is 1.2 miles. The minimum distance of an alternate route via West Saddle River Road, Bogert Road, West Saddle River Road and Bingham Road is 1.2 miles and the furthest distance is 1.6 miles.

The pertinent statutes are R. S. 18:11-1 and 18:14-8. These statutes must be read together. R. S. 18:11-1 reads as follows:

"Each school district shall provide suitable school facilities and accommodations for all children who reside in the district and desire to attend the public schools therein. Such facilities and accommodations shall include proper school buildings, together with furniture and equipment, convenience of access thereto, and courses of study suited to the ages and attainments of all pupils between the ages of five and twenty years. Such facilities and accommodations may be provided either in schools within the district convenient of access to the pupils, or as provided in sections 18:14-5 to 18:14-9 of this title."

R. S. 18:14-8 reads in part as follows:

"Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part * * * ."

There have been numerous appeals arising out of the interpretation of remoteness by local boards of education. In a series of decisions extending over a long period of time, a board of education has never been reversed for refusing transportation to an unhandicapped pupil residing within two miles of a schoolhouse in the case of elementary pupils and within two and one-half miles where high school pupils are concerned. These distances have become so well established that county superintendents have for many years based their approval of transportation for State aid on these limits. The State Board of Education has adopted these distances as a guide for the approval of State aid for transportation.

Petitioners point out that the normal route which their young children are obliged to take extends some 1,300 feet along State Highway No. 17. They argue that the absence of a shoulder or sidewalks makes this route hazardous in the extreme and that these hazards render the schoolhouse remote. The Board of Education counters by pointing to the availability of an alternate route to the Glen School where the distance varies from 1.2 to 1.6 miles.

Petitioners contend that the alternative route is more circuitous and would not be the normal route used by the children. They maintain that "remote" as used in the School Law refers to a direct or reasonably direct route.

In deciding transportation disputes over the years, the Commissioner has had to rule occasionally on the question of alternate route. In each of the instances, however, the question has been between one route which was less than the minimum distance as opposed to another which was more than the distance required for transportation. In the instant case both the most direct and the more circuitous route are within the established minimum distance within which transportation cannot be required.

While the Commissioner is in sympathy with the concern of any parent for the safety of his child, he cannot hold that the existence of hazards along the routes to be traversed constitutes remoteness. This position, originally taken in *Read, et al. v. Roxbury Township Board of Education*, 1938 S. L. D. 763, has been consistently held in subsequent decisions and is supported by resolution of the State Board of Education adopted as a guide for approval of State aid for transportation, which states:

"State aid for shorter distances for the sole reason of traffic hazards should not be given, inasmuch as traffic hazards are a local responsibility."

The provision for safe conditions of travel is a municipal function. A board of education is limited to educational functions. It can provide instruction in safety in order to inculcate habits of safety. It is not within its authority to enforce traffic laws, to provide sidewalks, traffic lights, crossing guards, police patrols, overpasses, etc., to meet the requirements of safe travel for school children. It can and should point out to the responsible governmental body the traffic hazards and other dangers to which pupils may be exposed. In this instance, there is evidence that the Ridgewood Board of Education has called this matter to the attention of the municipal governing body and has suggested that the erection of a footbridge across the Saddle River would eliminate practically all of the problems in question.

The evidence before the Commissioner discloses no elements so different from other situations in the State as to make inapplicable previous decisions with regard to remoteness or to warrant any departure from previous determinations in construing "remoteness" and "convenience of access." The Commissioner holds that the respondent violated no statute in refusing transportation for petitioners' children.

Having determined that no statute has been violated, it remains to decide whether the Board of Education has abused its discretion by discriminating as to petitioners' children. Petitioners cite the fact that respondent Board has for some time transported at local expense junior and senior high school pupils from this area who must cross State Highway No. 17 to reach their schools, although they do not live far enough away to be entitled to State aided transportation. Petitioners contend that granting transportation to these pupils and denying it to their children is discriminatory. In order to establish discrimination, there must be a showing that one group in entirely the same circumstances as another is given favored treatment.

In the Commissioner's judgment, a board of education may, in good faith, evaluate conditions in various areas of the school district with regard to conditions warranting transportation. It may then make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district. Such differences need not be great in classification, but no classification may be unreasonable, arbitrary or capricious. *Guill, et al. v. Mayor and Council of City of Hoboken*, 21 N. J. 574 (1956); *Pierro v. Baxendale*, 20 N. J. 17 (1955); *DeMonaco v. Renton*, 18 N. J. 352 (1955); *Borough of Lincoln Park v. Cullari*, 15 N. J. Super., 210 (App. Div. 1951).

The respondent Board has evaluated traffic conditions in the areas in question and its judgment is that the traffic conditions encountered by pupils crossing Route No. 17 to reach the secondary schools are such as to justify transportation at local expense. Its judgment is that the conditions encountered by petitioners' children in traveling to and from the Glen School are not such as to justify transportation. The Commissioner will not substitute his judgment for that of the local Board of Education in a matter which lies within its discretionary authority. The Commissioner made his position clear in this regard in *Boult and Harris v. Passaic*, 1939-49 S. L. D. 7, 13; 135 N. J. L. 329 (1947); 136 N. J. L. 521 (1948), as follows:

"* * * 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 local boards. Finally, boards of education are responsible not to the Commissioner but to their constituents for the wisdom of their actions * * *."

The Court of Errors and Appeals in upholding the Commissioner said:

"Neither of the quoted statutory provisions (R. S. 18:3-14 and 18:3-15) was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board. The review authorized of the local board's action here involved is judicial in nature. *Thompson v. Board of Education* (Supreme Ct. 1895) 57 N. J. L. 628.

"In exercising that reviewing power the Commissioner was properly guided by the principles governing the scope of judicial review of municipal action. The reviewing officer was not empowered to substitute his discretion for that of the local board. The offer of proof, as it is described in the Commissioner's opinion, amounted to nothing more than an offer to establish that the local board's determination was based upon erroneous factual material. Discretionary municipal action may not be judicially condemned on that basis. *Downs v. Board of Education of Hoboken*, (Supreme Court, 1934) 12 N. J. Misc. 345; affirmed, sub. nom. *Fletcher v. Board of Education of Hoboken*, (Court of Errors and Appeals, 1934) 113 N. J. L. 401; *Murphy v. Bayonne* (Supreme Court, 1943) 103 Id. 336."

Abuse of discretion means "nothing else than that the court's ruling went far enough from the mark to become reversible error." *Hager vs. Weber*, 7 N. J. 201, 214 (1951). It is the opinion of the Commissioner that no showing of abuse of discretion was made which would warrant the Commissioner in interfering with the action of the local Board.

Petitioner calls the Commissioner's attention to *Klastorin v. Scotch Plains*, 1956-1957 S. L. D. 85. This case is not in point. It was stipulated in *Klastorin v. Scotch Plains*, *supra*, that the transportation policy was discriminatory relative to distance and traffic hazards. In the instant case, discrimination was neither stipulated by the Board nor found by the Commissioner.

The Commissioner finds and determines that the residences of the children of petitioners are not remote or inconvenient of access to the Glen School and that the Ridgewood Board of Education has not abused its discretion or unlawfully discriminated against petitioners' children.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

April 25, 1961.

XXI

CONTRACT OF EMPLOYMENT AS TEACHER ENTITLES HOLDER TO ASSIGNMENT WITHIN SCOPE OF CERTIFICATE

SAMUEL HIRSCH,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON,
MERCER COUNTY,

Respondent.

For the Petitioner: Mr. George Pellettieri.

For the Respondent: Mr. Arthur A. Salvatore.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner filled out an application form of the Trenton Public School System under date of April 13, 1958, for a position as teacher in the secondary schools. He listed Drama, English and Speech as the subjects he was qualified to teach. After interviewing petitioner, the Superintendent of Schools, under date of April 29, made him a written offer of a position as secondary school teacher from September 1, 1958 to June 30, 1959, at a salary of \$6,350.00.

Under date of May 2, 1958, petitioner received the following notice from the Superintendent of Schools:

"At a meeting of the Board of Education held on May 1, 1958, you were appointed as a teacher in the Trenton Public Schools for the school year 1958-1959 at an annual salary of \$6,350 in the secondary division."

On May 5, 1958, the Superintendent of Schools wrote to the petitioner as follows:

"After examining the records now available, it becomes evident that you will not be able to meet specified requirements for the particular job which we expected to be open for September, 1958. It would necessarily involve the teaching of English and Social Studies.

"It will probably take you at least a year to meet the requirements which are being satisfactorily met by many other applicants.

"It is with regret, therefore, that I must recommend that you not be appointed for the year 1958-1959."

On June 5, 1958, the Superintendent of Schools recommended to the Board of Education the termination of petitioner's contract. The respondent Board, on September 4, 1958, by a vote of six to three, terminated the contract.

Petitioner was issued a Temporary Certificate by the County Superintendent of Schools on September 4, 1958, valid to November 4, 1958, and a Provisional Secondary Teacher's Certificate by the State Board of Examiners on September 11, 1958, valid until June 1, 1959. These certificates entitled him to teach English in secondary schools.

Petitioner appealed from the action of the Board of Education in terminating his contract. The prayer of his petition is that he be employed as a teacher in respondent's school system from September 1, 1958 to June 30, 1959, at a salary of \$6,350, or, in the alternative, pay to him the aforesaid salary for the duration of the contract.

Respondent in its answer makes five separate defenses:

1. There was no valid contract between petitioner and respondent.
2. The petitioner was to be employed as a teacher qualified to teach English and Social Studies. Both the Board and petitioner believed the petitioner so qualified when in point of fact he was not.
3. Petitioner did not possess, at the time of appointment, and has never possessed or presented a New Jersey State certificate or credential that enabled him to meet the requirements for teaching in the particular subjects to be taught in the position offered him.
4. On or about September 3, 1958, the County Superintendent of Schools of Mercer County advised the Superintendent of Schools of the City of Trenton, in writing, that the petitioner was not in possession of the proper teacher's certificate, and the contract, if same existed, was thereby terminated.
5. A returning veteran formerly employed by respondent in the position for which petitioner was temporarily appointed, who had been separated from his said position by entry into active duty in the military service, notified the Superintendent of Schools of the City of Trenton on or about May 5, 1958, that he was returning to employment. Thereupon any contract between respondent and petitioner, if one existed, ceased.

The defenses will be considered in order:

1. To make a valid contract the acceptance must in every respect meet and correspond with the offer. *Bordusch v. Hofbeck*, 139 N. J. Equity 327 (1947); *Johnson and Johnson v. Charmley Drug Co.*, 11 N. J. 526 (1953); *Kivet v. Board of Education of Wyckoff*, 1938 S. L. D. 774. The Board of Education appointed petitioner on May 1, 1958. The Superintendent notified him of the terms of the appointment in writing on May 2, 1958. Petitioner, on May 3 agreed "to accept the position as secondary school teacher in accordance with the terms as stated in the notice of May 2, 1958." Acceptance was unconditional and in every respect met and corresponded with the offer. Thus, a contract was consummated. The Commissioner must hold that the contract was valid and that the Superintendent's letter of May 5, 1958, notifying petitioner that he would recommend that he not be appointed, was too late.

2. The testimony is conflicting as to whether there was any discussion of social studies at the interview. However this may have been, the negotiations between the superintendent and the petitioner may be considered only to the extent that they are embodied in the action of the Board of Education in making the appointment. *Seidel v. Ventnor*, 110 N. J. L. 31 (Supreme Ct. 1932), and *Campbell v. Hackensack*, 115 N. J. L. 209 (E. & A. 1935). There is nothing in the statement of petitioner's background (Ex. P-1) and in the application form (Ex. P-2) that he represented himself as qualified to teach social studies and the testimony reveals that the superintendent made no mention of social studies to the Board of Education at the time of the appointment at the meeting of May 1, 1955. Regardless of what may have been discussed between the superintendent and the petitioner, there is no evidence to indicate that the qualifications to teach social studies were a consideration in the Board's appointment. The Commissioner finds that petitioner was appointed as a teacher in the secondary schools without requirement that he qualify in a particular subject-matter field.

3. Respondent contends that petitioner at the time of his appointment did not hold a New Jersey certificate as required by the Rules, Regulations and Policies of the Board of Education of the City of Trenton, New Jersey, as follows:

"XI. *Appointment and Salary Guide Regulation 41*

"No person shall be appointed to any teaching position * * *

"2. Who does not hold a New Jersey State certificate or credentials that will enable the applicant to meet the requirements for State certification in the particular department or subject to be taught."

Because of the time involved in securing credentials to support an application for certification and to process it, it is not practicable in many cases to require the actual possession of a certificate prior to appointment. The circumstances of the petitioner's appointment would indicate that the Board did not always follow this rule. It was not bound by the rule. The rule was procedural. It is well established that an appointment made according to law is legal notwithstanding the Board's disregard of its own procedural rules. See *Noonan and Arnot v. Board of Education of the City of Paterson*, 1938 S. L. D. 331, 336; *Barnet v. Mayor and Board of Aldermen of the City of*

Paterson, 48 N. J. L. 395 (Supreme Ct. 1886); *Michaelis v. Board of Fire Commissioners of Jersey City*, 49 N. J. L. 154 (Supreme Court 1886).

It is not denied that the Board had the authority to make and enforce Rule XI at its discretion, but the point is that it was not bound by the rule and that in appointing petitioner it could and did waive it. The statutes contemplate that certification will not always be completed prior to appointment. R. S. 18:13-8 provides that a contract may be terminated upon notice in writing from the county superintendent or city superintendent that the teacher is not in possession of a teacher's certificate and R. S. 18:13-14 makes the payment of salary contingent upon holding a teacher's certificate. Petitioner was issued a valid temporary certificate in time. Furthermore, it appears that petitioner did have the "credentials * * *" to meet the requirements for State certification" as required by the rule, even if he had not yet obtained the certificate.

4. It is contended that on or about September 3, 1958, the County Superintendent of Schools advised the Superintendent in writing that petitioner was not in possession of the proper teacher's certificate and the contract, if same existed, was thereby terminated. The Commissioner does not find this writing among the papers of the case. He does find a memorandum from the Secretary of the State Board of Examiners addressed to the County Superintendent under date of September 3, 1958, to the effect that a provisional high school certificate to teach English was being issued to petitioner. Also in evidence is a temporary certificate (Ex. P-7) issued by the County Superintendent dated September 4, 1958, pending the processing of the application for an appropriate certificate. The appropriate provisional certificate to teach English in secondary schools (Ex. P-8) was issued under date of September 11, 1958, and was forwarded by the County Superintendent of Schools to petitioner. The County Superintendent testified that after receiving a telephone inquiry from the Superintendent of Schools on September 2, 1958, he telephoned the office of the State Board of Examiners and learned that petitioner was not eligible to teach social studies and he so advised the Superintendent of Schools. (Tr. 138, 140.)

The facts do not support the contention that the County Superintendent advised the Superintendent of Schools in writing that petitioner was not in possession of the proper teacher's certificate and that the contract was thereby terminated. It would appear that upon inquiring the County Superintendent informed the Superintendent that petitioner was not qualified to teach social studies and the Board drew its own inference that his lack of certification for social studies was caused for termination of his contract. The action to terminate the contract came on September 4, 1958, after the information was conveyed by the County Superintendent that the petitioner was qualified to teach English and on the same date the temporary certificate was issued. The Commissioner finds that petitioner was properly certificated for a position in the secondary division of the Trenton Public School System.

5. The final defense is that the return of a veteran formerly employed by respondent filled, by prior claim, the vacancy for which petitioner had applied. This defense rests upon R. S. 18:4A-2, the pertinent excerpt of which reads:

"Every person holding office, position or employment for a fixed term or period under the government of any school district of this State * * *

who * * * has entered or hereafter shall enter the active military or naval service of the United States or of this State, in time of war or an emergency, or for or during any period of training * * * shall be granted leave of absence for the period of such service and for a further period of three months after receiving his discharge from such service * * *

“In no case shall such person be discharged or separated from his office, position or employment during such period of leave of absence because of his entry into such service. Such person shall be entitled to resume the office, position or employment held by him at the time of his entrance into such service * * *. Upon resumption of his office, position or employment the service in such office, position or employment of the person temporarily filling the same shall immediately cease.”

The Superintendent testified that he did not say anything to the Board of Education about returning veterans at the meeting of May 1, 1958, when petitioner was appointed. (Tr. 18.) The notice about the returning veteran arrived on May 5, 1958. There is nothing in the record of the Board's action to indicate that petitioner was appointed temporarily to fill the position of a teacher absent in the military service.

There are two ways that the termination of the employment of a person who is temporarily filling the position of a person absent on military leave may be effected: (1) The Board may include in the terms of the contract a provision that either party may, at any time, terminate the contract and the employment by giving to the other party a specified number of days or months notice, in writing, of its intention to terminate. The Commissioner of Education in *Mannion v. Northampton*, 1938 S. L. D. 402, upheld a Board for exercising its right under such a contract. See also *Palmer v. Weehawken*, 1938 S. L. D. 399; (2) the Board of Education may put the teacher on notice in accepting the position that he may be compelled to relinquish it upon the return of a veteran. Recommended policy is for the Board to state that the teacher is appointed to fill the position of a person absent in the military service. In the case of *Martin v. Board of Education of the City of Trenton*, decided August 27, 1947, the Commissioner upheld the Board in its contention that Mrs. Martin was a substitute teacher because of the absence of teachers in military service. She had filled out and signed a form “Agreement to Accept Position” in which she was designated a “temporary teacher” and in which was the sentence: “It is understood that I may be compelled to relinquish this position at the end of the war.” For the reason that there was no mutual agreement for termination of the contract and no mention of temporary appointment to fill the position of a person absent in military service, the Commissioner must hold that petitioner was appointed as a regular teacher and not as a substitute for a person absent in military service. Therefore, R. S. 18:4A-2 is not applicable.

The Commissioner finds and determines that (1) there was a valid contract between petitioner and respondent, (2) that petitioner was appointed as a teacher in the secondary division without reference to any specified subject field and was, therefore, entitled to a position within the scope of his certificate, (3) that at the time he was to begin teaching petitioner did possess an appropriate certificate which would enable him to teach legally in the secondary schools, and (4) that petitioner was not appointed temporarily to fill the posi-

tion of a person absent in military service, and, therefore, his employment could not be terminated pursuant to R. S. 18:4A-2 upon the return of the veteran from military service.

The Board of Education of the City of Trenton is directed to pay petitioner pursuant to R. S. 18:13-11 the sum to which he would have been entitled as teacher had he been permitted to perform services under the terms of his contract.

COMMISSIONER OF EDUCATION.

April 27, 1961.

XXII

TENURE ACCRUES TO SUPERINTENDENT UPON COMPLETION OF THREE CALENDAR YEARS OF EMPLOYMENT

JOHN J. MULLEN,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF JEFFERSON, MORRIS COUNTY,

Respondent.

For the Petitioner: James & Wyckoff (Mr. John Wyckoff, of Counsel).

For the Respondent: Mr. Aaron Dines.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case claims that he had acquired tenure as Superintendent of Schools in Jefferson Township and that respondent's action in dismissing him was unlawful. He seeks reinstatement in his position with full salary from the date of dismissal. Respondent denies both allegations. The facts in the matter are established by a Stipulation of Facts and testimony taken by the Assistant Commissioner of Education in Charge of Controversies and Disputes at a hearing on October 20, 1960, at the office of the Morris County Superintendent of Schools.

Petitioner was appointed Superintendent of Schools by resolution of respondent on April 9, 1957, and a two-year contract was entered into providing for employment from July 1, 1957 to June 30, 1959. Before the expiration of this agreement the Board took action on January 14, 1958, by a 5 to 2 vote, to cancel it and issue a new contract under which petitioner was to be employed from January 15, 1958 to January 15, 1961, with salary increased from \$8,500.00 to \$10,000.00. The reason given for this action by its proponents was to insure continuity of administration during the ensuing period when school plant expansion would be a matter of major concern. Petitioner continued in his position as Superintendent of Schools without interruption.

On June 27, 1960, at a meeting of the Board, a motion to rescind petitioner's contract and declare it null and void failed to pass on a 4 to 4 tie vote. At the next meeting on June 30, 1960, the following motion was adopted by a vote of 5 yes, 3 no:

“* * * whereas, a previously constituted membership of the Board of Education of the Township of Jefferson, New Jersey, in the County of Morris, did on January 15, 1958 attempt illegally and unlawfully to enter into an extended agreement with John J. Mullen for his services as Superintendent of Schools for a consecutive period of 3 years until January 15, 1961, and since this illegal agreement contemplated the rendering of services and duties beyond the term of said Board of Education, and sought to bind and hamper a successor Board of Education and deprive it of its right to exercise discretion, and was a device of subterfuge to decide them, and bind subsequent Boards, for the acquisition of tenure for said John J. Mullen, contrary to law and in violation of the New Jersey Education Statutes, and since this Board of Education has decided against being bound by this legal contract and these devises, Be it resolved that the purported contract dated January 15, 1958, between the Board of Education and John J. Mullen be and is hereby rescinded, cancelled and considered null and void.”

Respondent then declared the office of Superintendent of Schools to be vacant and petitioner filed this appeal.

After the hearing of testimony on October 20, 1960, and the submission of briefs by counsel and while the Commissioner's decision herein was pending, respondent filed a Motion to Dismiss on the grounds that the issues had become moot. Argument on the motion was heard by the Assistant Commissioner in Charge of Controversies and Disputes on February 3, 1961, in the office of the State Department of Education in Trenton. Evidence was received disclosing that petitioner had been employed since September 15, 1960, by the Board of Education of School District No. 9, Elmsford, New York, as District Principal at a salary of \$14,000.00 on a twelve months' basis.

Respondent argues that it is apparent that petitioner's employment in New York is intended to be continuing, that it represents abandonment of any purported tenure rights, as witness his failure to disclose the employment at the hearing on October 20, 1960, or at any time since, plus his failure to take a position or state his intent clearly on February 3, 1961. For these reasons, it is contended, the question herein is moot, there is no justiciable issue before the Commissioner, and the case should be dismissed.

While agreeing that the Commissioner's jurisdiction should not extend to the adjudication of academic questions, petitioner denies that the issue herein is moot. He denies any intent to abandon his claim by the acceptance of other employment, citing his necessity to earn a livelihood while this matter is pending. He takes the position that he is entitled to have his rights to employment in Jefferson Township adjudicated before he commits himself to a future course of action. In support of his argument he says that, although his New York salary is larger, this is offset by the security of tenure, real estate owned here, his family's roots in New Jersey, and the professional reputation he has established in this State. Even if it is denied that his New York employment terminated his claim to reinstatement here, he argues there still remains the period from July 1, 1960 to September 15, 1960, for which salary would be due him.

The Motion to Dismiss must be denied. While it is well established that the Commissioner is not required to decide moot questions (*Worthy, et al. v.*

Dover Township, 1938 S. L. D. 687, 691; *Tedesco v. Lodi Board of Education*, 1955-1956 S. L. D. 69; *Freeholders of Essex County v. Freeholders of Union County*, 44 N. J. L. 438 (E. & A. 1882); *Mills v. Green*, 159 U. S. 653 (1895), the issue here is not academic. Even if it should be assumed that the petitioner had abandoned his claim by reason of his New York employment on September 15, (which he does not concede) the period from July 1 to September 15 still presents a justiciable issue. The Commissioner will, therefore, deny the Motion to Dismiss and will decide the basic question of petitioner's claim to tenure of office.

Petitioner's position is that he had acquired tenure under the provisions of R. S. 18:13-16 *et seq.*, by reason of employment for three consecutive calendar years. If for any reason it may be held that tenure had not accrued, he argues, there remains the fact that he was still employed under a valid contract which would not expire until January 15, 1961. In any event, he contends, there was no legal way in which the Board of Education could arbitrarily abrogate the contract and summarily dismiss him without, at least, the filing of charges and a hearing.

Respondent defends its action by saying that the petitioner had not met the conditions requisite for tenure because (1) during the initial period of his employment, from July 1, 1957 to November 14, 1957, he was without the necessary certificate for the position and that time, therefore, cannot be counted as part of the period required in order to gain tenure, and (2) there was no specific provision that employment was to be on a calendar year basis. It says, further, that the action of the Board on January 15, 1957, entering into an extended contract with petitioner, was illegal for several reasons:

1. The item did not appear on the agenda of the meeting.
2. The board members had no prior notice that such a matter would be considered.
3. The action was taken after 11 P. M. in violation of the Board's rule that no official business would be transacted after that hour.
4. The public had no opportunity to be heard on the question, having left the meeting by 11 P. M. believing the business of the Board to have been concluded.
5. It was a device seeking to evade the tenure laws and to bind and divest succeeding boards of their right to decide the question of tenure for the petitioner.

Respondent attacks the wording of the contract also, stating that its failure to state clearly the salary for succeeding years resulted in such a lack of mutuality of performance and remedy as to render it unenforceable. Finally, respondent contends that petitioner has contrived to achieve tenure by indirection and as a result comes with "unclean hands" to invoke the Commissioner's jurisdiction.

The first question to be decided is whether or not the conditions required for the acquisition of tenure had been fulfilled as to petitioner. These conditions are set forth in R. S. 18:13-16 as follows:

“The services of all teachers, principals, superintendents and assistant superintendents, of the public schools, excepting those who are not the holders of proper teachers’ certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of three consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for three consecutive academic years together with employment at the beginning of the next succeeding academic year, (c) after employment, within a period of any four consecutive academic years, for the equivalent of more than three academic years. * * *”

The evidence supports petitioner’s claim that he had fulfilled the requirement under (a) of the statute and had therefore acquired tenure, in the Commissioner’s judgment. His employment began on July 1, 1957 and continued without interruption until June 30, 1960, a period of three calendar years. It is not disputed that his employment commenced on July 1, 1957 and that he was actually employed in the performance of his duties on June 30, 1960. The fact that he was in attendance in his official capacity as Superintendent of Schools at a meeting of the Board of Education the evening of the last day of the third calendar year is conclusive evidence of the fact of employment. It is also not denied that he was paid salary from July 1, 1957 to and including June 30, 1960. The conclusion that “a period of employment of three consecutive calendar years” had expired and petitioner had thereby acquired tenure is inescapable, in the Commissioner’s opinion.

The Commissioner finds no merit in respondent’s argument that petitioner did not possess the proper certificate until November 14, 1957, and employment prior to that date cannot be counted for satisfaction of tenure requirements. The evidence shows that petitioner had fulfilled the study and other requirements for issuance of the certificate at the time he began his service. The fact that time was required to process his certificate through the office of the Morris County Superintendent of Schools and the Division of Teacher Education and Certification cannot be held against him nor deprive him of a statutory right. It is well known that applications for certificates cannot always be processed immediately during the summer months when the volume is at its peak. The important fact here is that the petitioner had completed the requirements at the time of beginning service and was qualified to have issued to him the necessary certificate. Furthermore, it is the responsibility of the County Superintendent of Schools to see that the certification requirements are effectuated and to notify the Board of Education in writing whenever an employee is lacking the proper certificate. It is at this point that “any contract * * * shall cease and determine and be of no effect.” (R. S. 18:13-8.) In this case no such notice was given by the Morris County Superintendent of Schools because the issuance of the certificate was in process.

The Commissioner rejects, also, respondent’s argument that the contracts contained no specific provision that employment was to be on a calendar year basis. The initial contract stated that employment would be from the first day of July, 1957 to the thirtieth day of June, 1959, and the second agreement sets the time from the fifteenth day of January, 1958 to the fifteenth day of January, 1961. In the Commissioner’s judgment this clearly indicates employment for the full calendar year. There is nowhere in the

record any indication that petitioner's employment was for an academic year, that he was absent from his duties from the close of school in June until its opening in September, or any other sign that employment was not on the basis of a full calendar year. Furthermore, the Commissioner considers that the contract provision that salary was "to be paid in 24 equal semi-monthly installments" supports this conclusion.

With regard to the legality of the action of January 15, 1958, entering into a new employment contract, the Commissioner holds that respondent's attack, even if valid, comes too late. No evidence appears that any of the questions now raised by respondent were posed at that time nor that any protest of any kind was made then or later. The succeeding Board of Education accepted the fact of the contract, continued to pay petitioner the salary as increased under it and apparently raised no question about it. This was also true of the next Board of Education who raised no question for more than four months after taking office, after which this matter was precipitated. The Commissioner believes that it is not necessary to deal with each of the alleged defects of procedure argued by respondent in this regard because even if any existed, which is not conceded, it was cured by the actions of acceptance of succeeding boards and the public in general. *Ratajczak v. Perth Amboy Board of Education*, 114 N. J. L. 577 (Supreme Ct. 1935); *City Affairs Committee v. Jersey City*, 134 N. J. L. 184 (E. & A. 1945).

Having reached the conclusion that petitioner had acquired tenure of position in the district, it is not necessary to determine other questions raised and argued. There remains, however, the question of the relief which petitioner seeks.

The Commissioner is in full accord with petitioner's assertion of need to earn a living during the pendency of the proceedings and endorses his right to be gainfully employed. Also, while he might sympathize with any desire that petitioner may have that "his honor be vindicated" as asserted by respondent, this is not the issue here. Petitioner has appealed to the Commissioner to adjudicate his rights to continue in his employment as Superintendent of Schools in Jefferson Township and to order his reinstatement there with payment of salary since the date of dismissal. If at any time after the filing of this appeal the relief sought by petitioner is modified or abandoned, the Commissioner holds that petitioner has a duty to make such disclosure. Absent such disclosure the Commissioner must assume that the relief prayed for is still sought.

In the instant case, petitioner sought reinstatement and back salary in Jefferson Township. Before the matter came to hearing, he sought and obtained employment elsewhere. When the case was heard, no questions were asked nor information offered as to present employment. Some months later the fact of other employment since before the case came on to be heard was discovered by respondent. At the second hearing no further disclosure nor change of position was made. In the instant circumstances, therefore, the Commissioner would assume that petitioner still seeks reinstatement and back salary.

Standing in the way of this assumption, however, is the documentary evidence that petitioner engaged himself to the board of education of a New York school district in September, 1960, on an annual basis. While no con-

tractual terms were mentioned, the excerpt from the minutes of the New York board indicates that the employment of the petitioner was on the basis of a year's employment. In the Commissioner's judgment petitioner's status is not clear and is rendered obscure by his failure to make full disclosure.

After considering the testimony and argument in this case, the Commissioner concludes that tenure had accrued to petitioner as Superintendent of Schools and he is, therefore, entitled to be reinstated in his position and to be paid his salary from the date of dismissal. In order to assert this right, petitioner must be ready and able to resume the performance of his duties immediately upon notice of this finding. Failure to do so will establish the fact that his claim to reinstatement has been abandoned and that the obligation of respondent in this respect terminated on September 15, 1960.

The Commissioner finds and determines that petitioner had acquired the protection of tenure in his position as Superintendent of Schools of Jefferson Township, that he could not be dismissed except for cause, and that he is entitled to be reinstated in his position and to be paid his full salary for the period of illegal dismissal. The Commissioner further finds and determines that petitioner is required to resume his duties immediately upon notice of this determination, that failure to do so will be held to constitute abandonment as of the date of other employment on September 15, 1960, and that in such case the Jefferson Township Board of Education is relieved of any claim to reinstatement and is required to pay to petitioner only the salary he would have earned had he continued in its employment from July 1, 1960 to September 14, 1960. The Jefferson Township Board of Education is directed to perform the actions required to effectuate this adjudication.

COMMISSIONER OF EDUCATION.

April 28, 1961.

Pending before State Board of Education.

XXIII

INSUBSTANTIAL CHARGES AGAINST SUPERINTENDENT DO NOT WARRANT DISMISSAL

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

Petitioner,

v.

THOMAS L. HARTY,

Respondent.

For the Petitioner: Mr. Robert D. Gruen.

For the Respondent: Mr. Harry C. Peterson.

DECISION OF THE COMMISSIONER OF EDUCATION

This is a matter of charges made against the Superintendent of Schools by the Wallington Borough Board of Education at its regular meeting on December 15, 1960. The Board determined on December 27, 1960, that these

charges, if true in fact, would warrant dismissal or a reduction in salary and they were duly certified to the Commissioner of Education for hearing and decision. A hearing on the charges was held at the Bergen County Court House on March 2, 1961, before the Assistant Commissioner of Education in Charge of Controversies and Disputes.

In May of 1960, the Board of Education employed the services of the Reading Institute of New York University to conduct a survey of the teaching of reading in the Wallington elementary schools. The survey was made and a report of the results was received by the Board in August, 1960. This report met with varying degrees of acceptance and became a subject of criticism and controversy among the school personnel and also among members of the Board of Education. As a result, in October, 1960, a representative of the Reading Institute met with the teachers and the Superintendent to discuss the survey report and the errors which it was alleged to contain. On November 1, 1960, the Board met and decided to withhold public release of the survey report until an analysis could be made of the alleged errors. The following resolution was adopted:

“* * * to have the Superintendent of Schools, Mr. Harty, give a report of the reading survey noting the corrections on items that were supposed to be in error before the copies of the report were released to the public.”

On November 11, the local press printed an article in which the President of the Board “reprimanded school trustees for refusing to release to the public results of a \$5,000 elementary school reading survey” and “also attacked the superintendent of schools and teachers.” In accordance with the resolution of November 1, the Superintendent prepared a report entitled “Reading Instruction Survey Corrections” and mailed a copy to each member of the Board in the latter part of November. This report was then presented to the Board at its meeting on December 8, 1960. That same evening the Passaic-Clifton Herald News carried a news article reporting an interview with the Superintendent and giving the gist of the report of “Corrections.” The Board of Education took exception to the action of the Superintendent in releasing his report to the press prior to its reception at the Board meeting and on December 15, 1960, the President to the Board made charges against the Superintendent of “insubordination,” “failure to perform duties—and improper performance of duties,” and “conduct unbecoming of Superintendent of Schools.” These charges were then certified to the Commissioner of Education for his determination.

The Board of Education contends that the action of the Superintendent in releasing his report without the Board’s prior knowledge embarrassed its members and deprived them of formally receiving and evaluating the survey and the “Corrections.” The Board states further that the resolution requiring the report of “Corrections” specifically prohibited any release to the newspapers prior to its submission to the Board and failure to comply constitutes an insubordinate act.

The Superintendent denies all of these allegations and defends his actions as necessary to protect the schools and the staff from unjustified criticism and attack. He cites the fact that he and his staff had been severely criticized in the press by the President of the Board and his belief that it was his duty to

counter what he considered to be irresponsible and uninformed attacks on the schools. He contends that he violated no rules, order, or direction of the Board by so doing.

The evidence in this case fails to support the charges, in the Commissioner's judgment. The book of "Policies and Procedures of the Board of Education" admitted in evidence fails to disclose any rule that could be considered to have been violated and the Commissioner finds no indication that the Superintendent was directed to submit his report in advance of any public statement. Whatever the motivation may have been of the Superintendent in releasing his report, there is no evidence of intent to embarrass the Board, to disobey its direction, or to fail to carry out its orders.

That the Superintendent had a right to speak on the matter of the reading survey cannot be questioned. This was an educational matter and the statutes specifically state that the Superintendent "shall have a seat in the board and the right to speak on all education matters * * *" (R. S. 18:7-70). In his zeal to protect the staff from what he believed to be unwarranted criticism, the Superintendent saw fit to release on the same day as the Board was to meet, a report which had been in the hands of the Board members for some two weeks but on which there had been no opportunity for official action. The most that the Superintendent can be accused of is an error in judgment, in the Commissioner's opinion, and even the evidence reveals that the act was not without provocation. However this may be, the question to be decided here is not whether the Superintendent acted with wisdom in releasing this report, but whether his act warrants dismissal for cause under the Teacher Tenure statute (R. S. 18:13-17). In this respect the Commissioner concludes that the charges and the evidence on which they rest are without merit and insubstantial in the extreme to support a finding of cause for dismissal or a reduction in salary. As the Commissioner said in the case of *Rein v. Riverside Board of Education*, 1938 S. L. D. 302, 305:

"* * * the charges and the evidence purporting to substantiate them are too trivial to receive individual consideration. If incidental acts occurring in school administration and supervision are permitted to be exaggerated so as to be considered legitimate grounds for dismissal, then the tenure law gives no protection to teachers and fails to meet the purpose for which it was enacted by the Legislature."

And also by the State Board of Education in the same case, at page 308:

"* * * it is quite convincing that if (the defendant) could be dismissed, then the position of no supervising principal or principal is secure. For them the word tenure would be a mockery."

The Commissioner finds no evidence in this case to support a charge of insubordination, failure to perform, unbecoming conduct, or other good cause for dismissal or a reduction in salary of the Superintendent of Schools. As the respondent Superintendent has not been suspended or subjected to a loss of or reduction of salary, no further relief is required.

The charges are dismissed.

COMMISSIONER OF EDUCATION.

May 1, 1961.

XXIV
IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE
ANNUAL SCHOOL ELECTION IN THE BOROUGH OF CLAYTON,
COUNTY OF GLOUCESTER

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual meeting of the voters of the School District of the Borough of Clayton, Gloucester County, held February 14, 1961, for three members of the Board of Education for full terms of three years were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Helen Born	333	1	334
William Bradel	371	---	371
Robert McGiboney	393	---	393
Eldon Morgon, Jr.	288	1	289
Herman Scholz	82	---	82
Francis Hewitt	326	---	326
Michael Kuchlak	344	---	344

Helen Born, a candidate for election, petitioned the Commissioner of Education for a recount of the ballots cast on the grounds that ballots were rejected which should have been counted and others were tallied which should have been voided. The request was granted and the recount was conducted by the Assistant Commissioner in Charge of Controversies and Disputes, on March 16, 1961, at the office of the Gloucester County Superintendent of Schools. It was agreed by all parties that the recount would be restricted to a determination of the votes cast for Helen Born and Michael Kuchlak.

At the conclusion of the recount, the tally of the uncontested ballots was:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Helen Born	332	1	333
Michael Kuchlak	345	---	345

Examination of the 15 ballots set aside for referral disclosed that 7 could not be counted for either candidate. As the remaining 8 votes in dispute could not alter the results, there was no need to make a further determination.

The Commissioner finds and determines that Robert McGiboney, William Bradel, and Michael Kuchlak were elected to membership on the Board of Education of the School District of Clayton Borough, Gloucester County, for the term of three years.

COMMISSIONER OF EDUCATION.

May 16, 1961.

XXV
IN THE MATTER OF THE RECOUNT OF BALLOTS CAST AT THE
ANNUAL SCHOOL ELECTION IN THE BOROUGH OF
LITTLE FERRY, COUNTY OF BERGEN

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual meeting of the voters of the School District of the Borough of Little Ferry, Bergen County, held February 14, 1961, for the election of three members for full three year terms to the board of education were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Joseph Barkowski	213	---	213
Francis E. Hesse	529	1	530
Raymond C. Miller	557	5	562
Thomas J. Bassano	506	1	507
Frank E. Caiazzo	505	5	510
Anthony J. Dopkus	356	---	356
Victor Kurtzo	441	5	446

One of the candidates, Thomas Bassano, requested a recount of the ballots cast. He stated that on the basis of the votes cast at the polls, he was a successful candidate, that the counting of absentee ballots reversed this result, and that there were 5 additional absentee ballots which were not counted. The request was granted and a recheck of the voting machines used in the election was made by the Assistant Commissioner in Charge of Controversies and Disputes on March 17, 1961, at the warehouse of the Bergen County Election Board in Hackensack.

The result of the recheck verified and confirmed the announced results as set forth above. The tally of absentee ballots as certified to the secretary of the Little Ferry Board of Education by letter signed by Helen Roussel, Chairman of the Bergen County Board of Elections, agreed with the announced results.

Petitioner contends that five absentee ballots were received but were not counted and that these votes, if tallied, might have altered the results. The letter certifying the tally of absentee votes by the Bergen County Board of Elections confirms the rejection of five ballots stating "Five ballots were not counted as they had no Doctor's certificate attached."

The canvass of absentee ballots is not within the authority of the Commissioner of Education whose jurisdiction is limited to controversies and disputes arising under the school laws, Title 18 (R. S. 18:3-14). Procedures relating to absentee voting are set forth in Title 19, governing elections. R. S. 19:57-24 specifically provides for the determination of disputed absentee ballots as follows:

"Disputes as to the qualifications of military service or civilian absentee voters to vote or as to whether or not or how any such military or

civilian absentee ballot shall be counted in such election shall be referred to the county court of the county for determination.”

Petitioner’s allegation in regard to absentee ballots is not a controversy under the School Law and for that reason is not cognizable by the Commissioner of Education, who must, therefore, accept the certification of the Bergen County Board of Elections. *In Re Recount of Ballots Cast at the Annual School Election in the Township of Monroe, Gloucester County, 1957-58 S. L. D. 79.*

The Commissioner finds and determines that Raymond C. Miller, Francis E. Hesse, and Frank A. Caiazzo were elected to membership on the Board of Education of the School District of Little Ferry, Bergen County, for the three year term.

COMMISSIONER OF EDUCATION.

May 16, 1961.

XXVI

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD
IN THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY,
ON FEBRUARY 14, 1961

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the annual meeting of the legal voters of the School District of the Borough of Lincoln Park, Morris County, held February 14, 1961, for the election of three members to the Board of Education for the full term of three years were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Elizabeth Adams	203	1	204
Edmund D. Berry	215	1	216
Leonard H. Greenfield	198	1	199
C. S. Johnson	294	---	294
H. R. Zapf	321	---	321
G. H. Baum	227	---	227

The three unsuccessful candidates petitioned the Commissioner for a recount of the ballots cast and an inquiry into the manner in which the election was conducted. The petition alleged that there were no set rules under which the election was held or write-in votes counted and expressed the belief that a recount could result in a change in the results. The request was granted and on April 5, 1961, a check of the voting machines used was made by the Assistant Commissioner of Education in Charge of Controversies and Disputes at the warehouse of the Morris County Board of Elections followed by a recount of the write-in votes and a hearing on the conduct of the election at the office of the Morris County Superintendent of Schools.

The tallying of the write-in votes disclosed many variations in the way in which the name of the voter’s choice was recorded and the line of the ballot on which it was entered. As an example, the name of each of the write-in

candidates varied in details of spelling, full names, initials, etc., and appeared on every line of the ballot which was not locked off for a public question.

Before deciding the validity of the votes cast for the several variations of each name or of those recorded on other than lines 3, 4, or 5, which corresponded to the position of those candidates whose names were printed on the ballot, the Commissioner first examined the tally of the write-in votes for the most commonly used spelling and which was written in the proper spaces. This examination disclosed that each of the following names was written in on line 3, 4, or 5 the number of times indicated:

C. S. Johnson	224
H. R. Zapf	281
G. H. Baum	268

As each of these totals exceeds that of any other candidate, it is not necessary to decide whether votes cast for variations of name and/or on other lines should be counted.

A hearing was held following the recount in order to establish the facts in regard to irregularities which were alleged to have occurred during the election. The procedures objected to included the following:

1. Offering instructions for making a write-in vote without being requested to do so by the voter. This charge was denied by each election official who testified and no evidence was adduced to support it.

2. Group instructions on write-in votes were given by election officials. Several of the officials testified that on the request of a family or of several voters at once, they had given the instruction in a small group in order to expedite the voting and reduce the time required for voters to wait in line.

3. Officials entered the voting booth with voters after the curtains were closed to answer questions and show voters how to make write-in votes. This charge was denied by all officials and was not supported by the evidence.

4. Names of write-in candidates were written on the metal slides of a voting machine and write-in stickers were left in one machine. Examination of the machines disclosed writing on the slides of one machine and incomplete erasure on another.

5. The election officials at the Chapel Hill School failed to inspect the face of the machine after each voter. This was not denied.

6. Voters were permitted 5 to 10 minutes in some instances, resulting in delays in voting, long lines of voters who had to wait finally as long as an hour and a half. Election officials admitted the delays but blamed the protests of challengers who questioned their instructing voters in the manner of making write-in votes. When they ceased instructing, the officials claim, delays resulted while voters figured out how to make a write-in vote.

The testimony fails to disclose irregularities of any substantial nature which would be sufficient to challenge the results of the election. The election officials were properly designated and had had previous experience in conducting elections using machines. Although it is apparent that some undesirable confusion existed, there is no evidence that any election official attempted to influence any voter or the results of the election. In fact, it appears that

those in charge of the election attempted to deal with a difficult situation in ways aimed at facilitating the election while still protecting its integrity and validity.

The Commissioner agrees with petitioners that school elections are no less important than other elections and are to be conducted with careful regard to every requirement of law. While deploring the confusion and delay which developed in the instant case, he can find no evidence of failure of the election officials to conduct the election in other than a fair and impartial manner. The Commissioner notes that petitioners' primary objection in lodging their protest is not to have the election declared invalid but to call attention to certain procedures which were followed and chiefly the lack of adequate instructions to voters as to the method of casting a write-in vote.

The Commissioner believes that many of these difficulties can be avoided by adequate foresight and preparation by those charged with the duty of making arrangements for an election. While it may not always be possible to anticipate a write-in vote, boards of education can usually gauge the interest in a forthcoming election by the number of candidates, the number and kind of public questions, and many other indicators. When it appears that more than usual interest exists, that the vote will be large, that more time will be necessary because of a lengthy ballot or the prospect of a write-in vote, preparations should be made accordingly. This may involve use of more machines, additional polling places, appointment of extra election officials, or whatever is required to insure that the election is conducted in an orderly and impartial manner and every voter is afforded an opportunity to cast his ballot without delay or any other inconvenience. The Commissioner holds that each board of education and its officers have the duty and responsibility to make careful and adequate preparations for every referendum.

Once the election has been opened, the responsibility for the manner in which it is conducted passes to the designated election officials. Challengers have the right to question a voter's eligibility and to observe the election procedures but may not intervene or interfere in the work of the election officials. These officials, as members of the district election board, are required to be instructed in the performance of their duties by the County Board of Elections. Obviously, such instruction cannot anticipate in minute detail every eventuality that may arise, and in such a case the election official is called upon to exercise his best judgment in the light of the laws and principles governing the conduct of elections. The development of a large write-in vote on voting machines, as in the instant case, is unusual and, in the absence of more adequate preparation, called for the exercise of judgment on the part of the election officials. The Commissioner finds no reason to hold that the election officials herein acted improperly or in such a way as to prejudice or influence the election, or permitted irregularities that would have affected the results. The Commissioner also urges the Board of Education to take steps to avoid any such charges in the future by making adequate preparations so that those in charge may be able to perform their duties properly.

The Commissioner finds and determines that H. R. Zapf, C. S. Johnson and G. H. Baum were elected to membership on the Board of Education of the School District of Lincoln Park for the full term of three years.

COMMISSIONER OF EDUCATION.

May 25, 1961.

XXVII
BOARDS OF EDUCATION ARE WITHOUT AUTHORITY
TO LEASE SCHOOL BUSES

WILLS BUS SERVICE, INC.,

Appellant,

v.

THE BOARD OF EDUCATION OF THE GREATER EGG HARBOR REGIONAL HIGH
SCHOOL DISTRICT, IN THE COUNTY OF ATLANTIC AND STATE OF NEW JERSEY,

Respondent.

For the Appellant: Powell & Davis.

For the Respondent: Edward W. Champion.

DECISION OF THE COMMISSIONER OF EDUCATION

The Board of Education advertised for bids for leasing to the school district four new automobile buses for use in school transportation for a period of ten months of each of the four years from September 1, 1960 to June 30, 1964. The specifications called for a 1960 International Chassis Model B173 or approved equal—238" wheelbase, color chrome yellow and a Wayne Superamic 49 Passenger High School Bus Body or approved equal. Additional specifications for the chassis and the bus body were set forth in some detail. There was also the requirement that all buses and equipment would have to meet the specifications for transportation contained in the rules and regulations of the State Board of Education and the additional specifications of the local Board of Education and that all contractors would have to comply with the laws and rules of the State Board of Education and of the local Board of Education pertaining to public school transportation.

Accompanying each bid was a questionnaire filled out by the bidder in which, among other things, he stated that he had read the State Bulletin of Pupil Transportation including the rules and regulations of the State Board of Education on "Pupil Transportation," the rules of the local Board of Education pertaining to transportation, the specifications upon the basis of which the bid was submitted, and the contract or lease agreement which the successful bidder was required to execute.

Bids were received on March 18, 1960 from Wills Bus Service, Inc. of Mount Holly, New Jersey, in the sum of \$9,390.00 per year for the four year period and from Nation Wide, Inc. of Harrison, New Jersey for \$11,560.00 for the same period. The respondent Board of Education on April 11, 1960, rejected the bid of Wills Bus Service alleging that the bid did not conform to the specifications. The contract was then awarded to Nation Wide, Inc. in the sum of \$46,240.00 for the four year period specified. On May 10, 1960, the Secretary of the Board of Education notified petitioner by letter of the action of the Board of Education and returned the certified check which had accompanied his bid.

Wills Bus Service, Inc. has appealed from this action of the Board of Education contending that it complied with all the specifications and that its bid was lower than the bid of Nation Wide, Inc. Petitioner prays that the award made to Nation Wide, Inc. be set aside and that the Board of Education of the Greater Egg Harbor Regional District be directed to accept the bid of Wills Bus Service, Inc.

In its answer, the respondent Board makes these defenses:

1. Wills Bus Service, Inc. did not conform to the specifications upon which bids were requested and Nation Wide, Inc. did conform.

2. The Board of Education is not required by statute to submit the leasing of buses to competitive bidding and by so doing it is not bound to award the contract to the lowest responsible bidder and it may disregard the bids and award the contract as it, in its discretion, sees fit.

3. Petitioner failed to act promptly after the award of the bid on April 11, 1960, and is therefore barred from the relief prayed for by its laches.

Testimony was taken at a hearing conducted by the Assistant Commissioner of Education in Charge of Controversies and Disputes, at the Court House, Mays Landing, on July 25, 1960, and subsequently briefs were submitted by counsel.

The following questions are presented to the Commissioner for determination:

1. Was petitioner in laches in the presentation of its appeal?

2. Should the petition be dismissed for the reason that Nation Wide, Inc. was not made a party-defendant to this proceeding?

3. Does the Board of Education have the authority to award a contract for the leasing of school buses without advertising and awarding the contract to the lowest responsible bidder?

4. Was the rejection of the bid of Wills Bus Service, Inc. justified on the grounds that it did not comply with the specifications in submitting its bid?

The questions will be decided in order.

1. First there is the question of laches. The contract was awarded April 11, 1960, petitioner testified he received verbal notification on April 21, 1960 and his check was returned on May 10, 1960. The affidavit annexed to the Petition of Appeal was sworn and subscribed to on May 18, 1960. Thus, it would appear that the petition was received well within 45 days of the action of the Board of Education. R. R. 1:3-1 (b) provides that an appeal from final action or decision of a State agency must be taken to the Appellate Division within 45 days of service of notice of the decision on the action taken. While the Commissioner is not bound by this rule, he may look to it for guidance in determining laches. The Commissioner would not think that he should ordinarily be more strict than the Appellate Division in his requirements for timely appeal. The Commissioner does not find petitioner to be in laches.

2. It is contended that the petition should be dismissed for the reason that Nation Wide, Inc. was not made a party defendant to this proceeding. At the hearing, a representative of Nation Wide, Inc. made the following statement:

“Commissioner, my name is Gassert. I represent Nation Wide, Inc., the other bidder in this matter. I have not been served with a notice of appeal nor have I had the opportunity to participate in any of the pleadings or any of the hearings on this, but I wanted the record to show that I am present, that Nation Wide is represented at this hearing, for what it may be worth.

“As to entering an appearance as an interested and voluntary party to this action, if it pleases you, I would like to reserve that until the hearing progresses.”

It is the opinion of the Commissioner that Nation Wide had an opportunity to participate. In addition, as is more fully explained below, there are no rights under an illegal contract. *Rankin v. Egg Harbor and Adams*, 1939-49 S. L. D. 209, 220. The Commissioner finds no grounds for dismissal on this count.

3. Respondent, in its brief, contends that it is well settled that apparatus, which term includes a school bus, may be purchased without advertising for bids. It argues further that the right to lease school buses without competitive bidding is found under the provisions of R. S. 18:7-76. It states that if the Board has the right to purchase a school bus and hold it in trust for the district, it clearly has the right to exercise the lesser right of leasing school buses. Therefore, leasing a school bus has the same exemption from the requirement of advertising for bids as the purchase of a bus. Respondent cites no authority to support the argument that the greater right of purchase includes the lesser right of leasing.

The relevant statutes on this point are R. S. 18:4-11, 18:14-12 and 18:7-76, the pertinent excerpts of which are as follows:

R. S. 18:14-11.

“No contract for the transportation of children to and from school shall be made, when the amount to be paid during the school year for such transportation shall exceed \$600.00, unless the board of education making such contract shall have first publicly advertised for bids therefore in a newspaper circulating in the school district once, at least 10 days prior to the date fixed for receiving proposals for such transportation and shall have awarded the contract to the lowest responsible bidder.”

R. S. 18:14-12.

“Nothing contained in this section or section 18:14-11 of this Title shall apply to school buses owned by boards of education * * * .”

R. S. 18:7-76.

“The board may insure school buildings, furniture, and other school property, and receive and hold in trust for the district any and all real or personal property for the benefit of the schools thereof.”

The Commissioner agrees that boards of education may purchase school buses without advertising for bids but he does not accept the theory advanced by respondent in its brief. Respondent states "the obvious purpose of the statute cited is to exempt from competitive advertisement for bids—cases where the school buses are owned by the board of education, even though said buses are used for the transportation of pupils, the theory being apparently that buses owned by boards of education may be used for other purposes than transportation of pupils." It seems to the Commissioner that this argument ignores the realities of the situation. It is hardly likely that respondent board would spend \$11,560.00 a year for buses for purposes other than school transportation. Nor would it seek the approval of the county superintendent for purposes of State Aid under such circumstances.

However this may be, respondent relies on R. S. 18:7-76 to support its authority to lease without bidding. It is the opinion of the Commissioner that a study of the legislative history of this statute points to an opposite conclusion. R. S. 18:7-76 originally read: "the board may insure school buildings, furniture, and other school property, and receive, lease and hold in trust * * *" By the terms of Chapter 162 of the Laws of 1948, R. S. 18:7-76 was amended by deletion of the word "lease." This same Chapter also amended R. S. 18:7-73 dealing with school lands and buildings. By this amendment, it seems that the Legislature deleted "lease" from R. S. 18:7-76 advisedly and, thereby, intended to make certain that leasing was limited to school buildings with the previous authority of the legal voters under R. S. 18:7-73. By no amount of stretching can leasing a school bus be brought within the authorization of R. S. 18:7-73.

The Commissioner believes there is another reason why respondent cannot look to the provisions of R. S. 18:7-76 instead of 18:14-11 and 12 to support its claim to exemption from bidding. R. S. 18:7-76 is a general statute; 18:14-11 and 12 apply only to school transportation. In event of conflict between a general statute and a specific one covering the subject more minutely and definitely, the specific will prevail as an exception to the general statute. *North Bergen v. Hackensack Water Co.*, 26 N. J. Misc. 6, (Div. of Tax Appeals 1947); *Ackley v. Norcross*, 122 N. J. L. 569, (Sup. Ct. 1939), Affirmed, 124 N. J. L. 133, (E. & A. 1939); *State v. Hotel Bar Foods, Inc.*, 18 N. J. 115 (1955). Also, while R. S. 18:14-11 and 12 apply to all kinds of school districts, R. S. 18:7-76 governs only those districts organized under the terms of Chapters 7 and 8. If respondent's argument were to prevail, Chapters 7 and 8 districts would be exempted from bidding but no such provision could be found for districts organized under Chapter 6. The Commissioner cannot believe that the Legislature had any such intent.

The Commissioner does not agree that the authority to purchase includes the authority to lease. The use of the words "purchase" and "lease" in R. S. 18:7-73 indicates that these words have different connotations and that the Legislature uses the words advisedly and not interchangeably. Therefore, court decisions which hold that bids are not required in the purchase of equipment are not in point in determining whether such bids are required in leasing.

The question whether there is statutory authority for leasing a bus was not raised by the parties hereto. They were concerned with whether bidding was required and, if so, whether the award was properly made. The Com-

missioner believes that a complete and proper determination of this case requires him to decide this question even if the question is not raised by the parties. In the case of *In Re Masiello*, 25 N. J. 590 (1958) and *Laba v. Newark Board of Education*, 23 N. J. 364 (1957) the Supreme Court pointed out to the Commissioner that "his primary responsibility is to make certain that the terms and policies of the school laws are being effectuated." If, on appeal to him, he discovers a violation of the law, the proper discharge of his duty requires corrective action. It was also pointed out to the Commissioner that he may make an independent finding of fact on the record presented.

The Commissioner has already stated that he can find no statutory basis for the leasing of a school bus. If the authority of a board of education to lease a bus and supply its own driver is upheld, the object sought by the Legislature in enacting R. S. 18:14-11 and 12 can be circumvented. Prior to the enactment of these statutes in their present form, a board of education was free to employ a driver and his bus without advertising for bids. Evidently there was a belief that the discretion of boards of education in this regard should be circumscribed. By the new enactments, a board of education was given two alternatives in providing transportation: (1) A board could advertise for bids for furnishing complete transportation service, i. e. driver, bus, maintenance, etc., or (2) it could purchase a bus, supply its own driver and assume the cost and burden of maintenance, gasoline, supervision, etc.

It should be pointed out that when a board decided to own its own buses, it had to raise the money for purchasing the buses and assume the burden of owning, maintaining and supervising them. If buses can be leased under the circumstances described in this case, the Board could, without any burden at all, lease a driver's bus and then employ him as a driver, thereby, accomplishing precisely what the Legislature intended to preclude; namely, favoring a friendly bus owner.

The Commissioner can not construe a statute so as to render impotent the intention of the Legislature. It is his duty to interpret in accordance with the intent of the Legislature. If boards of education desire to lease school buses in the manner described in this case, they should look to the Legislature for empowering legislation. *Belfer v. Borella*, 6 N. J. Super., 557 (Law Div. 1949).

The Commissioner holds that boards of education are without authority to lease school buses and advises county superintendents of schools not to approve State aid for leased buses. Having reached this conclusion, it is not necessary to decide any other question presented for determination.

For the reasons hereinbefore set forth, the contract awarded to Nation Wide, Inc. for leasing buses will be set aside. The Board of Education of the Greater Egg Harbor Regional District is directed forthwith to take appropriate action to enter into agreements for the transportation of school pupils by contract or for the purchase of school buses as the Board may decide and the county superintendent approve. The case is remanded to the Board of Education with instructions to carry out this decision.

COMMISSIONER OF EDUCATION.

May 26, 1961.

Pending before State Board of Education.

XXVIII

TIMELY PROTEST REQUIRED IF AWARD OF BID
IS TO BE SET ASIDE

CONSUMERS ICE CREAM COMPANY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

Respondent.

For the Petitioner: Mr. Milton Josephson.

For the Respondent: Mr. Samuel Supnick.

DECISION OF THE COMMISSIONER OF EDUCATION

The petitioner is a corporation with its principal offices in Bordentown, New Jersey, and is in the business of distributing ice cream products. Petitioner says that it submitted a proper bid to respondent with a surety bond on July 14, 1959, which bid was substantially lower than any other bid submitted. Before awarding bids, respondent had its own laboratory test samples of the ice cream, none of which petitioner alleges was that which was to be used by the school system. Petitioner alleges that respondent thereupon with malice, arbitrarily, capriciously and unreasonably, and without cause, awarded the bid to the Breyer Ice Cream Company, a Pennsylvania corporation, at a substantially higher price than that submitted by the petitioner. He, therefore, prays that an order be issued by the Commissioner, enjoining the respondent from purchasing ice cream elsewhere, directing the respondent to purchase its requirements from petitioner and awarding him damages for the arbitrary, capricious, unreasonable and unlawful conduct of the Board of Education.

Respondent admits that petitioner submitted the lowest bid and that it did have various samples of petitioner's ice cream tested and examined by the Dairy Laboratories of Philadelphia prior to awarding the contract. It further states that petitioner's ice cream was not in accordance with the "Specifications for Ice Cream" required by the respondent, which specifications were made part of the advertisement and a copy of which specifications the petitioner received. Respondent maintains that petitioner did not comply and conform with the requirements of the specifications as set forth in paragraph b, as follows:

"Flavor shall be rated excellent or good by an independent laboratory designated by the Board of Education."

Respondent says that the failure to comply with the specification is evidenced by two independent reports of the laboratory aforesaid, which reports were dated July 29, 1959 and August 24, 1959, respectively. Respondent denies that it acted maliciously, arbitrarily, capriciously and unreasonably, and without cause in awarding the bid to the Breyer Ice Cream Company. It further denies that petitioner is entitled to the order of relief requested.

The Commissioner is unable to grant the relief prayed for in the petition. He is without power to issue restraining orders or to award damages. The contract under litigation was for the school year 1959-60 and has been performed. Therefore, the case is moot.

In *McAllister v. Board of Education of Lawnside*, 1951-52 S. L. D. 39, 40, the Commissioner said:

“The coal has been delivered and the bill has been paid. In the case of *Roberts v. Board of Education of the Township of Cranford*, decided December 24, 1931, dealing with a somewhat similar situation where the bill had been paid, the Commissioner said:

“The contracts and bills referred to in this case having been fulfilled or paid at the time of the hearing, the legality of the board’s action in relation thereto appears for the most part to constitute a moot case.

“ ‘Courts do not adjudicate moot cases and will not hear a case where the object sought is not attainable. *Jones v. Montague*, 194 U. S. 150.

“ ‘A case is not moot where interests of a public character are asserted by the government under condition that they may be immediately repeated merely because a particular order has expired. *Southern Pacific Terminal Company v. Interstate Commerce Commission*, 219 U. S. 498.’ ”

Also see decisions of the U. S. Supreme Court in *Mills v. Green*, 159 U. S. 653; *Freeholders of Essex v. Freeholders of Union*, 49 N. J. L. 438; *Worthy, et al. v. Board of Education of the Township of Berkeley*, 1938 S. L. D. 691.

Even though the case is moot, the Commissioner will comment on some of the questions at issue for the information and benefit of the parties and boards of education which may face these questions in the future.

The principal issue here is—can a board of education include in a specification for competitive bidding for the purchase of ice cream such requirements as the elimination of any stabilizers and a test for flavor?

The Commissioner’s first comment is that whenever there is any question of the validity of specifications or the manner in which competitive bids are sought the complainant should make timely protest and not wait until bids are awarded. Such objections should be made before the bid is submitted. *Rankin v. Egg Harbor Township Board of Education*, 1939-49 S. L. D. 205, 215. In any event the complaint should be made with reasonable promptitude. *Bullwinkel v. East Orange*, 4 N. J. Misc. 593 (Sup. Ct. 1926); *Gunne v. Glen Ridge*, 11 N. J. Misc. 3 (Sup. Ct. 1932); *Tim v. Long Branch*, 134 N. J. L. 285 (Sup. Ct. 1946).

With regard to the prohibition of stabilizers in ice cream, the Commissioner notes that the New Jersey statutes permit their use. The issue here is whether such a specification would limit the bidding to the product of a single company. Such a device would, of course, be improper. While it may be that a board of education might be sustained in excluding stabilizers if, in the exercise of its discretion, it honestly believes them to be undesirable, a serious

question would be raised, in the Commissioner's opinion, as to whether the aim of such a specification was to effect closed bidding.

Finally, there is the question of flavor as a basis for the award of an ice cream contract and the possibility that such a subjective criterion might be used as an excuse to make the award to a favored bidder.

The Commissioner does not believe that the flavor tests must be excluded from ice cream specifications because of the possibility that such tests might be used to favor a particular bidder. If flavor testing is desirable, the power to require the test should not be withheld because of the possibilities of the abuse of the power. It must be presumed that boards will act in good faith. When they do not so act, they can be brought to account for abusing their discretion.

The Commissioner recognizes that flavor is a subjective determination and a matter of individual idiosyncrasy. The judgment of flavor depends upon the individual and his previous background. It can be affected by what he may have eaten and his psychological state. Flavor cannot as yet be measured by a critical method which is reproducible. Presumably this is the reason that not all laboratories make flavor tests and that no State specifications for flavor in ice cream are included in R. S. 24:10-58 to 73.

The Commissioner is aware of the difficulties connected with the preparation of specifications including flavor testing which will satisfy the requirements of public bidding. He observes that the art of judging ice cream flavor has not advanced so far as the judging of tea, butter, and other foods. He notes that the United States Department of Agriculture does not officially score ice cream as it does butter. He also notes that judging ice cream for flavor is not unknown and has been used in judging contests.

R. S. 18:6-25 and 18:7-64 which require advertisement for bids for school supplies must be applied to each item with due regard for the practicalities and the realities of the situation attending the purchase. Competitive bidding is required by law primarily because it means better prices for the public and only incidentally because it benefits the bidder. Competitive bidding, however, does not require the impractical. *Schwartz and Nagle Tires v. Board of Chosen Freeholders*, 6 N. J. Super. 79 (Sup. Ct. 1949). The public interest would not be served by requiring the purchase of an ice cream of a flavor so distasteful to the pupils that they would refuse to buy it. The Commissioner also wishes to make clear his belief that flavor should not be the sole test. Ice cream served in school cafeterias should measure up to high standards of quality and nutrition.

If, in view of *Schwartz and Nagle Tires v. Board of Chosen Freeholders*, *supra*, it is not practical to prepare completely objective specifications for ice cream, it would seem, because of the importance of flavor, that a board of education should not be denied the right to include a flavor test if it provides for testing standards, methods, and procedures which will be entirely impartial, if not entirely objective. Therefore, the Commissioner will not rule against the inclusion of flavor tests in ice cream specifications, *per se*.

If, despite all the difficulties involved, a board of education determines that a flavor test is necessary and desirable in ice cream specifications, it is

incumbent upon such board to cause specifications to be drawn with standards, procedures and methods for testing which will reduce subjectivity to a minimum and which will be entirely impartial. If any prospective bidder believes that any such specifications are improper, he would have a right to make a timely protest and appeal to the Commissioner to rule whether a specific set of specifications violate the requirements of competitive bidding. The Commissioner prefers not to rule in general. Finally, it is pointed out that the requirement of flavor should be kept in proper balance with other requirements.

The Commissioner finds that the issues herein are moot and for that reason the petition is dismissed.

COMMISSIONER OF EDUCATION.

May 25, 1961.

XXIX

BOARD OF EDUCATION MAY ESTABLISH CONDITIONS NOT
CONTRARY TO LAW IN OFFERING POSITION AS HEAD
OF DEPARTMENT

SHIRLEY HIMMELMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE LOWER CAMDEN COUNTY REGIONAL HIGH
SCHOOL DISTRICT NUMBER ONE,

Respondent.

For the Petitioner: Mr. Cassel R. Ruhlman, Jr.

For the Respondent: Mr. Norman Heine.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner says she is employed by respondent as Instructor of Business Education and Head of the Department of Business Education and has acquired tenure as a teacher. She is also President of the Lower Camden County Regional High School Faculty Association.

On or about March 24, 1960, the respondent Board adopted the following motion:

"The secretary is instructed to write into the contract of all Department Heads that no Department Head shall be an officer of the Faculty Association nor shall he/she serve as a member of a committee of the Faculty Association dealing with the Board regarding salaries."

At the same meeting, petitioner was appointed to the position of Head of the Business Education Department. On or about April 1, 1960, petitioner was notified that her appointment as Department Head was "contingent upon the fact that you do not hold any office in the Faculty Association or serve on any committee of the Faculty Association dealing with the board of education relating to salary matters."

Petitioner says that the Board was without power and authority to make her appointment contingent in the matter set forth above. She prays that an order be issued by the Commissioner declaring the action of the Board to be void and of no effect, and declaring that she has a right to continue in her position without the restriction imposed by the Board of Education.

Respondent in its answer admits that petitioner enjoys tenure as a teacher but denies that she is under tenure as Head of the Department of Business Education. It further denies that it exceeded its authority in making petitioner's appointment contingent upon the conditions cited.

The question to be decided is whether a board of education may make an offer of a position of Department Head in a public school system with the condition that the person to whom the offer is made shall not at the same time serve as an officer of the Faculty Association dealing with the Board regarding salaries.

The Commissioner would point out that he does not consider himself called upon to decide whether the Board of Education may adopt a rule requiring the present holder of a position in the school system to give up an office in the Faculty Association and membership on its salary committee. Petitioner is not being deprived of a school position which the Board members apparently do not wish to fill with a person who is an officer of the Faculty Association and a member of its salary committee.

Does she have any right to appointment to the position? The Commissioner thinks not. It seems well established that there is no right to public employment except as provided by law. *Chalmers v. State Board of Education*, 11 N. J. Misc. 781 (Sup. Ct. 1933); *Ahrensfield v. State Board of Education*, 126 N. J. L. 543 (E. & A. 1941); *Schultz v. State Board of Education*, 132 N. J. L. 345 (E. & A. 1945); *Moresch v. Bayonne Board of Education*, 52 N. J. Super. 105, 111 (App. Div. 1958); *Laba v. Newark Board of Education*, 23 N. J. 364 (1957); *Liva v. Lyndhurst Township Board of Education*, 126 N. J. L. 221, 224 (Sup. Ct. 1941).

Is a board member free to vote against a person for a school position if that person insists upon retaining an office in the Faculty Association which the member honestly thinks might interfere with the proper performance of her duties and obligations both to the Board and to the faculty members? The Commissioner thinks he is. In so deciding, the Commissioner is not obliged, of course, to endorse the wisdom of the policy. It is well established that if an action of a board of education offends no statutory regulation, the Commissioner cannot substitute his judgment for that of the Board in the absence of a clear showing of abuse of discretion. *Boult and Harris v. Board of Education of Passaic*, 136 N. J. L. 521 (E. & A. 1948). The Commissioner finds no abuse of discretion.

Matters which a board of education is forbidden to consider in employment of staff members are found in R. S. 18:5-49, 18:13-10 and 18:25-12, which mention religion, sex, race, creed, color, national origin and ancestry. Consideration of office holding in a Faculty Association is not forbidden by these statutes. In the case of *Liva v. Lyndhurst Board of Education*, *supra*, which dealt with the salary of a teacher, the Court said:

“* * * the fixation of salaries is within the express power of the local board. The action does not offend any statutory regulation. As held in *Downes, et al. v. Hoboken, supra*, the motives, reasons and considerations of the local board in so acting are not evidence of bad faith. The prosecutor has not shown any legal right to an increase in salary, and, therefore, no equal protection of the law has been denied her. She holds her position by virtue of a contract and not by virtue of any right guaranteed by the constitution. Subject to the regulations of the school law, the local board was at liberty to contract with its teachers as it saw fit.”

The Commissioner concludes that, since petitioner has no right to the position under discussion and since the board members were not prohibited from considering her office holding in the Faculty Association in voting to fill the position, the Board members were free to vote against her if they honestly thought an office holder in the Faculty Association and a member of the salary committee should not at the same time be a Department Head. While the Commissioner does not associate himself with the policy of the Board, he does not consider it such an abuse of discretion and so unreasonable as to justify his setting it aside. Petitioner cites *Angell and Ackerman, et al. v. Board of Education of the City of Newark*, decided by the Commissioner May 11, 1960. For the reasons mentioned above, the Commissioner does not consider this decision controlling in the case under consideration.

Constitutional questions also are raised. While Commissioners of Education have repeatedly declined to decide constitutional questions, the Commissioner would point out that some of these questions have already been determined by our courts and he will comment on these.

Petitioner refers to Section 1 of Article I of the Constitution of the State of New Jersey which reads as follows:

“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

In *Laba v. Newark, supra*, it was held that a teacher has no property right in her position.

Petitioner also claims that support for her contention is found in Section 19 of Article I of the Constitution which reads as follows:

“Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.”

It is argued that teachers have a right under this provision to choose their own representatives and Department Heads are not precluded from representing the teachers. It is further submitted that, if the Board can disqualify any employee from holding office in the Faculty Association merely by assigning him or her to a position of Department Head, it can assume a dangerous degree of control over the Association.

In this regard, the Commissioner would point out that petitioner was not assigned against her will to the position of Department Head but was made a conditional offer to accept the position. Petitioner was, of course, free to refuse the offer and remain as an officer of the Association. Certainly the Board cannot arbitrarily defeat the right of the teachers to be represented by persons of their own choosing, but the Commissioner does not find that the Board acted arbitrarily. Nor can the Commissioner hold that the purpose of the Constitution is defeated by an offer to a teacher to be a Department Head conditioned upon not serving as a member of the salary committee.

A constitutional provision must be implemented to make it operative and to safeguard it. For example; Section 3 of Article II of the State Constitution entitles everyone with the requisite qualifications to vote. This does not preclude, however, the limitation that voters must be registered. The Commissioner would think that the Board of Education does not unduly limit the rights of teachers by denying them representation by the Department Heads for reasons it considers valid.

The First Amendment provides:

“Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

It is not stated with particularity what rights have been abridged. The Commissioner cannot find that the right of the teachers peaceably to assemble and petition has been abridged. If the freedom of the petitioner to speak for the teachers is meant, the Commissioner would call attention to the dictum of the late Justice Oliver Wendell Holmes that “the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” *McAuliffe v. New Bedford*, 155 Mass. 216, 220 (1892).

The Fourteenth Amendment provides:

“* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

Unless the action of the Board is patently discriminatory or arbitrary, this provision would not be offended. See *Laba v. Newark*, *supra*. The Commissioner does not consider the action of the Board to be discriminatory or arbitrary.

The Commissioner concludes that the Board of Education was within its authority in conditioning its offer of the position of Department Head to the petitioner on her agreement not to serve as an officer of the Faculty Association or as a member of the salary committee. The petition is dismissed.

COMMISSIONER OF EDUCATION.

June 14, 1961.

Pending before State Board of Education.

XXX

APPOINTMENT OF BOARD MEMBER BY MAYOR VALIDATED
DESPITE LACK OF CERTIFICATE OF APPOINTMENT

CORBIN CITY TAXPAYERS' ASSOCIATION,

Petitioner,

v.

GLADYS PELLIGRINI,

Respondent.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case contests respondent's right to membership on the Corbin City Board of Education and requests that her appointment be declared invalid and her seat on the Board be vacated. The facts in this controversy were established by testimony before the Assistant Commissioner of Education in Charge of Controversies and Disputes at the Court House in Mays Landing, New Jersey, on February 10, 1961.

Prior to November 14, 1960, the school district of Corbin City functioned under the provisions of Chapter 6 with a five member Board of Education appointed by the Mayor. On September 8, 1960, one member of the Board, Joseph Schneider, submitted his resignation in writing to the Mayor. According to the testimony, after consulting several members of the Board, the Mayor asked respondent to accept appointment to the vacant unexpired term and she agreed. No certificate of appointment was issued. The only documentation of the appointment rests on two letters placed in evidence, both dated October 14. One is from respondent to the Mayor, thanking him for appointing her to the Board, and the other is the Mayor's reply, as follows:

"Dear Sir:

"I would like to thank you for appointing me a member of the Corbin City School Board.

"I shall try to serve as best as I can.

"Sincerely,

"(Mrs.) GLADYS PELLIGRINI."

"Dear Mrs. Pelligrini:

"Thank you for consenting to accept appointment to the Corbin City School Board to fill out the term of Mr. Schneider who resigned. I will be unable to swear you in until the November meeting of the Board.

"Respectfully,

"JOHN B. LOVETT

"Mayor."

No mention of the appointment was made at the regular meeting of the Board on October 13. Respondent, attending as a spectator, made no attempt to take a seat on the Board, giving as her reason the fact that neither the Mayor nor the Secretary of the Board of Education was able to be present and there was, therefore, no one who could administer the oath of office.

At the general election on November 8, 1960, the voters approved a change in the organization of the school district from the provisions of Chapter 6 to those of Chapter 7 under which members are elected to the Board of Education. Two days later, on November 10, at the regular meeting of the Board, the Mayor administered the oath of office and the respondent took her seat on the Board, which action was then challenged by petitioner.

Petitioner questions the validity of the action on the grounds that the Mayor failed to fill the vacancy within the thirty days provided by statute and contends that he could not subsequently do so, and particularly could not, after the change from an appointed to an elected board.

Respondent contends that her appointment occurred before the October 13 meeting of the Board and that it was in all respects valid.

The relevant statute herein is R. S. 18:6-6, the pertinent excerpt of which follows:

“A vacancy in the board shall be forthwith reported by the secretary of the board to the mayor or other chief executive officer, who shall, within thirty days thereafter, appoint a person to fill the vacancy for the unexpired term.

“To every appointee the mayor or chief executive officer shall issue and deliver a certificate of appointment.”

From the testimony elicited at the hearing, it is evident that appointments to the Board of Education by the Mayor in this school district have been made in an informal manner. The Mayor, who is in his second term of office, testified that when he had a vacancy to fill he made it a rule to consult the members of the Board as to candidates first and then, after selecting the person, to see him and tell him of his appointment. It was also the custom of the Mayor to “swear him in” at the next meeting of the Board. This procedure was confirmed by the Secretary of the Board, also a Board member, who testified that she never received a certificate of appointment nor, to the best of her knowledge, had any other member. It is apparent that in this small community the usual more formal procedures were by-passed and matters such as this have been conducted in an informal, face-to-face and word-of-mouth manner.

While the Commissioner does not condone loose procedures and holds that the business of government should be conducted with strict regard to all statutory requirements, he cannot find in this case that respondent's appointment was invalid by the lack of a formal certificate of appointment. If this were so, it would appear that no present member of the Board was ever lawfully appointed.

The testimony reveals that the Mayor intended to appoint respondent to the Board of Education and did so, using the same methods that he had

previously followed. Two other Board members and the wife of a third testified that the Mayor had consulted them about appointing respondent. The Mayor stated that he talked then to respondent, obtained her acceptance, and told her she was appointed. Respondent fixes this conversation as occurring during the first week in October. It was also agreed that no announcement would be made nor would she be sworn in until the November meeting because the Mayor could not attend the October meeting. Subsequently, respondent sent her letter of thanks to the Mayor and received his reply.

The Commissioner finds no merit in petitioner's contention that the Mayor failed to act within thirty days and the appointment was, therefore, invalid. As stated above, the weight of the evidence is to the effect that the appointment, informal and verbal as it may have been, was made early in October. However that may be, there is no penalty in the statute for failure to act within the thirty days nor is there any provision that the power to fill such a vacancy passes to any other official or body. In the Commissioner's opinion a mayor may be required to perform this duty of his office, but the power to appoint cannot be taken from him or reassigned except by a reorganization of the district approved by the electorate. Having determined that the Mayor appointed respondent prior to the referendum changing to an elective board, failure to administer the oath of office until two days after the referendum does not alter the fact of the appointment in the Commissioner's judgment. Although respondent could not take her seat on the Board until sworn in, she held her appointment from the time she was notified by the Mayor.

The Commissioner finds and determines that Gladys Pelligrini was appointed to the Board of Education of the School District of Corbin City to fill the unexpired term of former member Joseph Schneider.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

June 26, 1961.

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION,
SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME
COURT ON CASES PREVIOUSLY REPORTED

FLORENCE S. EVAUL,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE CITY OF CAMDEN,

Defendant-Respondent.

DECISION OF THE SUPERIOR COURT, APPELLATE DIVISION

Argued October 25, 1960.

Decided before Judges Price, Gaulkin and Sullivan.

Mr. Meyer L. Sakin argued the cause for petitioner-appellant.

Mr. A. Donald Bigley argued the cause for defendant-respondent.

The opinion of the court was delivered by PRICE, S. J. A. D.

Appellant seeks to reverse the decision of the State Board of Education affirming, without written opinion, the decision of the Commissioner of Education which determined that respondent's acceptance of appellant's resignation as a high school teacher in the Camden public school system had legally terminated her employment on March 13, 1959. The State Board based its decision on the reasons expressed in the Commissioner's written opinion.

Appellant alleges that the document, which she had written and signed, and which had been accepted by respondent as her resignation, was not such in fact and, in any event, was void because she had not intended that it be considered as a formal declaration of the termination of her position as a teacher; that it had not been legally directed to or tendered to the respondent school board; and moreover was the "product of fraud, coercion and duress," to which she had been subjected by her superiors at a time when, to their knowledge, she was emotionally distressed. She further contends that the purported acceptance of her resignation at a special meeting of the school board was void as beyond the scope of the announced purpose of that meeting. The resignation was couched in the following language:

"March 13, 1959

Dr. A. R. Catrambone,

Because it seems impossible to resolve the *false* accusations, the misunderstandings, the attacks on my reputation (*not* my character), and the constant references to ridiculous stories of my past history, I hereby offer my resignation from the Camden School System. No one seems interested in clearing up these matters.

Sincerely yours,

Florence Smith Evaul"

Appellant had been a teacher in the Camden public school system since 1934. Although during her employment she had not been suspended and had not been the object of any formal charges, her superiors in the school system asserted that within the last few years she had exhibited a quarrelsome disposition; that certain irritating situations in connection with her work had arisen, which they attributed to lack of cooperation on her part, and which, they claimed, had caused disharmony in the school system. They contended that by March, 1959, conditions had reached a point of such seriousness that a conference meeting with appellant was deemed imperative. Such a meeting, called by the president of the school board, was held on March 13, 1959 at about 11:30 A. M. in the office of the principal of the high school in which appellant taught. In attendance were appellant, the principal, the superintendent of schools and the school board's president.

The meeting, lasting about 40 minutes, was an acrimonious one. It was concerned with a variety of subjects, including appellant's alleged quarrels with other teachers, the disrespect which, it was asserted, she had shown for the head of her department, her controversies with the principal of the high school and her criticism of the superintendent and of the school board's president. The record reveals that at times during the conference harsh words were spoken; that at times appellant appeared nervous, excited and distraught and once she cried; at other times she was calm; and, at still others, became extremely angry, at one point branding a statement by the principal as "a lie."

At the hearing before the Commissioner appellant testified that, although nervous while at the conference, she "was well aware of what was going on"; that immediately after the termination of the conference, she took charge of a study hall but felt "dazed"; that she was "shocked" by what had occurred and felt "discouraged" that she "couldn't convince" those at the conference "that there had been nothing wrong." At the conclusion of the study hour she sought a conference with the principal but found that he had left the building. She stated that she was crying bitterly at this point, and called her doctor and, on his advice, started for home. However, instead of going there, she stopped at the place of business of the school board's president and sought a conference with him. He refused to confer with her and, as related by her, voiced the opinion that at the morning conference, had he been her immediate superior, he would have suspended her "on the spot."

Appellant then went to the superintendent's office and conferred with him. She told him that she wanted to resign. She testified that despite the superintendent's twice-expressed admonition that she "[t]hink it over until Monday" (March 16), she asked his secretary for paper and on receiving it wrote the aforesaid resignation in longhand and signed it. She admitted that, in rejecting the superintendent's suggestion that she defer her decision, she replied: "If I do, I'll change my mind." She testified that she was not threatened by the superintendent "in any way." She testified that her reason for her resignation was the "absence" of action in accomplishing things she wanted done. The conference then ended and, as the superintendent departed to go to another appointment, appellant left the resignation on a clerk's desk in his office.

Appellant's testimony at the hearing before the Commissioner was in sharp contrast with the statements contained in her petition of appeal to him and reiterated in her brief filed on her present appeal. In both of them she charged that duress, fraud and coercion were responsible for her act in penning the foregoing resignation. However, she testified that, at the conference with the superintendent, her mind was "clear" and that she knew what she was "doing"; that she was "calm," and that without assistance she "chose" her "own words" in phrasing her resignation. In explanation of her act she stated: "I was offering a resignation which could have been accepted or rejected, hoping that it would bring up a discussion before the Board of Education to find out why I would take such a serious step or even consider it * * *. I thought that any other request less than that would not seem serious enough for them [the board members] to discuss it. I was relying on the integrity of the Superintendent and the President of the Board to explain what had happened that day and why that letter was written."

Unknown to appellant, on March 10, 1959, a special meeting of the board of education had been called for 8:00 P. M. on March 13, 1959 pursuant to written notice sent by the board's secretary to each of its nine members. A copy of the notice and the Clerk's certificate annexed thereto were received in evidence before the Commissioner. They were as follows:

"NOTICE

March 10, 1959

There will be a Special meeting of the Board of Education held on Friday, March 13, 1959 at 8:00 P. M., in Room 503, City Hall, Camden 1, New Jersey.

The purpose of the meeting is to consider the following:

1. Final adoption of the 1959-60 budget.
2. Adoption of the Rules and Regulations.
3. Other matters that may come before the Board.

* * * *

It is certified that the above notice of Special meeting was given to each and every Member of the Board of Education of the City of Camden.

Joseph C. Ragone

Joseph C. Ragone
Secretary

Seal"

The meeting was attended by seven of the nine school board members. Many subjects were discussed and action taken thereon, the transcript of the minutes covering 25 typewritten pages. Appellant's resignation was presented by the superintendent and was accepted unanimously. On March 14 appellant noticed a newspaper reference to the meeting and, on calling the school board's secretary, learned that her resignation had been accepted the previous night. She testified that following a futile visit at the superintendent's home on March 15 she sent the following night letter to the respondent board:

“Camden Board of Education, Attn Joseph Ragone Secy = 5th Floor City Hall Camden NJER

= Am rescinding resignation of March fourteenth because of illness after Fridays conference I am unable to report on March sixteenth will return when doctor permits=

Florence S. Evaul=

Similar telegrams were sent by appellant to the superintendent and to the principal. Her attempted rescission of her resignation was treated by respondent as ineffectual as the board had accepted her resignation and deemed that her status as a teacher in the city's school system had ended. Appellant was so advised by telegram on March 16. Her appeal to the Commissioner followed.

We find no merit in appellant's contention that the document she wrote, signed and left at the superintendent's office was in fact not a resignation. Our conclusion flows not only from the unequivocal language used in the above quoted written resignation, but the record shows that the proposal originated with her and, as noted, that she expected that the school board might accept it or reject it.

Appellant places great stress on the fact that the superintendent in his testimony explained his suggestion to appellant that she think about her proposed resignation “over the week-end,” by saying “I didn't think she meant it.” The stress on this item of evidence loses whatever significance it may have had when it is realized that appellant immediately rejected any deferment of her resignation and insisted on writing it immediately. The school board accepted the resignation and the document cannot now be treated as a mere expression of a desire for a conference or as a conditional resignation or as a method employed by appellant to shock the school board into attention. Twice, as noted, she admitted that she refused to waver from her determination to present it. The record reveals that the superintendent testified that on five (not two) occasions during the conference he endeavored to have her defer any such action but she remained adamant and persisted in presenting her resignation forthwith. Again, her testimony that she expected the school board to accept or reject her resignation is destructive of her present claim that she intended only to promote discussion. The Commissioner's determination that appellant's belated attempted rescission could not be deemed effective was sound.

Appellant further contends that her resignation was not legally effective because it was not “directed” to the board of education or “tendered” to it. There is no merit to that contention. The resignation was addressed to the superintendent. It was appropriate that he should process it. Again, appellant's testimony that she expected that the board might accept it or reject it is irrefutable proof that she intended that it should be presented to the school board and acted upon by it.

Appellant next advances the contention that the school board's aforesaid acceptance of her resignation was invalid because of *N. J. S. A. 18:13-20*, which provides as follows:

“Any teacher, principal, or superintendent of schools, under tenure of service, desiring to relinquish his position, shall give the employing board

of education sixty days' written notice of his intention, unless the local board of education shall approve of a release on shorter notice.

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

Appellant contends that in the absence of specific waiver of the aforesaid 60 day provision the school board's action in accepting her offered resignation was a nullity. Not so. The Commissioner in his opinion noted that the obvious intent of the statute "is to guarantee the employing Board sixty days in which to arrange for suitable replacement." Its provisions are for the benefit of the board and the public, not the teacher. We agree with the Commissioner's statement that to hold that a teacher's resignation, once accepted, can be withdrawn within 60 days, destroys the purpose of the statute. The resignation when accepted was, as the Commissioner found, a "finality."

We also perceive no reason to disturb the State Board of Education's approval of the Commissioner's finding that appellant had failed to establish her claim that her resignation was the result of fraud, duress, or coercion.

Appellant's counsel contends in his brief that in the light of the heated morning conference with her superiors, the frustration which appellant felt, and her emotional state engendered thereby, "the conclusion is inescapable that the paper writing was not a voluntary act proceeding from her own free will and not unconstrained by external emotional interference." He adds that "there is present the exaction of a paper writing under circumstances clearly demonstrating a lack of free will on the part of appellant * * *"

The Commissioner found to the contrary. He recognized that at the morning conference "undoubtedly some unpleasant and emotionally upsetting things were said" but that the proofs failed to sustain "any claim to a degree of provocation that could constitute duress or coercion."

Appellant cites *Gobac v. Davis*, 62 N. J. Super. 148 (Law Div. 1960), in support of her contention. The evidence in the record before us falls far short of the proofs which, in the cited case, led the court to the conclusion (at p. 160) that "the plaintiff was subjected to such psychological pressure and compulsion in the situation in which he found himself that it caused such fear on his part as to preclude the exercise by him of free will and judgment." The evidence in the case at bar not only fails to sustain such a contention but, as noted, the record includes strong affirmative proof that appellant's action was voluntary, was not the result of threats or coercion and reflected a course which, of her own choosing, she elected to pursue. The record is barren of any proof supporting the aforesaid contention of plaintiff's counsel that the resignation was exacted from appellant.

Appellant also cites the holding in *Rubenstein v. Rubenstein*, 20 N. J. 359, 367, 368 (1956), that the "act or conduct complained of need not be 'unlawful' in the technical sense of the term; it suffices if it is 'wrongful in the sense that it is so oppressive under given circumstances as to constrain one to do what his free will would refuse.' * * * [D]uress is tested, not by the nature of the threats, but rather by the state of mind induced thereby in the

victim.” The above quoted principle undoubtedly represents the law of this state but it has no application to the case at bar in which no claim is made that threats were employed to induce the resignation. In our consideration of appellant’s contention we have, as directed in *Rubenstein, supra*, at p. 367, considered the “age, sex, capacity and relation of the parties and all the attendant circumstances.” So assayed we find no justification for concluding, as contended by appellant, that psychological pressure constituting duress deprived her of the exercise of her free will.

Finally, we consider appellant’s claim that the purported acceptance of her resignation was void because it was accomplished at a special meeting of the board of education called pursuant to a notice which did not include in the agenda specific notification of the presentation of such resignation.

The single question projected in this connection by appellant is whether the school board was within its rights in considering and accepting appellant’s resignation as an item of business comprehended within the general language in the above quoted notice of the meeting that there would be considered “other matters that may come before the Board.” The Commissioner, in rejecting appellant’s contention and in affirming the propriety of the school board’s consideration of appellant’s resignation at the special meeting aforesaid, stated:

“In deciding questions of this kind which are not specifically covered by statute or rule, great weight must be given to custom and prevailing practice. It is evident that the Camden City Board of Education has followed a practice of holding special meetings between the regular monthly meetings for many years and has customarily transacted miscellaneous items of business under such a general purpose notice as in the instant case. The minutes of the particular meeting in question show that a number of items, other than the two specifically listed, were acted upon. These included correspondence, payment of bills, award of a construction contract, appointment of a committee, authorization of a request of the Business Manager, as well as petitioner’s resignation. That this has been a regular practice of the Board and that all members were well aware of it and accepted it cannot be doubted.

The Commissioner has knowledge also, that this custom is not peculiar to the Camden City Board of Education, but is the general practice of many boards of education in New Jersey, particularly in the larger districts where the volume of business to be acted upon requires meetings of more frequency than once a month. For many years boards of education in this State have been inserting in the call of a special meeting some such omnibus clause as the one in question to permit them to dispose of miscellaneous items of business accumulated since the last meeting. In sanctioning this practice, the Commissioner believes that it has not been and should not be extended to cover major decisions of policy on which the public might wish to be heard, but should be limited to action upon routine items that need not wait until a regular meeting.”

We are in accord.

Appellant contends that the consideration of her resignation was not a “routine” matter and that the board’s acceptance thereof, in the absence of

express reference thereto in the call of the meeting, was void. She urges that the inclusion of the word "teacher" in association with the word "superintendent" in *N. J. S. A.* 18:13–20, *supra*, when considered in the light of the importance attributed to the position of superintendent in *Cullum v. Bd. of Education of Tp. of North Bergen*, 15 N. J. 285 (1954), is confirmation of the importance of the subject of a teacher's resignation and refutes the suggestion that it can ever be labelled "routine." She stresses particularly the importance of the statement found in *Cullum, supra*, at p. 292, to the effect that: "Amongst their [members of a board of education] most vital and responsible duties is the proper selection of personnel, particularly the school superintendent."

There can be no proper challenge of the propriety of the above quoted statement. It is equally apparent that it has no application to the factual situation present in the instant case. We are not here dealing with the selection of a superintendent or of a teacher. We have before us the simple question whether a signed resignation of a teacher in a public school system may be considered and acted upon at a special meeting of the school board even though such projected item of business was not specifically listed in the meeting's call. In other circumstances or with a different factual background, it might well be that a teacher's resignation would loom so large, as a public issue, as to require specific notice if its consideration were to take place at a special meeting. No such element is here involved. Despite the aforesaid events of the morning and afternoon of March 13, 1959, the resignation of appellant, as it came to the school board through the medium of the superintendent's report, was a routine matter and not such as to require specific inclusion of its consideration in the call of the special meeting.

The judgment of the State Board of Education is affirmed.

65 N. J. Super. 68 (1961).

DECISION OF THE SUPREME COURT OF NEW JERSEY

Argued May 9, 1961.

Decided June 30, 1961.

Mr. Meyer L. Sakin argued the cause for the Petitioner-Appellant.

Mr. A. Donald Bigley argued the cause for the Defendant-Respondent.

The opinion of the court was delivered by PROCTOR, J.

Appellant, Florence Evaul, is a former Camden public school teacher. Her employment with the Camden school system was terminated on March 13, 1959, when the respondent Board of Education accepted her alleged offer to resign. On her successive appeals, the Commissioner of Education, the State Board of Education, and the Appellate Division (65 N. J. Super. 68 (1961)) upheld the validity of her release. Since one judge of the Appellate Division dissented, she appeals to this court as of right. *R. R.* 1:2–1(b).

The facts necessary to understand how and why appellant's employment was terminated are as follows:

Miss Evaul was a teacher in the Camden school system from 1934 to March 13, 1959. In 1937, she acquired tenure, see *N. J. S. A.* 18:13–16, and,

in due course, seniority and pension rights. During her twenty-five years of service no charges were ever preferred against her; nor was she ever suspended.

For some time prior to her release, Miss Evaul taught English at Woodrow Wilson High School. The record does not clearly disclose the nature of her relationship with other faculty members. She testified before the Commissioner that she never had any serious clashes or disputes with colleagues. On the other hand, the school Principal testified that she did. It is clear that appellant believed she was overloaded with work; for at some point she complained to the Superintendent of Schools and the President of the Board of Education about the extent of her curricular and extra-curricular duties.

On the morning of March 13, 1959, appellant informed her department head that fellow teachers who were preparing a departmental notebook were not reporting the activities of appellant's pupils. The department head replied, in effect, that the others were at least undertaking a chore which appellant had declined. Appellant said she was sorry she could not assist because of her heavy program, and that the Superintendent and President had asked why the department head did not provide appellant with assistance. With that, the department head began to cry and said, "You have certainly put me in a position" (apparently implying that appellant's request to the school officials had adversely reflected upon the department head's performance of her duties). Later in the morning, appellant sent a note to the department head which read as follows:

"Grace,

3/13/59:

Just one thing. I was as amazed as you are that the Bd. Pres. & Supt. should have expected you to do something to help me. Ordinarily, I get help from no one. But, more important I did not bring up anything about you.

Florence

"I have appreciated your sympathy *but* I need help."

Miss Evaul testified that the purpose of the above note was to apologize and to make clear that she did not mention the department head's name to the President and Superintendent. The department head gave the note to the Principal, and he, in turn, sent a note to the appellant directing her to report to his office.

When appellant arrived at the Principal's office, she was confronted by the Principal, the President and the Superintendent. What happened next is unclear; but all four persons testified that everyone was talking at the same time. The meeting, which lasted about forty minutes, was heated and acrimonious. Appellant was charged by one or the other of the school officials with being argumentative, uncooperative, insubordinate, disrespectful, and hypercritical. The record reveals that during the meeting she appeared nervous, excited and distraught; that at one point she cried; that at other times she was calm; and at still other times angry. At one point she responded to an accusation with "that's a lie." After appellant left the Principal's office she supervised a study period. She testified that during this time she was "dazed" and didn't "remember anything but walking up and down the aisles"; she was

“shocked” by what had happened and felt “discouraged” that she “couldn’t convince” those at the meeting “that there had been nothing wrong.” At the end of the study period, she sought a conference with the Principal, but learned that he had left the building. She testified that at this point she was crying and telephoned her doctor who advised her to go home. Instead of going home, she went to the office of the President of the Board. He refused to discuss the subject matter of the earlier meeting, and told her to speak with the Superintendent.

Miss Evaul arrived at the Superintendent’s office at about 4:00 p.m. She said to the Superintendent, “I can’t take any more of this and I have a few thousand, I’ll resign.” He told her not to be hasty, to think it over, and at least to wait until Monday (March 16th). She responded, “If I do, I’ll change my mind.” The Superintendent testified that he told her five times to think over her decision. When asked why, he testified, “I didn’t think she meant it.” The appellant apparently persevered; for the Superintendent provided her with a piece of paper and left. She then wrote the following note, placed it on the secretary’s desk, and departed:

“Mr. A. R. Catrambone,

March 13, 1959.

Because it seems impossible to resolve the *false* accusations, the misunderstandings, the attacks on my reputation (*not* my character), and the constant references to ridiculous stories of my past history, *I hereby offer my resignation* from the Camden School System. No one seems interested in clearing up these matters.

Sincerely yours,

Florence Smith Evaul”

Appellant testified that during her conversation with the Superintendent, she was “too vague and disturbed, discouraged to even bother with time.” But she also said that her mind was clear; that she alone chose the words appearing in her alleged resignation; and that she “was offering a resignation which could have been accepted or rejected, hoping that it would bring up a discussion before the Board. * * *”

Appellant was unaware that a special meeting of the school board had previously been scheduled to take place at 8:00 p. m. on March 13th—a few hours after she left her alleged resignation with the Superintendent. The meeting was held as scheduled. After other business was transacted, the Superintendent, when called upon for his report, said,

“Mr. Chairman, I have been handed the resignation of Florence Smith Evaul. I recommend to the Board of Education that this resignation be accepted, to take effect on the date of her letter, March 13, 1959.”

One member moved acceptance of appellant’s resignation; the motion was seconded; and, without discussion, it was unanimously adopted.

On March 14, 1959, appellant read in the local paper that a special meeting of the Board of Education took place the night before. She called the Board Secretary, and he told her that her resignation had been accepted.

The following evening, March 15, 1959, she visited the home of the Superintendent to see what she could do about rescinding her resignation. She testified that after the meeting the Superintendent would do nothing to help her. Later in the evening, she sent telegrams to the Superintendent, the President of the Board, and the Board in care of the Secretary, informing them she was rescinding her resignation. On the morning of March 16, 1959, the Secretary, upon receipt of the telegram, immediately wrote to the Superintendent informing him that he had received the telegram and that "Miss Evald went off the payroll on Friday, March 13, 1959 at the end of the school day, as her resignation was offered and accepted by the Board before receipt of the telegram of rescission." He instructed the Superintendent to "handle payroll accordingly." Later that morning the Superintendent sent Miss Evald the following telegram:

"Your night letter received this morning since the Board accepted your resignation dated March 13 at its meeting on March 13, 1959 the resignation is in effect and there is no further action to be taken by this office."

Appellant asks us to reverse the judgment below and order her reinstatement on a number of grounds. Our view of this case is related to her argument that the resignation was invalid because her offer to resign was the product of duress. As will appear hereinafter, our disposition of this appeal makes it unnecessary for us to discuss appellant's other arguments.

Although the record does not disclose any conduct by the school officials which amounts to duress, *cf. Rubenstein v. Rubenstein*, 20 N. J. 359 (1956); *Gobac vs. Davis*, 62 N. J. Super. 148 (L. Div. 1960), we think that the peculiar circumstances of this case require the reinstatement of the appellant on equitable principles. It was an extraordinary concatenation of events which resulted in a loss to appellant of her tenure, seniority and pension rights acquired during twenty-five years of service. First, there were the disturbing incidents of March 13, 1959, which led to the submission of her resignation. The unpleasant and emotional meeting with her department head was shortly followed by the unanticipated and tempestuous confrontation in the Principal's office. It is reasonable to suppose that the anxiety and distress engendered by these incidents reached a climax when her subsequent efforts to confer with the Principal and the President of the School Board were frustrated. It is clear to us that the submission of her resignation was an impetuous act prompted by her understandably distraught condition. The emotionally-charged words she used in her note of resignation bear this out. Second, linked to the above chain of events, was the fortuitous circumstance that a special meeting of the school board had, unknown to her, previously been scheduled for a few hours after she wrote her resignation. But for that happenstance, her attempted rescission on March 15, 1959, would have been effective.

In view of the above facts, we think that, in the unusual circumstances of this case, it is unduly harsh for appellant to lose rights acquired during the many years she served as a teacher in the Camden school system. This is particularly so, in light of the additional fact that in the interim between the acceptance of her resignation and appellant's prompt attempt to rescind, the school board did not take any action in reliance upon the effectiveness of her release. Accordingly, we hold that the appellant must be reinstated.

The appellant has not asked for back salary in this appeal. To avoid later litigation, however, we hold that because the loss of her teaching position was occasioned by her own impetuous conduct and her reinstatement is based upon equitable principles, she is not entitled to collect her salary for the period dating from the acceptance of her resignation until her reinstatement.

The judgment of the Appellate Division is reversed and the cause is remanded to the Board of Education for proceedings consistent with this opinion.

35 N. J. 244 (1961).

THOMAS HOUSTON,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF NORTH HALEDON, PASSAIC COUNTY,

Respondent.

DECIDED BY COMMISSIONER OF EDUCATION DECEMBER 2, 1959

DECISION OF THE STATE BOARD OF EDUCATION

Except as hereinafter supplemented, the basic and material facts are sufficiently stated in the decision of the Commissioner dated December 2, 1959. Suffice it to say that the issue in this case is as follows:

Did the respondent Board of Education have power to adopt the resolution of November 6, 1958 whereby it retained an attorney to represent Ralph N. Angelillo, a member of the said Board, and Herman Steinberg, Board counsel, in a suit filed against them in the Superior Court of New Jersey by one DeMayo, former attorney of the Board. The said resolution retained one Lawrence Diamond, an attorney-at-law, to represent Angelillo and Steinberg at a fee of \$2,000.00, including disbursements and services, except for appeal, with a retainer of \$750.00 payable immediately and with the credit of \$100.00 against the total sum of \$2,000.00, and the resolution further stated: "it being further understood that if this litigation does not reach trial, this fee will be proportionately reduced commensurate with services rendered." Since oral argument herein, we have been advised that the suit by DeMayo against Angelillo and Steinberg has been settled without trial.

The suit which had been instituted by DeMayo against Angelillo and Steinberg, individually, sought money damages for what may be generally described as alleged interference with the contractual relationship which DeMayo had had with the Board of Education under 2 contracts (a) as attorney for the Board, which was terminated by resolution of May 5, 1958 and (b) as board attorney which was terminated by resolution of June 2, 1958.

The Commissioner, in his decision below, held that (a) *N. J. S. A. 18:5-50.2* did not constitute sufficient express authority for the Board below to retain an attorney to defend either Angelillo, the Board member, or Steinberg, the Board's counsel, and (b) that nevertheless, the Board of Education did have discretionary, or implied, power to retain counsel to defend both Angelillo, the Board member, and Steinberg, the Board's counsel.

We agree with the Commissioner's holding that *N. J. S. A.* 18:5-50.2 does not constitute sufficient express authority to warrant retention of an attorney to defend either Angelillo or Steinberg. On the question of implied power to do so, we feel that the problems deserve further consideration.

In resolving the question here presented we should keep in mind the principles of public policy by which we should be guided. First, we should be alert to avoid improper use of public funds. Second, public money should not be expended for such retention of attorneys if indeed the acts upon which the suit is based were not related to official duties of the defendant. Third, the principles to be adopted should not serve to discourage interested citizens from assuming the burdens of such public service which they render in serving on or for, Boards of Education.

It seems to us that the same objectives which have dictated the granting of the defense of "privilege" to public officials should be kept in mind in determining the question of implied power of a Board of Education to hire an attorney to defend officials of a Board of Education when they are sued for acts related to their official duties. In such cases, it has been suggested by distinguished authority that, even though an official be malicious in the uttering of a libel, he is nevertheless entitled to an absolute privilege, lest public-spirited citizens avoid the responsibility of public office. As was said by Chief Judge Learned Hand in *Gregoire v. Biddle*, 2 Cir. 1949, 177 F. 2d 579, certiorari denied 1950, 339 U. S. 949, 70 S. Ct. 803, 94 L. Ed. 1363:

" 'It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.' * * * "

See also *Barr v. Matteo*, (1959), 360 U. S. 564. Thus, in the complaint filed by DeMayo, he makes the allegation that the acts of the defendants were done with malice. Nevertheless, in line with the philosophy stated above, we feel every intendment in favor of an implied power to supply counsel to defend public officials should be indulged.

It is clear that a public official is entitled to *reimbursement* for expenses incurred in the performance of his official duties, *cf. O'Connell v. Morris County Freeholder Board*, (Sup. Ct. 1960) 31 N. J. 434. The principle of

“reimbursement” provides the best insurance that the expenses were reasonable and that they were incurred for a public purpose. But is it best suited to attain the other public objective of encouraging, and not discouraging, interested citizens to assume the burdens and responsibility of public service as a member of a Board of Education—in a context such as this where that public servant is confronted with the expense and hazard to his personal resources represented in a law suit against him? Should he, in such a situation, be compelled to first lay out of his own pocket the moneys necessary to retain an attorney, leaving in the realm of speculation the question as to whether he will later be reimbursed? We think not. If that burden be his either of two effects are not improbable. Either he will not, in the first instance, be willing to serve, or, if he does so, his judgment as a Board member will not be the objective display of conviction and competence for which his talents have been sought, but will not unnaturally be restrained and fettered by his concern for his personal security. Thus, in balancing the respective desiderata, we hold that, in this context, the most desirable means to the whole public good is to adopt a principle that, where a Board member, or other official, is sued in an action where the Board has reliable evidence that the suit is based upon acts related to his official duties, it has the implied power to retain an attorney to defend him. Such “reliable evidence” may be found in the complaint served, or a fair construction thereof, or upon other evidence reasonably persuasive that the suit is related to official acts.

Thus, in *State, Rollin Bradley, Prosecutor v. The Council of The Town of Hammonton*, (Sup. Ct. 1876) 38 N. J. L. 430, the Court sustained a resolution of the governing body of the town wherein it was resolved that the town would defend a suit against an individual member of the governing body, in which he was sued for acts done in his official capacity. It is true that in that case the Supreme Court’s decision was reached after the member of the town council had been “acquitted” of the charges made against him in the civil suit. Nevertheless, we read the decision as sustaining the resolution at the time it was adopted, and we construe it as supporting the position which we here take in holding that, as a practical matter, the Board or other official body should take action when the official is served with the complaint against him, and that he should not be compelled to expend moneys out of his personal funds and later seek reimbursement.

However, the Board or other official body must have some evidence before it upon which to base a judgment as to whether the suit is grounded in acts of the defendant related to his official duties. In this case, as to Angelillo, at least, the Board had ample information upon which to base that judgment. The record here discloses that in February, 1958, Angelillo had been appointed as chairman of a special committee of the Board to study Mr. DeMayo’s status and contract. On May 5, 1958, he reported the results of the study and inquiry to the Board, as a result of which DeMayo’s services as attorney were terminated. On June 2, 1958, DeMayo was discharged as attorney in connection with the bonding procedures. Further, the complaint filed by DeMayo makes several allegations with respect to actions taken by Angelillo in speaking to other members of the Board of Education and with allegedly distorting DeMayo’s contract “to the members of the Board of Education of North Haledon”. Clearly then, the suit against Angelillo was based upon acts done by him in his official capacity.

As to Steinberg, who was retained as attorney for the Board on May 5, 1958 in the place and stead of DeMayo, it is not as clear, as it was in the instance of Angelillo, that the suit against him was based upon acts done by him in his official capacity. Yet DeMayo's suit includes a charge that the defendants conspired to interfere with DeMayo's contract, *i. e.*, both as Board attorney and as bonding attorney. A fair reading of the complaint therefore leads to the conclusion that part of the proofs which would be admissible under the cause of action framed would be such acts as were done after Steinberg's appointment as attorney to the Board on May 5, 1958, and up to and including the termination of DeMayo's contract as bonding attorney on June 2, 1958. It is fair to conclude that whatever Steinberg may have done after May 5 and before June 2 was done by him in his official capacity as attorney for the Board. Further, Angelillo testified before the Commissioner below that the question of continuing to retain DeMayo as bonding attorney was discussed with Steinberg after May 5. Since such acts are within the scope of the suit started by DeMayo against Steinberg, we hold that there was sufficient evidence before the Board to construe that suit as involving acts of Steinberg done in his official capacity, and therefore, the Board had implied authority to retain an attorney to defend Steinberg in the suit instituted against him by DeMayo.

There remains the question as to whether the resolution retaining Mr. Diamond as attorney to defend Angelillo and Steinberg is reasonable, in terms of the amount of his fee. We decide this question in the present context, at the time of this decision, *i. e.*, that the case has been settled. The resolution expressly stated that, if the litigation did not reach trial, the fee of \$2,000.00 would be reduced commensurate with the services rendered. We therefore direct that before the Board pays the fee to Mr. Diamond, it obtain a voucher from him as to the actual services rendered, time spent and the value of his services. Here, the Board should carefully consider such vouchers, and pay them if the amount is reasonable.

The decision of the Commissioner herein is modified insofar as the local Board's duty to adjudge the reasonableness of the fee is concerned. Otherwise, the decision is affirmed for the reasons herein expressed.

March 1, 1961.

CARMEN LACARRUBBA

v.

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

Decided by the Commissioner of Education February 10, 1960.

Affirmed by State Board of Education without written opinion December 9, 1960.

CONSTANCE P. NICHOLS,

Plaintiff-Appellant,

v.

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

Defendant-Respondent.

DECISION OF THE SUPERIOR COURT, APPELLATE DIVISION

Argued November 21, 1960.

Decided January 10, 1961.

Before Judges Conford, Freund and Kilkenny.

Mr. Alvin Weiss argued the cause for appellant (Mr. Carl R. Fenstermaker, attorney).

Mr. George R. Blaney argued the cause for respondent (Mr. John J. Witkowski, attorney).

The opinion of the court was delivered by KILKENNY, J. A. D.

This appeal was brought under *R. R. 4:88-8* to review a decision of the State Board of Education, which affirmed the dismissal of plaintiff's petition by the Commissioner of Education of New Jersey.

The present case is a sequel to earlier litigation between the same parties, involving the same basic claim by plaintiff for preference in appointment as an assistant superintendent of schools in Jersey City. In that original action, *Nichols v. Board of Education, Jersey City*, 9 N. J. 241 (1952), at p. 243, the Supreme Court summarized the facts then existing as follows:

"The facts, stipulated in this case, are: that petitioner was appointed a teacher in the Jersey City School System on September 1, 1928; that she acquired tenure as a teacher in said system in September, 1931, and had tenure as a teacher, when, by the city board's resolution of December 19, 1946, she was appointed assistant superintendent of schools, and on the date, January 1, 1947, when she entered employment in that capacity; that petitioner is a citizen of the United States of America and holds a state teacher's certificate; that petitioner was employed as assistant superintendent of schools from January 1, 1947, to December 15, 1949, during which

time her state teacher's certificate was in full force and effect; that the city board on or about December 15, 1949, by resolution of that date, for reasons of economy, abolished the position of petitioner as assistant superintendent of schools; and that on or about December 15, 1949, petitioner was assigned to teaching at school No. 22. It appears that petitioner, under protest, accepted this classroom teaching assignment by letter of December 16, 1949. It also appears that by letter of the same date she protested the abolition of her position as an assistant superintendent of schools."

The essential holding in that 1952 decision was that petitioner was not eligible for placement on a preferred list for re-employment as an assistant superintendent, her position as such having been abolished on December 15, 1949 *for reasons of economy*, rather than natural diminution of pupils in the school district, because (a) there was no statute in existence, when her position was so abolished, affording such re-employment protection to an assistant superintendent under such circumstances; and (b) *L. 1951, c. 292*, amending *R. S. 18:13-19*, and providing for placement on such a preferred list, even where dismissal is for reasons of economy, was not retroactive in nature and did not enure to petitioner's benefit, since her position as assistant superintendent was abolished for economy prior to its adoption. The qualified statement of the Supreme Court, in that decision, that Mrs. Nichols had tenure as assistant superintendent, on the basis of the limited question presented, will be considered hereinafter.

Since that 1952 decision, the following additional facts appear. Dr. Richard T. Beck, whose appointment as an assistant superintendent of schools in charge of elementary education was also effective as of January 1, 1947, resigned on March 1, 1954. Plaintiff's application for appointment to fill the vacancy occasioned by that resignation was rejected by the respondent board. No one was then appointed to Dr. Beck's job. On September 15, 1955, the local board of education adopted a series of resolutions, all effective July 1, 1955, (1) abolishing a number of supervisory positions, including those of "Assistant Superintendent of Schools in charge of Elementary Education" and "Director of Personnel"; (2) establishing several new supervisory positions, including that of "Assistant Superintendent of Schools in charge of Personnel and Elementary Education"; and (3) promoting Maurice J. O'Sullivan, who had been Director of Personnel since 1950, to the newly created dual position of Assistant Superintendent of Schools in charge of Personnel and Elementary Education "at no increase in salary." O'Sullivan's annual salary at that time was \$10,100; and that of Mrs. Nichols, then employed as a teacher, was \$6,340.

Thereupon, plaintiff, by her petition of December 14, 1955, requested the Commissioner of Education to order the Jersey City board of education to appoint or reinstate her as Assistant Superintendent of Schools in the place and stead of Maurice J. O'Sullivan; and to direct the board to account for and pay to her the sums withheld from her by reason of its failure to appoint her as Assistant Superintendent of Schools on September 15, 1955, when O'Sullivan was appointed.

In the long interim between the filing of her petition on December 14, 1955 and the Commissioner's decision on July 24, 1959, two important changes

were made by city board resolutions in O'Sullivan's status, which we interpose here for chronological coherence. On July 29, 1957, the duties of the Division of Personnel were taken away from O'Sullivan and assigned to the Superintendent of Schools; and O'Sullivan's position suffered a title change from its dual aspect to the simpler and earlier form of "Assistant Superintendent of Schools in charge of Elementary Education." Then, on July 1, 1959, O'Sullivan's position as "Assistant Superintendent of Schools in charge of Elementary Schools (sic)" was abolished *for reasons of economy*, and the duties of this position were assigned to the Superintendent of Schools. The position has not been re-established.

At this point, we observe that the primary relief sought by plaintiff, namely, appointment or reinstatement as assistant superintendent of schools "in the place and stead of Maurice O'Sullivan," cannot be ordered at this time, because the position is presently non-existent. That portion of plaintiff's case is now moot. However, we must still consider her claim for secondary relief, *i. e.*, salary allegedly lost by reason of the board's failure to appoint her assistant superintendent on September 15, 1955.

In dismissing Mrs. Nichols' 1955 petition, the Commissioner determined that she never held the necessary and appropriate certificate required by the rules of the State Board of Education at the time of her appointment in 1946, or while she held the position of assistant superintendent. These rules, promulgated in 1944, required a principal's or a supervising principal's certificate as a qualification for appointment as an assistant superintendent. The 1948 rules, effective September 1, 1948, required an administrator's certificate. Mrs. Nichols never held those certificates, either then or even now. She had only a state teacher's certificate, when she was appointed in 1946. Accordingly, the Commissioner ruled that she never acquired tenure in respondent's school system as assistant superintendent, because she never held the proper certificate for the position.

On appeal, the State Board of Education decided on May 4, 1960 that the Commissioner's dismissal of plaintiff's 1955 petition was correct. However, it disagreed with the reason upon which the Commissioner's determination was based, that Mrs. Nichols never held a proper certificate qualifying her for the appointment as an assistant superintendent. The State Board concluded that she was statutorily qualified by reason of her possession of a "state teacher's certificate," when she was appointed on December 19, 1946. *R. S. 18:6-41* then plainly provided:

"No person shall be appointed superintendent of schools, or assistant superintendent, under the provisions of this article, unless he shall hold *a state teacher's certificate.*" (Emphasis supplied.)

As above noted, the State Board's 1944 rules required a principal's or supervising principal's certificate, which Mrs. Nichols did not have. The State Board held, however, that its 1944 rules enlarging upon the statutory requirements were *ultra vires* and void.

We concur in the State Board's finding that Mrs. Nichols, as holder of only a state teacher's certificate, possessed sufficient statutory qualification to validate her 1946 appointment as assistant superintendent. The Supreme Court also stated in the *Nichols* case, *supra*, at p. 245:

“On December 19, 1946, when she was appointed, and on January 1, 1947, when she became employed, as an assistant superintendent of schools, petitioner was qualified to hold the position under *R. S. 18:6-41*.”

It is very significant that *R. S. 18:6-41* was amended by *P. L. 1947, c. 148*, effective May 12, 1947, to read:

“No person *shall be appointed* superintendent of schools, or *assistant superintendent of schools*, under the provisions of this article, *or act as, or perform the duties of*, a superintendent of schools or *an assistant superintendent of schools* as prescribed by the rules and regulations of the State Board of Education, *unless he shall hold an appropriate certificate as prescribed by the State Board of Education.*” (Emphasis supplied.)

This substantial statutory change was evidently curative of the State Board’s previous lack of rule-making power to require an “appropriate certificate,” and not merely confirmatory of power theretofore exercised contrary to the plain language of *R. S. 18:6-41*. It exhibited a legislative awareness of a need for raising the standards of qualification from a mere “state teacher’s certificate” to an “appropriate certificate prescribed by the State Board of Education.”

We observe, too, that this 1947 amendment also modified *R. S. 18:6-41*, which previously dealt only with appointment, by requiring this appropriate State Board certificate not only as a condition precedent to a valid appointment, but also “*to act as, or perform the duties of * * ** an assistant superintendent of schools as prescribed by rules and regulations of the State Board of Education * * *” (Emphasis supplied.) This is particularly noteworthy when we realize that assistant superintendents did not enjoy any tenure rights in 1947 and were thus subject to discharge at any time and without cause.

As an indication of our Legislature’s procedure in a situation where a certification statute is not intended to be retrospective, it would be profitable to compare the provisions presently under consideration with another section of the same legislative revision of our school laws in 1947. In *N. J. S. A. 18:14-56.1*, apparently for the first time certificates became mandatory as a condition precedent to appointment as a school nurse. The certificates were designated “appropriate certificates,” and were to be issued by the State Board of Examiners under rules and regulations prescribed by the State Board of Education. Note, however, that the statute reads, “No person shall *hereafter* be appointed * * *” unless that person procures a certificate. Compare *N. J. S. A. 18:6-41*, which not only omits the word “hereafter,” but also goes further than mere reference to further appointments—it provides that no person shall “act as, or perform the duties of * * * an assistant superintendent unless appropriately certified, a seeming reference to those who were then engaged as administrators under the prior law which required them to hold only teaching certificates. We also note the provision, with reference to nurses’ certificates, of *N. J. S. A. 18:14-56.3*, which expressly prohibits the dismissal of any nurse appointed prior to the passage of this act for failure to obtain a certificate.

The State Board rested its decision on the premise that Mrs. Nichols, though qualified when appointed, never acquired *tenure* as an assistant superintendent. She argues that the Supreme Court decided in 1952 that she had

tenure, thus making this phase of the controversy *res adjudicata*. It is true that the Supreme Court did then hold that she had tenure, but only on the basis of the limited question submitted for determination, and with the express reservation by the Supreme Court that it had given no consideration to the effect, if any, of *P. L. 1947, c. 148*, quoted above on her claim of tenure. The limited question submitted and answered in the affirmative was whether petitioner could “tack” her prior years of service *as a teacher* in the Jersey City school system to her less than three years service as an assistant superintendent to make up the three years needed under *R. S. 18:13–16* for tenure as an assistant superintendent. The allowance of “tacking” did not dispose of the present issue.

It is clear that the plaintiff did not acquire tenure when she was appointed assistant superintendent in 1946, despite her many prior years of service in the same school system, because there was no statute at that time granting tenure to assistant superintendents. Tenure was first provided for assistant superintendents by *P. L. 1948, c. 470*, effective October 29, 1948, (*R. S. 18:13–16.1*). But, as the State Board points out, prior to this Tenure Act of 1948, the legislature had raised the standards of qualification for appointment and service as an assistant superintendent by *P. L. 1947, c. 148*. The State Board’s rules effective September 1, 1948, also prior to the effective date of the 1948 Tenure Act, required an “Administrator’s Certificate” before one could be appointed or act as an assistant superintendent. Mrs. Nichols never held such a qualifying certificate. Hence, the State Board reasons, and we agree, that she was not entitled to tenure, because she never measured up to the new increased standards of qualification duly adopted by the legislature and promulgated by the State Board prior to the 1948 act which conferred tenure rights. This conclusion does not contravene the Supreme Court’s 1952 decision, but interprets the effect of *P. L. 1947, c. 148*, which the court then expressly reserved.

As noted above, O’Sullivan’s position as an assistant superintendent having been abolished for reasons of economy on July 1, 1959, and not having been re-established, plaintiff’s petition for an order directing the city board to appoint or reinstate her “in the place and stead of O’Sullivan” cannot be granted. Her claim for secondary relief, in the form of money allegedly lost by her, by reason of the board’s failure to appoint her on September 15, 1955, instead of O’Sullivan, must also be denied, and not only because, as we have concluded above, she did not have tenure. Even if all her assumptions of fact were true, *viz.* (1) her *tenure* as assistant superintendent; (2) O’Sullivan’s *non-tenure* in that position when appointed; and (3) O’Sullivan’s 1955 appointment was to fill a *vacancy* caused by the resignation of Dr. Beck on March 1, 1954, she has still failed to establish a right to the secondary, monetary relief for two main reasons.

As a first reason, we observe that the plaintiff had no statutory, or other, preferential right of re-employment, in the event of a subsequently occurring vacancy in the position of assistant superintendent of schools. Her lack of *statutory* preference was established by the Supreme Court, as far back as 1952, in the first *Nichols* case, *supra*, and that ruling is *res adjudicata* in this respect. But she bases her claim for preferment over O’Sullivan on the following *judicial* declaration in *Downs v. Board of Education, Hoboken*, 13 N. J. Misc. 853, 181 A. 688, (Sup. Ct. 1935) :

“While in the interest of economy reduction in the number [of teachers] may be made, those having tenure should have a *preference* in reappointment *where vacancies occur*.” (Emphasis supplied.)

However, in the subsequent case of *Downs vs. Board of Education, Hoboken*, 126 N. J. L. 11 (Sup. Ct. 1940), affirmed o. b. 127 N. J. L. 602 (E. & A. 1942), the above observation in the earlier *Downs* case was held inapplicable to “subsequently occurring vacancies.” Accordingly, in the absence of a statute, tenure teachers dismissed in 1932 for reasons of economy had no preferential right of appointment over nontenure teachers to fill vacancies occurring in 1940. A 1935 statute, *P. L. 1935, c. 126*, giving such preferential right in the case of subsequently occurring vacancies, was held not retrospective to a case of teachers discharged for economy in 1932 before its adoption.

As Justice Heher pointed out in the later *Downs* case, at 126 N. J. L. p. 12, the observation in the earlier decision, that teachers having tenure should have a preference in reappointment where vacancies occur, “must needs be viewed in the light of the question before the court for determination.” In *Downs*, tenure teachers had been dismissed “in the guise of economy,” while non-tenure teachers were retained. The Supreme Court, 12 N. J. Misc. 345 (1934), affirmed 113 N. J. L. 401 (E. & A. 1934), had ordered seven tenure teachers re-employed in place of seven non-tenure teachers, who were retained to fill vacancies. The board thereupon pretended to “discharge” the seven non-tenure teachers to comply with the court order, and then immediately re-engaged them as “special substitute teachers,” so that, in effect, they were continuously employed. In the judicial declaration relied upon in 13 N. J. Misc. 853, *supra*, as Justice Heher clearly sets forth in the later decision, the court was referring to *existing vacancies* which the board was filling with non-tenure teachers by “the merest subterfuge to defeat the legislative purpose” and the judgment itself. With that clarification, the later *Downs* case decided that, absent an applicable statute, tenure teachers discharged for economy in 1932 did not enjoy preference in re-employment over non-tenure teachers as to 1940 vacancies.

By analogy, the later *Downs* decision is authority for the conclusion that Mrs. Nichols, whose position as assistant superintendent was abolished on December 15, 1949 for economy, even if she then had tenure, would not, absent an applicable statute, have preference over a non-tenure appointee to fill a vacancy in that position in 1955. As in *Downs*, where the intervening 1935 enactment was held inapplicable to teachers discharged before its adoption, so in this *Nichols* case, our Supreme Court has already ruled that the intervening 1951 statute, conferring preferential rights of re-employment, is not retrospective and does not enure to Mrs. Nichols’ benefit. Since plaintiff did not have the right to be appointed in the place and stead of O’Sullivan, she has no valid claim for any salary differential by reason of the board’s failure to appoint her in 1955.

As a second reason for denying plaintiff’s secondary claim for a money judgment against the city board, we conclude that the plaintiff has failed to present necessary proofs in that regard. She has chosen to submit the matter to the Commissioner without any testimony, on a meagre paper record consisting only of her verified petition, the board’s answer, affidavits by herself

and the board's opposing affidavits of the Superintendent of Schools and Dr. O'Sullivan, and copies of pertinent board resolutions. At no time has she challenged the good faith or reasons of economy of the board in abolishing her position in 1949, or Dr. Beck's position in 1955, or the establishment of the dual position of assistant superintendent and director of personnel in 1955. Her sole contention is one of preference in reappointment.

There is no evidence of how much monetary loss, if any, she sustained by reason of the board's failure to appoint her an assistant superintendent on September 15, 1955, in the place and stead of O'Sullivan. The proofs in this respect are left to pure speculation. We do not know what her salary would have been, either as assistant superintendent alone, if the board had appointed her, or in the dual position later created, as against what her salary was as a teacher, during the four-year period when O'Sullivan occupied the post. We know that O'Sullivan's appointment to the dual position of "Assistant Superintendent of Schools in charge of Personnel and Elementary Education" was expressly "at no increase in salary" over his former position of Director of Personnel. Therefore, the additional duties and title of an assistant superintendent in charge of elementary education brought no additional salary to O'Sullivan. What monetary emoluments, then, did O'Sullivan enjoy by the appointment, which otherwise might have enured to the plaintiff? Was she entitled to this dual position over O'Sullivan, who had been Director of Personnel since 1950? What would her salary have been, as an assistant superintendent, alone, since O'Sullivan was promoted to do both jobs without any increase in salary? The record supplies no answers to these questions.

Finally, we know from supplemental proofs submitted, by leave of the court, following oral argument that O'Sullivan's annual salary as of July 1, 1960 was only \$8,400, while plaintiff's annual salary as of May 16, 1960, when the board promoted her to the position of Supervisor—General Methods, Lower Primary Grades, was \$8,440. Thus, ironically, the plaintiff now receives more than O'Sullivan. The deficiency in plaintiff's proofs and the speculative factors involved make impossible any determination of possible pecuniary loss suffered by her, even if she was rightfully entitled to the appointment in 1955. However, we are satisfied that she was not legally entitled to such appointment for the reasons above stated.

Accordingly, the decision of the State Board of Education is affirmed.

65 N. J. Super. 45 (1960).

ANN A. QUINLAN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN,

Respondent.

DECIDED BY COMMISSIONER OF EDUCATION FEBRUARY 10, 1960

DECISION OF THE STATE BOARD OF EDUCATION

Petitioner appeals from a decision of the Commissioner upholding her dismissal as a "clerk-attendance officer" in the North Bergen public school system for reasons of economy. She was originally appointed as a clerk in 1948, and served in that capacity until the end of 1955. It is not disputed that she thereby attained tenure as a clerk, *R. S. 18:6-27*. During this time, she applied twice for the position of attendance officer. Thereafter, by resolution effective January 3, 1956, the local board appointed her a "clerk-attendance officer." The Commissioner found as fact that after this appointment and until her dismissal, petitioner functioned primarily as an attendance officer, and only incidentally, at best, as a clerk. She was listed in the "Schedule for Attendance Officers" issued by the Superintendent of Schools on December 17, 1957, and in a resolution fixing salaries for the year commencing January 1, 1958. She was the only one who was appointed under the dual title of "clerk-attendance officer."

On February 1, 1958, the Board adopted a resolution dismissing "Ann Quinlan, attendance officer," for reasons of economy. Petitioner concedes that she enjoys no tenure rights in her capacity as an attendance officer. She is correct. Under *R. S. 18:14-43*, tenure protection is limited to attendance officers of city school districts, and North Bergen is a township. On appeal to the Commissioner, however, petitioner contended that the tenure rights which she achieved as a clerk were not interrupted by her subsequent appointment as a "clerk-attendance officer," and therefore that she was improperly dismissed.

We here observe that technically speaking, petitioner was not dismissed from the position to which she claims tenure rights. She was originally appointed as a "clerk," then as a "clerk-attendance officer," and, finally, was dismissed as an "attendance officer," but not as a "clerk," or as a "clerk-attendance officer." However, it was obviously the intention of the Board to relieve her of all of her duties within the school system, and we shall deal with the problem on that basis.

On the appeal below, both parties took extreme positions. The issue as framed was whether petitioner, at the time of her discharge, was an attendance officer or a clerk. Petitioner contended that her subsequent appointment to the hybrid office of clerk-attendance officer merely added new duties to her original and basic function as a clerk, and therefore did not affect her tenure as a clerk. The Board contended that by accepting appointment as a clerk-

attendance officer and treatment as an attendance officer, petitioner relinquished her status as a clerk to become an attendance officer without tenure. The Commissioner, invoking the doctrine that the nature of the duties actually performed, and not the formal title of the position, controls in determining whether a person is protected by tenure, see *Phelps v. State Board of Education*, 115 N. J. L. 310 (Sup. Ct. 1935) aff'd. 116 N. J. L. 412 (E. & A. 1936), held that since petitioner functioned primarily as an attendance officer after her second appointment, she "voluntarily relinquished the duties of clerk to assume those of an attendance officer," and thereby became an attendance officer vulnerable to summary dismissal.

We do not find the problem so clear cut, for in this context we cannot agree with the exclusory premise that petitioner must be regarded as either a clerk or an attendance officer. The circumstances of this case dictate its resolution on a middle ground.

In our view, the record indicates that from the time of her appointment as a clerk-attendance officer until her discharge, petitioner served as both a clerk and an attendance officer. She testified that she worked "half and half," as a clerk, and as an attendance officer. She performed whatever clerical duties her supervisor gave her. Asked to detail the specific things that she did, she said that Superintendent of Schools Egan sent her to No. 9 School when 2 clerks were ill and she worked there for about 2 days performing clerical work. She also testified that she received "many" calls to look up records in the vault and worked on social security records, high school records and payroll records for one Machetti (who, we were advised on oral argument, was the acting Secretary of the Board of Education). Respondent Board argues that petitioner's testimony was "vague" and that it is the petitioner's burden to establish her case by a clear preponderance of the evidence. We deem her testimony to establish, at least, *prima facie* support for her contention that she actually performed the duties of a clerk since working under the title of clerk-attendance officer. We further feel that, in the context of a claim by the Board of Education that one with conceded tenure as a clerk has in fact "relinquished" or "waived" that tenure, the burden of proof should be upon the Board of Education and not upon the petitioner. As the Commissioner observed in his opinion below, the superintendent, principals and other officials who might have testified as to her clerical duties, were not called. We think that it was the burden of the respondent Board to go forward and produce testimony of such officials or others who might have been able to controvert the testimony of the petitioner that she continued to perform clerical duties after she held the title of clerk-attendance officer.

Respondent relies upon the cases of *Phelps v. State Board of Education*, *supra*, and *Lange v. Board of Education of Borough of Audubon*, 26 N. J. Super. 83 (App. Div. 1953). In our view, neither case is controlling under the circumstances of this case. In both instances, there was no question but that the employees involved completely severed themselves from the duties of the class of employment in which they claimed to have had tenure. In neither case, after the change of circumstances involved, did the employee continue to perform the duties of the tenure position. Thus, in *Phelps*, the "teacher clerks" concededly performed nothing but the duties of a clerk and in no sense performed the duties of a teacher. In *Lange* (apart from the other distinctions hereinafter noted), the employee ceased to act as principal (the claimed tenure

position) in 1927, acted as a supervisor until that position was abolished in 1944, and thereafter performed in no other duties but teaching duties. In each of those cases it was undisputed that the employee voluntarily abandoned the duties of the tenure position which each claimed. Here, Mrs. Quinlan, so far as the record shows, continued to perform the duties of her tenure position, *i. e.*, that of clerk. In that context, and even though it may be said that her clerical duties were not the major part of her work, it cannot be said that she "voluntarily relinquished" the position of "clerk."

Further, if it had been the intention of the Board, upon her appointment effective January 8, 1956, as a clerk-attendance officer, to remove her from the duties of clerk, it is to be expected that they would not have bestowed upon her the title of "clerk-attendance officer," but would have given her the title of "attendance officer" as others who performed solely the latter duties. She thus remained under the obligation to perform clerical duties and in fact did so down to the date of her dismissal.

We think that the case of *Lange v. Board of Education of Borough of Audubon*, *supra*, relied upon by respondent Board, is not controlling here. The basic holding there was that petitioner Lange never had tenure in the office of principal because there was no law providing tenure in that position while she held it, the "preferential treatment" statute (*L. 1935, c. 126, p. 331*) was not enacted until 8 years after she surrendered her principalship and, since that statute could not be construed retroactively, it availed her nothing. It is true that the opinion of the Court also says that Miss Lange's acceptance of the unprotected position of supervisor constituted a waiver of "whatever rights" she may have acquired as principal. But, as we have pointed out above, she thereafter never performed any of the duties of principal, whereas, here, Mrs. Quinlan did continue to perform the duties of clerk.

We feel that we should be guided by the following principles: (1) tenure laws are to be liberally construed and every effort should be made to preserve a tenure status, absent a clear showing that such status has been surrendered, (2) where a board claims that a person holding a tenure position has voluntarily relinquished it, it is the board's burden to introduce evidence that he or she has in fact done so, and (3) if uncertainties arise as to whether or not a person, in performing duties, is performing them as a clerk, an attendance officer or a clerk-attendance officer, the fault for such doubt lies not with an employee, but with the board which could have clarified the responsibilities by adoption of job descriptions. Such uncertainty should not operate to affect valuable tenure rights. With said considerations in mind, we would hold that the record herein does not support the contention of the Board that Mrs. Quinlan voluntarily relinquished her statute as a clerk.

The local Board also claims that Mrs. Quinlan's position was abolished for reasons of economy. This is a plea of "confession and avoidance" and, again, it is the burden of the Board to sustain it. *Hester v. Bradbury* (Sup. Ct. 1935) 115 N. J. L. 82 at 83. The position abolished was that of "clerk-attendance officer." We do not think the Board's contention that petitioner's tenure position of "clerk" was abolished for economy reasons is fairly supported in the context of the proofs here. On September 12, 1957, a clerk was appointed in the office of the Superintendent of Schools at the salary of \$2,100.00 per year. And, on August 12, 1958, 2 appointments were made as

a principal's clerk at a salary of \$2,600.00 a year. *Cf. Hefter v. Bradbury, supra.*

The Board holds that the decision of the Commissioner should be reversed and the cause remanded with instructions that petitioner be reinstated as a clerk as of February 1, 1958, at such salary as she was receiving as clerk prior to her appointment as clerk-attendance officer, effective January 3, 1956. So ordered.

March 1, 1961.

Pending before Superior Court, Appellate Division.

MARIE RINALDI,

v.

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

Decided by the Commissioner February 10, 1960.

Affirmed by State Board of Education without written opinion December 9, 1960.

BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER VALE,

Appellant,

v.

WILLIAM H. SHANAHAN,

Respondent.

DECIDED BY COMMISSIONER OF EDUCATION AUGUST 19, 1959

DECISION OF THE STATE BOARD OF EDUCATION

This is an appeal by the Board of Education of the Township of River Vale from a decision of the Commissioner of Education which reversed the local Board's dismissal of William H. Shanahan, respondent here, as Superintendent of Schools of the Township of River Vale.

The ground for the Commissioner's reversal is stated in his decision of August 19, 1959. However, it is the opinion of this Board that the instant appeal must be dismissed for the reason that, subsequent to the decision of the Commissioner and after the filing of this appeal to the State Board of Education, the local Board, by its own action, has rendered moot the issues which it would here seek to have determined. On September 15, 1959, the local Board passed a resolution retiring Mr. Shanahan pursuant to the provisions of N. J. S. A. 18:13-12.45, known as the State Teachers' Pension and Annuity Law. By such action, the local Board recognized that as of the date of the resolution of retirement, Mr. Shanahan was lawfully and honorably entitled to the position of Superintendent of Schools for otherwise he could not have been entitled to the benefits of the Retirement Act. For the Board to now urge affirmance of its dismissal of Mr. Shanahan is fatally inconsistent with its action in retiring him. For these reasons—and entirely apart from the question as to whether the Board was justified in dismissing Mr. Shanahan—this appeal is hereby dismissed.

September 7, 1960.