

State of New Jersey
Department of Education
Trenton

NEW JERSEY
SCHOOL LAW DECISIONS

January 1, 1965, to December 31, 1965

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I

TUITION CHARGES IN HIGH SCHOOL SENDING-RECEIVING
RELATIONSHIP MAY NOT EXCEED ACTUAL COST PER
PUPIL

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN,
GLOUCESTER COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLAYTON,
GLOUCESTER COUNTY,

Respondent.

For the Petitioner, Leonard H. Kaser, Esq.

For the Respondent, Milton L. Silver, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

For the school year 1959-60, petitioner paid as tuition to respondent an amount which was \$4,648.40 in excess of the actual cost of providing high school education to petitioner's pupils, which amount petitioner seeks to recover. In a counter petition, respondent seeks to recover from petitioner the sum of \$11,535.67, which represents the difference between the amount paid as tuition for the school year 1958-59 and respondent's actual cost for that year. Both petitioner and respondent deny liability for the amounts claimed of them.

A hearing in these matters was held by the Assistant Commissioner in Charge of Controversies and Disputes at the office of the County Superintendent of Schools in Clayton on February 26, 1964. A Stipulation of Facts was filed, and counsel submitted briefs on respondent's defense of laches.

The amounts of money involved have been stipulated by the parties as follows:

"2. The Respondent charged and the Petitioner paid the sum of \$162,350.00 as the tuition for the school year 1959-60.

"3. A subsequent audit of the accounts and records for 1959-60 of both Petitioner and Respondent established that the actual cost for the number of students sent to the Respondent by the Petitioner amounted to \$157,701.60 for the school year 1959-60. Thus the petitioner actually paid \$4,648.80 in excess of the actual cost of the Respondent.

"8. For the said school year 1958-59 the actual cost for the number of students sent to Respondent amounted to \$138,626.12. Petitioner paid the sum of \$127,909.45 as tuition for said year. Therefore petitioner actually paid \$11,535.67 less than the actual cost of the respondent. Demand for said difference has been made of the petitioner by the respondent."

Two errors are apparent in the amounts recited in these stipulations. The Commissioner has consulted the audits of these accounts in his files and finds the correct figures to be as follows:

Amount charged and paid for tuition 1959-60	\$162,350.00
Actual cost for tuition purposes 1959-60	157,701.60
Overcharge	\$4,648.40
Actual cost for tuition purposes 1958-59	\$138,626.12
Amount charged and paid for tuition 1958-59	127,090.45
Undercharge	\$11,535.67

In this decision the correct figures will replace those stipulated in error.

Respondent asserts that petitioner is estopped from recovering the overcharge of tuition for the 1959-60 school year because it delayed more than two years in claiming the refund. It is respondent's argument that petitioner had the burden to determine whether or not there had been an overcharge of tuition and that such knowledge was available to it. Failure of petitioner to assert its claim over a period of two years, respondent contends, unduly prejudiced respondent's proper administration of its fiscal affairs.

Petitioner denies any unreasonable delay in the assertion of its claim for a refund, pointing out that its first knowledge of the overcharge came in February 1963, in a report of a "field audit" of tuition charges and payments of the two contending districts, made by an auditor from the State Department of Education. Shortly thereafter petitioner sought a conference with respondent, which was held on June 19, 1963. The petition herein was received by the Commissioner on July 18, 1963. Petitioner contends that it had no access to the books and records of respondent, and that it was, in fact, respondent's duty to examine its own records to determine whether it had overcharged for high school tuition and if so to refund or credit the excess to petitioner.

Tuition charges are controlled by R.S. 18:14-7, the pertinent portion of which reads:

"* * * The boards of education of the districts containing high schools so designated shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto, *but in no case shall the tuition rate exceed the actual cost per pupil.* * * *" (Emphasis supplied)

"Actual cost per pupil" for tuition purposes for each receiving high school is computed annually at the close of the school year according to a formula and procedures established by the State Board of Education. These data are submitted to the Commissioner by the secretary of the local district board of education, are audited by the Division of Business and Finance, and when complete, are reported to each receiving district and to the county superintendent of schools and are promulgated in several different reports.

A review of practice in setting tuition rates is also essential in order to understand the instant matter. Boards of education of Chapter 7 districts customarily prepare their budget for the next school year which begins July 1,

during the months of December and January in order to submit it for voter approval at the annual school election in February. To make sound budgets, receiving high school districts must estimate how much revenue can be anticipated from tuition, and sending districts need to know the amount to be raised for tuition payments. This requires a determination of a rate to be charged which can be multiplied by the number of pupils to be sent or received.

In December and January, when the budget is being prepared, the latest actual cost per pupil available is for the preceding school year. The current year is only 4 or 5 months under way and costs for the entire year can be only an estimate. This means that if actual known pupil costs are to be used, the tuition charged for next year must be in terms of last year's costs. This two-year lag, particularly in an era of rapidly increasing costs, produced increasing dissatisfaction and led the State Board of Education to amend its rules. This amendment, effective July 1, 1958, provides in part as follows:

"d. A tentative tuition rate may be set by agreement between the receiving district and the sending district, and such tentative rate shall be based upon the estimated cost per pupil for the ensuing school year, as to be reflected in the proposed budget of the receiving district.

"(1) If the sending district and the receiving district reach an agreement before January first, they shall notify the Commissioner.

"(2) If the sending district and the receiving district cannot reach an agreement on the estimated cost per pupil by January first, then the tentative tuition rate shall be based upon the actual cost per pupil for the completed school year immediately preceding.

"(3) If the Commissioner later determines that the tentative tuition rate was greater than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district shall return to the sending district the amount by which the tentative rate exceeded the actual cost per pupil, or, at the option of the receiving district, shall credit the sending district with the amount by which the tentative tuition rate exceeded the actual cost per pupil.

"(4) If the Commissioner later determines that the tentative rate was less than the actual cost per pupil during the school year for which the tentative rate was charged, the receiving district may charge the sending district all or part of the amount by which the actual cost per pupil exceeded the tentative rate, to be paid not later than during the second school year following the school year for which the tentative rate was paid."

Thus, prior to July 1, 1958, a receiving district might set the tuition rate for the following year as high as but no higher than the actual cost per pupil for the preceding year. After July 1, 1958, receiving districts were authorized to enter into tentative rate agreements with their sending districts with appropriate adjustments to be made either way after the completion of the particular year and determination of the actual per pupil cost.

The first question to be determined is whether petitioner is estopped from claiming repayment of the admitted overcharge by reason of delay in making

such claim. The defense of laches turns on the circumstances of each particular case.

“Whether or not laches bars a cause of action, depends on the circumstances of the case.” *Heagen v. Borough of Allendale*, 42 N. J. Super. 472, 485 (App. Div. 1956); *Donnelly v. Ritzendollar*, 14 N. J. 96 (1953). Generally speaking, laches is not imputed to one who has no knowledge, or means of acquiring knowledge, of the facts giving rise to his cause of action.” *Schultze v. Wilson*, 54 N. J. Super. 309, 324 (App. Div. 1959)

In this case respondent made its usual cost reports to the Commissioner at the close of the 1959-60 school year. The data were audited and the actual per pupil cost certified to it. Thus respondent knew in the fall of 1960 what its actual costs per pupil had been for the prior year. Although the secretary of the Franklin Township Board of Education testified (Tr. 8) that the Board's first knowledge of the overcharge came in February 1963, and even assuming that the Board should or could have been aware of the State report when it was promulgated early in 1961, the fact still remains that respondent had direct knowledge of its actual costs for 1959-60 soon after it closed its books for that school year.

Moreover, there is evidence that respondent was aware of its obligations to make an adjustment when its actual per pupil cost was found to be less than the tuition rate charged and paid. By letter dated December 6, 1958, (P-3) respondent notified petitioner that it was proposing a tentative tuition rate for 1959-60 under the terms of a new State Board rule outlined in a State Department Bulletin of July 8, 1958. The letter reads, in part:

“* * * We have, therefore, calculated a tentative tuition rate for the school year 1959-60 based on the proposed budget for that year. This tentative rate was calculated to be \$454.00.

“Paragraphs numbered 3 and 4 under section D of the bulletin explains the procedure for adjusting the tentative rate to the actual cost for the year for which the tentative rate was charged.”

The statute, R. S. 18:14-7, *supra*, clearly prohibits charging more than actual cost per pupil. The responsibility to obey the law rests upon the receiving high school district. It therefore becomes incumbent upon such district to determine whether or not its tuition charges exceed actual cost and, pursuant to the pertinent State Board rules governing high school tuition charges, to provide for a refund or a credit of any overcharge. Failure of the sending district to initiate prompt action to recover an overcharge cannot, under such circumstances, become grounds for the defense of laches.

It having been stipulated that for the school year 1959-60 petitioner paid to respondent \$4,648.40 in excess of respondent's actual cost for providing high school education to petitioner's pupils, the Commissioner therefore finds and determines that petitioner is entitled to a refund of such overpayment. He directs respondent to refund to petitioner the amount of \$4,648.40. There being no provision in the State Board of Education rules for the payment of interest on overcharges and undercharges of tuition, the Commissioner will deny petitioner's request that interest be added to this amount.

There remains respondent's counter petition seeking payment from petitioner of \$11,535.67, which it is stipulated represents the difference between respondent's actual per pupil costs and the amount charged for the education of petitioner's high school pupils in 1958-59, the year prior to that in which an overcharge was made.

Respondent bases its claim for additional tuition on the fact that it regarded the amount which it established on December 30, 1957, for the 1958-59 school year as a "tentative" or "estimated" tuition rate. It supports its position not only by the testimony of the superintendent and a Board member at that time (Tr. 51, 57) but also by the minutes of the meeting of that date, which read in part as follows:

"* * * The secretary reported that based on the current years budget and actual expense where possible an estimated high school per pupil cost of \$386.50 had been calculated. A motion was made by Manbeck, seconded by Linnekin and carried that the high school tuition rate for the school year 1958-59 will be \$386.50. The secretary will so notify Franklin-township Board by letter." (R-1)

The letter (R-2) which the secretary addressed to the Franklin Township Board of Education on January 4, 1958, reads in full as follows:

"This is to advise you that the High School tuition rate for the School Year 1958-59 has been established at \$386.50 per pupil. This is an estimated cost based on the current years actual cost, where known, with the balance based on the current year budget. Should the actual cost, when calculated at the close of the school year, be lower than the estimate you will, of course, be billed at the lower figure.

"This is a change of policy from past years, however, it is not a new policy since it is patterned after that used by other Boards in our County.

"As explained above this change of policy bases the tuition rate on the current year cost where as up to this time it has been based on the pupil cost reported to the State Dept. of Education for the prior year.

"A figure of \$324.00 has reached you and I believe has been used in your tentative budget. This is the High School per pupil cost for 1956-57.

"We regret the confusion that has occurred. We also regret the delay in advising you of this and hope it does not put an undue hardship on you in submitting your budget on time."

It must be observed that the letter proposes an adjustment if the "estimated" cost exceeds the actual cost, when determined, which would be required by law in any event. There is no mention of an adjustment should it later be found that the reverse is true and the actual cost exceeds the cost estimated and charged. The "change of policy" referred to in respondent's letter reflects concern over the two-year lag explained *supra*. Respondent's new policy anticipated in part the State Board's amendment to its rules permitting agreement on a tentative tuition rate which was not enacted until 6 months after the date of respondent's letter. The State Board rule was made effective as of July 1, 1958. Thus, in its action on December 30, 1957,

respondent had no authority of State Board rule on which to offer an "estimated" tuition rate.

Nor did the procedure adopted by respondent make any provision for either agreement or disagreement by the Franklin Township Board with the proposal. The rate, so far as petitioner was concerned, was set, subject only to adjustment if it exceeded actual per pupil costs as later determined.

In all essential respects, respondent's counter petition herein is similar to *Board of Education of Red Bank v. Board of Education of the Township of Shrewsbury, et al.*, decided by the Commissioner January 7, 1963. In that case the receiving (Red Bank) board of education had notified its sending districts (including Shrewsbury Township) in December 1957 of the tuition rate "set" for 1958-59, with the note that the rate was less than actual cost. Then during the 1958-59 school year, the Red Bank Board of Education, on the basis of actual cost figures, attempted to modify the tuition rate on the grounds that the rate originally established was only tentative. In denying petitioner's claim for additional tuition the Commissioner said:

"* * * The section of the rule having to do with setting a tentative rate (Part D, *supra*) was clearly prospective. It provided a procedure for (a) fixing a tentative rate by agreement between receiving and sending districts not later than January 1 preceding the school year in which the rate would be effective, and so notifying the Commissioner or (b) if no agreement can be reached, basing the tentative rate on the actual cost per pupil for the completed school year immediately preceding. Clearly, petitioner's action in December 1958, modifying the rate already set for 1958-59 according to revised estimates of costs for *that* year, cannot be regarded as taken in fulfillment of the procedures required in the rule. Nor indeed was it possible for respondent to follow the rule with respect to a tentative rate for 1958-59, since the setting of such a rate would have had to take place prior to the adoption of 1958-59 school budgets, before the amended rule was in existence. On these grounds, the Commissioner finds that petitioner's claim for additional tuition for 1958-59, based upon the provisions of the State Board of Education rule allowing the fixing of a tentative rate, is without merit * * *."

Thus, notwithstanding respondent's description of its 1958-59 tuition rate as an "estimated" cost (R-2), and its reiteration of that description in a letter to petitioner a year later (P-3), respondent's claim for additional tuition based upon subsequent determination of actual costs is without validity and will not be allowed. Respondent's counter petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

January 22, 1965.

II

RESIDENCE OF MARRIED WOMAN HOLDING STATE
SCHOLARSHIP IS THAT OF HER HUSBAND

JOYCE LEVENSON LASSER,

Petitioner,

v.

STATE SCHOLARSHIP COMMISSION,

Respondent.

For the Petitioner, Gerald A. Flanzbaum, Esq.

For the Respondent, Arthur J. Sills, Esq., Attorney General (Howard
Kestin, Esq., Deputy Attorney General)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner seeks restoration of a New Jersey State competitive scholarship which was discontinued after two years. She contends that respondent erred in its determination that she has ceased to be a resident of New Jersey and is therefore ineligible for any further grant and prays the Commissioner to renew and continue the scholarship for the full term of four years.

The facts in this matter were made known through testimony, affidavits, and exhibits at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the New Jersey State Department of Education, Trenton, on September 11, 1964. A memorandum of law was also submitted by petitioner's counsel.

Upon her graduation from North Plainfield High School in June 1961, petitioner was awarded a State competitive scholarship as provided by R. S. 18:22-14.2 *et seq.* She entered Simmons College in Boston, Massachusetts, in September 1961 and has attended there regularly since, with the expectation of receiving a degree in dietetics in June 1965. In August 1963, petitioner married David Lasser, a resident of Plainfield, New Jersey, who had just graduated from Bryant College in Providence, Rhode Island, with a degree in business administration. They then took up their abode in Boston where Mr. Lasser found employment with an insurance company while Mrs. Lasser returned to her studies at Simmons. Except for college vacation periods they have lived in Boston since their marriage. In October 1963, petitioner received notice that she was no longer eligible for a State scholarship since she lived with her husband in Massachusetts and therefore she no longer maintained a New Jersey residence as required by law for continuance of the grant.

Petitioner contends that she is still a resident of New Jersey. She says that for some years it has been her husband's intention to return to New Jersey to assume charge of his father's business and that he will do so as soon as she graduates from Simmons. Faced with the choice of living apart or of her transferring to a New Jersey college after their marriage, petitioner says that they decided she would complete her work at Simmons and while

doing so her husband would find temporary employment in the Boston area. She claims, therefore, that although she and her husband are living in Boston, it is not their residence in any legal sense and that they consider themselves to be residents of Plainfield, New Jersey.

Petitioner's argument is supported by her husband's testimony and by an affidavit of her father-in-law. Both of them stated that it has been understood for many years that petitioner's husband would take charge of the family business after he finished college. He had, in fact, done so for a period of one semester in 1962 while his father was incapacitated with a heart ailment. Petitioner and her husband point out that the medical and dental practitioners they consult are in New Jersey, that what money they have is deposited in New Jersey bank accounts, that they receive mail and store clothing and other possessions at the home of her husband's parents, that they return home to Plainfield during vacations and at every possible opportunity, and that they make their major purchases such as clothing and appliances in that area. They declare that they consider Plainfield, New Jersey, to be their permanent residence and their home in Boston is a temporary domicile only.

Particularly significant in support of this claim, in the Commissioner's judgment, is Mr. Lasser's testimony that he was unemployed and had been out of work for six weeks at the time of the hearing. The reason for this, he testified, is that he was asked to sign a two-year contract with the insurance company for which he worked and he refused to do so because of his intention to return to New Jersey and his family's business in a lesser period of time.

The hearing also educed petitioner's reasons for choosing to remain at Simmons rather than to transfer to a New Jersey institution, the satisfactory status of her academic achievement, and her continuing financial need.

Counsel for petitioner argues that nowhere in the statute is a continuing four-year residency in the State of New Jersey required as a condition of a scholarship grant. The pertinent statutory excerpts on this issue are as follows:

R. S. 18:22-14.8

"No person shall be awarded a State competitive scholarship unless (a) He has been a resident of New Jersey for a period of not less than 12 months immediately preceding the date of his application for such scholarship. * * *"

R. S. 18:22-14.10

"Each State competitive scholarship is for a period of 4 academic years, but shall remain in effect only during such period as the holder thereof achieves satisfactory academic progress and is regularly enrolled as a full-time student in an institution of collegiate grade as described in section 10."

The Commissioner deems it unnecessary to reach this question in this matter because he concludes from the evidence that in the particular circumstances of this case, petitioner has maintained her New Jersey residency without interruption. It is conceded that a married woman's residence is that of her husband and therefore it is David Lasser's residence which is to be

determined here. The Commissioner is aware of the complexity involved in a legal determination of residence and has examined a number of the leading cases which deal with this problem. In this case, however, no such difficult problem is presented. After hearing all the facts the Commissioner concludes that petitioner's husband is residing temporarily in Massachusetts, that there is a reasonable basis for such temporary residence, that he has every intention of returning to New Jersey after June 1965, and that his permanent residence, therefore, continues to be at his parents' home in Plainfield, New Jersey. *Harral v. Harral*, 39 N. J. Eq. 279 (E. & A. 1884); *Kurilla v. Roth*, 132 N. J. L. 213 (Sup. Ct. 1944); *Lea v. Lea*, 28 N. J. Super. 290 (Chan. Div. 1953), affirmed in part and reversed in part 32 N. J. Super. 333 (App. Div. 1954), affirmed 18 N. J. 1 (1955); *Cromwell v. Neald*, 15 N. J. Super. 296 (App. Div. 1951); *In re Dorrance's Estate*, 115 N. J. Eq. 268 (Prerog. 1934), affirmed 13 N. J. Misc. 168 (Sup. Ct. 1935), affirmed 116 N. J. L. 362 (E. & A. 1936); *Rinaldi v. Rinaldi*, 94 N. J. Eq. 14 (Ch. 1922); *In re Fisher's Will*, 13 N. J. Super. 48 (App. Div. 1951) This being so, petitioner, being David Lasser's wife, is also a resident of New Jersey. The determination that she is ineligible for renewal of her State competitive scholarship grant because she no longer maintains New Jersey residency is therefore in error and will be reversed.

The Commissioner would observe that respondent State Scholarship Commission in no way sought to impose hardship upon petitioner or to set unnecessary obstacles in the way of completion of her college education. Nor did it take a strong adversary position in this case but aimed rather at eliciting the particular facts upon which a just and equitable determination could be made. In the Commissioner's judgment this has been accomplished, and on the basis of the facts as now known he finds and determines that petitioner has been and is eligible for renewal of the State competitive scholarship previously granted to her. The State Scholarship Commission is directed to renew the grant to Joyce Levenson Lasser for the third and fourth years.

COMMISSIONER OF EDUCATION.

January 26, 1965.

III

TENURE DOES NOT ACCRUE TO COACHING ASSIGNMENTS

NELLO DALLOLIO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,

Respondent.

For the Petitioner, Plone, Tomar, Parks and Selinger (Albert K. Plone, Esq., of Counsel)

For the Respondent, Frank J. Testa, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION
ON MOTION TO DISMISS

This action is brought against the Vineland City Board of Education by a teacher employed in that system whose assignment to coach the football team was not continued. Petitioner contends that he has rights to the position of football coach which were illegally abrogated by respondent. The Board of Education recognizes no right of petitioner to continue in the coaching assignment and denies any improper action on its part.

Oral argument on a motion to dismiss filed by respondent was heard by the Assistant Commissioner in charge of Controversies and Disputes at the Cumberland County Court House, Bridgeton, on July 15, 1964. Exhibits and affidavits were received and briefs of counsel were later submitted.

There is essential agreement on the facts. Petitioner has acquired tenure as a teacher in the Vineland High School where he has taught science and mathematics for more than 30 years. In 1935 or 1936 he was assigned as head coach of football in addition to his classroom teaching duties and this assignment continued until the 1946-47 school year when he was replaced as coach. At the beginning of the 1955-56 school year he was again appointed football coach and was continued in that assignment each year until 1963. In December of that year he was asked to attend a conference meeting of the Board of Education at which time he was notified that he was to be replaced as football coach for the next year. It is from this action that petitioner appeals.

Petitioner claims that he has acquired tenure not only in his classroom teaching position but in his football coaching assignment. For that reason he argues that he cannot be dismissed from his coaching position except for cause following written charges and the right to a hearing thereon. Respondent recognizes no tenure in its coaching assignments, which it contends are annual appointments separate and distinct and in addition to the employment of and salary paid to the individual as a teacher.

The pertinent sections of the relevant statutes are as follows:

R. S. 18:13-16

"The services of all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and such other em-

ployees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, (a) after the expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year * * *."

R. S. 18:13-17

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

R. S. 18:6-19

"The board shall make, amend, and repeal rules, regulations, and by-laws not inconsistent with this title or with the rules and regulations of the state board of education, for its own government, for the transaction of business, and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers."

The thrust of petitioner's argument is that a football coach is a teacher who in the performance of his coaching duties employs the professional knowledge, skills and techniques ordinarily required in any teaching-learning situation. To support this thesis he has submitted voluminous quotations, excerpts from professional literature, and an extensive analysis of his coaching practices. With this position the Commissioner is in complete accord. There can be no question that the coach of an athletic team in the public schools must be first of all a good teacher and that what he is called upon to do as coach requires the use of a broad range of teaching knowledge and skills. It was with this in mind and to insure that only persons who were qualified as teachers could serve as coaches that the State Board of Education enacted regulations such as the following:

"(4) The program of activities or sports to be employed by any public school in competitive contests, games or events or in exhibitions with individual pupils or teams of one or more schools of the same district, or of other districts, shall be approved annually by the superintendent and by the board of education.

"(5) Every person appointed subsequent to June 1, 1960, to coach, teach, or train individual pupils or school teams for interschool athletic competition shall be a certificated member of the school faculty in that same school district and shall be employed full-time during the regular

school day when classes are in session. He shall be officially designated by the district board of education for the duties for which he is to be held responsible." (*Rules and Regulations of the State Board of Education*, January 1964, page 82)

It does not necessarily follow, however, that a coach acquires rights to his coaching assignment because he performs teaching functions as part of it. The issue here is not whether a coach is a teacher but whether a coach holds a position of employment which is afforded tenure protection by the statutes. The Teachers Tenure Act, *supra*, provides tenure after fulfillment of the required period of probation to "* * * all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and such other employees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners * * *." There is such a certificate for the position of teacher, and no teacher may be employed who does not hold a valid license to teach. No certificate other than that of teacher is either issued or required for the position of football coach.

It is clear that petitioner holds an appropriate teacher's certificate and is employed and has tenure as a teacher in respondent's schools. It is also clear that in certain years petitioner has been assigned to coach the football team in addition to his regular classroom teaching assignment. The pleadings disclose that this was a yearly appointment made by the Board, for which petitioner was paid a sum in addition to his regular salary as a teacher.

Under these circumstances the Commissioner can find no basis for petitioner's claim to tenure as a football coach. He has tenure in his position as teacher from which employment he cannot be dismissed or suffer a reduction in salary except for causes determined by a hearing. Except for the loss of the compensation in addition to his teacher's salary which he is paid for his services as coach, he is threatened with neither of these misfortunes. It is clear that a board of education has the right to assign and transfer or reassign teachers in its employ. *R. S.* 18:13-5, 18:7-56, 18:7-58, 18:6-19, 18:6-20. A transfer is not a demotion. *Lascari v. Lodi Board of Education*, 36 *N. J. Super.* 426 (*App. Div.* 1955) In this instance petitioner has been relieved of an assignment which he was offered annually by the employer and which he accepted voluntarily. It must be noted that his duties as coach were not permanently engrafted on his duties as a teacher, either by rule or by the terms of his employment. The Board was not obligated to make the offer or to continue it each year. In fact, the Board is without authority to make such an assignment for more than a year under the well-established principle that a board of education is a non-continuous body which cannot bind its successors except in matters specifically permitted by statute. *Skladzien v. Bayonne*, 1938 *S. L. D.* 120, affirmed State Board of Education 123, affirmed 12 *N. J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N. J. L.* 203 (*E. & A.* 1935)

Teachers in public schools customarily direct or supervise a variety of activities which are a part of the curriculum but which are not necessarily directly related to their classroom teaching assignment. These activities are not limited to the coaching of teams in the various sports but might include an assignment to direct (or coach) the school dramatic productions, to ad-

vise the student council, to sponsor one or more school clubs, to direct the school assembly programs, to direct the school orchestra, band, or chorus, to supervise school publications, and many others. In some instances, these extra responsibilities are considered part of the teacher's total assignment, and no remuneration other than the basic contractual salary is paid for performing them. In most cases, however, and particularly for those assignments which require the expenditure of much additional time beyond the normal school day, such as coaching athletics, extra compensation is customary.

The Commissioner can find no basis for differentiating between petitioner's extra-classroom teaching assignment as football coach and the various other kinds of assignments which teachers perform. Therefore, if tenure accrues to an assignment as football coach it must also attach to such other positions as senior class advisor, coach of the junior play, supervisor of safety patrols, sponsor of the chess club, or other similar jobs. Such a circumstance would seriously interfere with sound school administration and would place obstacles in the way of the development of a good educational program. The Teachers Tenure Act was not enacted for such a purpose as petitioner contends, nor was it intended to fix school personnel practices in as rigid and inflexible a structure as would be the case if petitioner's argument were upheld. The Teachers Tenure Act is the enunciation by the Legislature of a public policy with regard to the employment and dismissal of teachers for the primary purpose of insuring the educational welfare of children and only secondarily as a protection to teachers. *Wall v. Jersey City Board of Education*, 1938 S. L. D. 614, affirmed State Board of Education 618, affirmed 119 N. J. L. 308 (Sup. Ct. 1938) The over-protection claimed by petitioner would be a disservice to the schools, in the Commissioner's judgment, and is not in the contemplation of the statute. Indeed, strong argument could be made in favor of changing the assignments of teachers from time to time. "Transfers are often advisable in the administration of schools for many reasons." *Cheesman v. Gloucester City Board of Education*, 1 N. J. Misc. 318 (Sup. Ct. 1923) Repetition of the same duties may increase competency and efficiency in a particular area but it can also act to stultify both the teacher and the program. There is a middle ground in this respect, and the school administration's hands should be kept free to make those assignments which will most effectively perform the school's functions.

Neither is the wisdom of the Board's decision to assign the football coaching duties to another teacher subject to question by the Commissioner. The Board has the statutory right to assign teachers as it sees fit, subject always to the limitations of certification and reasonableness. *Tinsley v. Lodi Board of Education*, 1938 S. L. D. 505; *Greenway v. Camden Board of Education*, 1939 S. L. D. 151, affirmed State Board of Education 155, affirmed 129 N. J. L. 46 (Sup. Ct. 1942), affirmed 129 N. J. L. 461 (E. & A. 1943); *Cheesman v. Gloucester City Board of Education*, 1938 S. L. D. 498, affirmed State Board of Education 500, affirmed 1 N. J. Misc. 318; *Downs v. Hoboken Board of Education*, 12 N. J. Misc. 345 (Sup. Ct. 1934), affirmed 113 N. J. L. 401 (E. & A. 1934) If a board decides to transfer this year's fourth grade teacher to next year's sixth grade, or to assign the current instructor in algebra who is also certificated in science to teach biology, it may do so. This exercise of discretion extends also to curricular assignments outside the classroom.

There remains the question whether petitioner's loss of the remuneration paid for coaching football constitutes a reduction of salary such as is pro-

scribed by *R. S. 18:13-17*, in the case of teachers under tenure. The Commissioner finds that it is not. Petitioner was assigned to coach football on a year-to-year basis and the annual notices given him were specific in this respect. They also stated the remuneration to be paid for performing this function. It is clear that such compensation was in addition to the basic contractual salary paid to petitioner for his employment as a teacher. Support for this view is found in the fact that deductions from petitioner's salary for contributions to his account in the Teachers' Pension and Annuity Fund, as required by law, have been made on the basis of his salary as a teacher only. No such deductions have been made from his compensation for coaching.

A similar issue was raised in *Reed and Hills v. Trenton Board of Education*, 1938 *S. L. D.* 437. In that case, a principal and a head teacher, each of whom was assigned to a single school, were given responsibility for two schools which were temporarily combined. Each was paid additional salary for the extra duties. This combination of schools and duties continued for more than four years and was then discontinued. The principal and the head teacher were then relieved of their extra assignment and the additional salary also ceased. They appealed the reduction in salary, claiming that as tenured personnel their salaries could not be reduced. In dismissing their appeal the State Board of Education said at page 440:

"* * * The Tenure of Service Act was not passed to fit such a case as this. The prohibition against reduction of salary applies to a permanent scheduled salary and not to a temporary increase given for extra work done.

"* * * The appellees were already under tenure by three years or more of service under regular scheduled salaries. Their status there is not questioned. But they now seek to invoke an extra tenure of service because of three years or more of extra work for which they received extra compensation. We do not believe that the law contemplated any such double protection. If the statute were so construed any and all temporary payments to teachers for temporary work could not be made without incurring the liability of a permanent indebtedness and school boards would be tempted to put all extra services upon teachers without any extra compensation whatever."

The Commissioner holds that a board of education has the power to assign and reassign teachers to curricular duties in addition to their regularly scheduled classroom instruction assignment and to pay such additional remuneration as is reasonable and appropriate therefor; that absent a requirement for a certificate other than that of teacher, no tenure accrues to such assignments and they are renewed or discontinued at the discretion of the Board; and that when the extra work is no longer performed the extra compensation for that purpose can no longer be claimed.

The Commissioner finds and determines that the Vineland Board of Education acted within its discretionary authority in relieving the petitioner of his extra duties and discontinuing his extra compensation as coach of football, and assigning that responsibility and extra remuneration to another staff member. Respondent's motion is granted and the petition is dismissed.

COMMISSIONER OF EDUCATION.

January 27, 1965.

IV

TEACHER MAY NOT BE DECLARED INELIGIBLE TO TEACH UNLESS
COMMUNICABLE DISEASE OR MENTAL ABNORMALITY
IS ESTABLISHED

EMMA MATECKI,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK,
MIDDLESEX COUNTY,

Respondent.

For the Petitioner, Kolodziej & Opdyke (Kenneth P. Keller, Esq., of Counsel)

For the Respondent, Wilentz, Goldman & Spitzer (Francis X. Journick, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case was declared ineligible to teach in respondent's schools on the basis of a psychiatric examination, conducted at respondent's direction. She seeks to have the determination of ineligibility set aside, to be reinstated as a teacher, and to be compensated for the period of time during which she was declared ineligible to teach. Respondent asserts that it made its determination of ineligibility in accordance with the statutory provisions for such a determination, and that in any event she should not receive back pay for that period of time during which petitioner, by her own inaction, delayed the hearing and adjudication of this matter.

A hearing was held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the County Superintendent of Schools in New Brunswick on June 19, July 21, and August 25, 1964. Briefs and memoranda were filed by counsel.

Petitioner holds tenure as a teacher in the East Brunswick School District, having been first employed there in 1950. Apparently there had been growing disharmony between her and the school administration prior to 1961, but no details of this were developed at the hearing. In any event, the incident which set in motion the events leading to the subject controversy occurred on March 8, 1961, when petitioner took two pupils to the principal's office for disciplinary reasons. When the supervisor, who was acting in place of the regular principal on that day, refused to keep the two pupils in the principal's office, petitioner became, in her own words, "very angry." Two days later petitioner met with the superintendent and the school principal in a conference at which the superintendent stated to her that he felt that she should leave the East Brunswick school system, which she declined to do. Later in the school year the superintendent offered to assign her for the following school year as a permanent substitute, which was also unacceptable to her.

It is evidently the practice in this school system to ask teachers toward the end of the school term to sign a declaration of their intention to return

for the following year. Petitioner, apparently dissatisfied with or uncertain about her assignment, did not sign and return such a statement of her intention to teach in East Brunswick in 1961-62. There is, of course, no law or valid rule which requires a teacher to make such a declaration and such a device cannot be employed to abrogate a teacher's tenure rights. Despite this, most teachers do comply as a courtesy and in recognition of the administration's need to know in order to plan. In this case, petitioner did not comply and as a result she was told, when she reported for duty in September 1961, that there was no assignment for her, and that she was suspended pending review of the situation by the Board of Education.

Subsequently, following further conferences involving the petitioner, the superintendent, and a field representative of the New Jersey Education Association, petitioner was put on a leave of absence, with full salary, for the 1961-62 school year. During that year she attended Rutgers—The State University, taking graduate work leading toward a master's degree in education.

In the spring of 1962, petitioner notified respondent of her intention to return to her teaching position for the 1962-63 school year. Thereupon respondent informed petitioner, by letter, that she would be required to submit to examinations by the school physician and the school psychiatrist. On June 8 she was examined by the school psychiatrist, who later testified that the examination took approximately 2½ hours. The psychiatrist concluded that petitioner's emotional make-up is such that she tends to become very angry or very anxious in situations in which she is not supported by authority or in which the solution to any given problem is emotionally too complicated for her. The report makes the following observation and judgment:

“* * * I feel that this teacher would function best in a very small school system, where teachers operate in a much more highly supervised milieu than they possibly can in a system as large and as necessarily diversified as is the East Brunswick system. If she showed more emotional capacity and more desire to change her current adaptation, then, with developing insight, she might become more adequate as a teacher. Since her adjustment has been poor and the possibility that she may change is so slim, it is my considered judgment that she should not be reinstated in the East Brunswick School System.

“DIAGNOSTIC IMPRESSION: Schizoid Personality” (P-5)

On September 3, 1962, the Board of Education adopted a resolution based upon this report, suspending petitioner without pay and declaring her ineligible to teach, pursuant to *R. S. 18:5-50.5*.

Petitioner, through her attorney, sought a hearing before the Board. On September 17, 1962, respondent, by resolution, denied the hearing, but agreed to “consider any medical reports or other information which Miss Matecki desired to submit in connection with her case.” Petitioner thereupon submitted for respondent's consideration the report of her personal physician (P-1) as well as those of two psychiatrists who had examined her at her own request, one on June 1, 1962, a week prior to the examination by the school psychiatrist, and the other on September 11, three months afterward. (P-3, P-4) Both psychiatrists reported that they found no psychiatric

condition that would interfere with the performance of petitioner's duties as a teacher.

Taking cognizance of the differences between the findings and recommendations contained in these two reports, and that of the school psychiatrist, respondent on October 22, 1962, directed that petitioner be notified, through her attorney, that it could not accept these findings. (P-11) Thereafter, on November 15, 1962, the petition herein was filed. A hearing was scheduled for March 14, 1963, but ten days prior to that date petitioner notified the Commissioner that she had dismissed her attorney and asked for a postponement. On July 25, 1963, after petitioner had been notified by the Commissioner that she must proceed with or withdraw her appeal, a letter was received from a second attorney notifying the Commissioner that he had been retained to represent her. In December 1963, petitioner dismissed this attorney. In February 1964, after counsel for respondent requested that the petition be dismissed for want of diligent prosecution, petitioner retained her present attorney and the matter was brought to hearing.

The statutory authority invoked by respondent to order the physical and psychiatric examinations of petitioner, and thereafter to declare her ineligible to teach, is R. S. 18:5-50.5, which reads in part as follows:

"* * * In addition to the routine examination of all employees as provided in this act, the board of education may require the individual examination of an employee whenever in its judgment such employee shows evidence of deviation from normal physical or mental health.* * *

"The cost of examinations, laboratory tests, or X-ray procedures may be borne by the board of education when made by a physician or institution designated by the board. In lieu of the examination by such authority with payment by the board, an employee may be examined at his own expense by a physician or institution of his own choosing; provided that such physician or institution shall be approved by the board of education.

"If the result of the examination indicates mental abnormality or a communicable disease, the employee shall be ineligible for further service until satisfactory proof of recovery is furnished. If an employee is under contract or tenure protection, he may be granted any sick leave compensation provided by the board of education for other employees, and shall upon satisfactory recovery be permitted to complete the term of his contract, or, if under tenure, shall be re-employed with the same tenure status as he possessed at the time his services were discontinued; provided, the absence does not exceed a period of 2 years. * * *"

The issue in this appeal is whether petitioner was properly declared ineligible for service under the provisions of the statute, *supra*. Petitioner contends, in the first place, that undue emphasis has been placed on the incident of March 8, 1961, and the conference which followed on March 10; that there is nothing in her record prior to or following this incident to support a conclusion by respondent that she had so far deviated from normal mental health as to warrant its requirement that she undergo psychiatric examination; and that in any event, respondent's finding that she is ineligible for

service is against the weight of the evidence contained in the reports of the psychiatrists.

Respondent argues, on the other hand, that it acted strictly in accordance with the provisions of the statute, and that in light of the report of its psychiatrist, which diagnosed a "schizoid personality" and recommended that petitioner should not be reinstated, the Board had no alternative than to declare petitioner ineligible for further service. Further, respondent contends, it had neither a right nor a duty to conduct a hearing to determine whether petitioner suffered a mental abnormality. *Cf. Harenburg v. Board of Education of Newark*, 1958-59 S.L.D. 80, 84. Finally, respondent urges that while the testimony of other psychiatrists may be relevant to the question of petitioner's present fitness to return to work, it was under no obligation to consider such testimony as satisfactory proof of recovery since the physicians who made the examinations had not been approved by the Board.

The Commissioner holds that petitioner's skill or competence as a teacher is not a proper question to be considered in connection with the application of R. S. 18:5-50.5. Whether such incidents as might have been reported to the Board of Education constitute sufficient evidence of deviation from normal mental health to warrant its requirement of a psychiatric examination is a matter which lies within the discretion of the Board to decide. The statute contemplates that a board, as a body of laymen, shall exercise such discretion only to the point of deciding whether to order examination by a physician or institution competent to determine "mental abnormality."

In the instant matter respondent received from its psychiatrist a diagnosis of "schizoid personality" and a recommendation that petitioner not be reinstated. It is of the utmost significance to the Commissioner that at no point in her report did the psychiatrist, whose competence is established, identify a mental illness or state that there was a condition of mental abnormality. Rather, she determined that petitioner's particular emotional and personality traits do not lend to a favorable adjustment to a school district of the nature of East Brunswick. Such a conclusion is not uniquely that of a psychiatrist. It is the kind of evaluation of a teacher which could be validly made by a competent school supervisor or administrator.

The school psychiatrist's diagnosis of "schizoid personality" was not confirmed by the testimony of the three other competent and qualified psychiatrists who examined petitioner. In any event, the testimony clearly established that many persons, including school teachers, have schizoid personalities, and that such a diagnosis does not in itself describe a disqualifying mental abnormality. The school psychiatrist's testimony on cross-examination on this point is significant (Tr. 193-195):

"Q. Well, you define it. Would you consider this person mentally abnormal?

"A. All right. If you define abnormal to mean——

"Q. You define it. I am not saying. You define it.

"A. Normal to me is a statistical concept. A normal person is in the majority of our population. Whatever you are studying, it's normal if it's the majority.

A schizoid personality is not the majority, so in the respect that the schizoid personality is not majority, she is not normal. However——

“Q. I am talking about mental abnormality. Go ahead.

“A. If you want to define——if you want to say that a schizoid personality is a personality disturbance which is not a psychosis, I would say that the majority of people in our day and age fall in this category, so in this respect she is normal.

* * * * *

“Q. And in most respects all of us are abnormal in some ways and in all respects some of us are normal in other ways.

“A. That’s right.

“Q. So you are not saying——period——whether she is mentally abnormal or not. You are just not answering the question. Right?

“A. Well, if you will define the word for me, I’ll answer it for you.

“Q. I can’t. It wasn’t my duty to define it for the Board. You are not answering it, right, I take it.

“A. I’ve answered it to the best of my ability.”

Even in the absence of the conflicting, often flatly contradictory, reports and testimony of three other psychiatrists who examined petitioner, one of them just prior to the hearing, the Commissioner finds that respondent was without proper evidence from its own psychiatrist of “mental abnormality” that would warrant its declaring her ineligible for further service. In so finding, the Commissioner does not impugn the right of the Board’s psychiatrist to reach a conclusion about petitioner’s adjustment to her teaching situation in respondent’s schools. However, the Commissioner holds that the language of *R. S. 18:5-50.5, supra*, demonstrates clearly the intent of the Legislature to bar from further service in the public schools of the State those showing, upon competent examination by physicians or institutions, evidence of communicable disease or mental abnormality, until further evidence of satisfactory recovery is presented. The statute has the wholesome purpose of protecting both the teacher and the children from harm resulting from the continued presence in the school of one whose health renders her unfit to be there. That a teacher is not well adapted to one school situation, but may be more adaptable to another, as respondent’s psychiatrist found of petitioner here, does not render petitioner ineligible within the clear meaning and intent of the statute. This section contemplates a ruling by a board of education that, in its opinion, a teacher is unfit to teach in any public school of the State, by reason of her mental or physical condition. If a school district finds a tenure teacher’s services unsatisfactory and wishes to dismiss her, its proper recourse is to the Tenure Employees’ Hearing Act, and not to the statute invoked herein. The Commissioner therefore holds that petitioner has been improperly denied the right to employment in respondent’s schools, and is entitled to be reinstated.

There remains petitioner’s prayer that the Commissioner order that petitioner be compensated for the period during which she was improperly declared ineligible for service. The statute under which respondent acted

(R.S. 18:5-50.5) makes no provision for compensation of employees illegally declared ineligible. Another statute, R.S. 18:5-49.1, provides for employees illegally dismissed or suspended as follows:

“Whenever any person holding office, position or employment with a local board of education or with the State Board of Education shall be illegally dismissed or suspended from his office, position or employment, and such dismissal or suspension shall upon appeal be decided to have been without good cause, the said person shall be entitled to compensation for the period covered by the illegal dismissal or suspension, *provided*, that a written application therefor shall be filed with the local board of education or with the State Board of Education, as the case may be, within thirty days after such judicial determination.”

While petitioner was not, in a literal sense, either dismissed or suspended, but rather declared ineligible for service, the Commissioner is convinced that R.S. 18:5-49.1 must be construed broadly enough to include the situation *sub judice*, since ineligibility for service is tantamount to suspension.

However, the Commissioner does not find the question of compensation to be one which can be settled at this point. There is insufficient evidence before the Commissioner to enable him to determine the amount of compensation to which petitioner is entitled. Under the provisions of R.S. 18:5-49.1, *supra*, petitioner has 30 days in which to make application to respondent for the compensation to which she believes she is entitled. Should the parties be unable to reach agreement on this issue, they will be allowed 30 additional days, or a total of 60 days from the date of this decision, to present to the Commissioner such additional evidence as will enable the Commissioner to make a determination. *Cf. Lowenstein v. Newark Board of Education*, 35 N. J. 94, 123-124 (1961).

The Commissioner finds and determines that petitioner was improperly declared to be ineligible to teach in respondent's schools. He therefore directs that she be reinstated as a teacher, with such rights as to compensation as may be appropriate under the circumstances of this appeal. For the purposes of the back pay issue, the Commissioner retains jurisdiction herein.

COMMISSIONER OF EDUCATION.

February 4, 1965.

V

RELOCATION OF BUS STOP IS WITHIN DISCRETIONARY
AUTHORITY OF BOARD OF EDUCATION

ARNOLD M. LIVINGSTON AND NORMA LIVINGSTON, HIS WIFE,
Petitioners,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION, SOMERSET COUNTY,
Respondent.

For the Petitioner, Harry P. Beldon, Esq.

For the Respondent, Anthony P. Kearns, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Restoration of a discontinued school bus stop is sought by petitioners who allege that respondent's action eliminating it was an arbitrary, unreasonable and capricious abuse of discretion and discriminatory with regard to their children. Respondent denies all allegations of improper conduct and maintains that removal of the subject bus stop was ordered for good and sufficient reasons.

Testimony was heard by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Somerset County Superintendent of Schools in Somerville on October 21, 1964. Counsel also introduced exhibits and subsequently filed briefs.

The oldest of petitioners' three children attends Oak Street Junior High School which is more than 2.5 miles from her home. She is, therefore, remote from school and entitled to school bus transportation. The two younger children are enrolled in Cedar Hill Elementary School which is less than 2 miles from their home and is, therefore, considered to be convenient of access so that no school bus transportation is required. Nevertheless, transportation has been provided for all three children under respondent's policy of furnishing school bus privileges for lesser distances than 2 and 2.5 miles.

Prior to February 1964, the school bus received and discharged petitioners' children directly in front of their home at the intersection of South Maple Avenue and Pond Hill Road. After making this stop the bus was required to reverse its direction. To do this, it moved forward just past the intersection of Pond Hill Road to a bridge over the Passaic River. At this point it pulled into the left hand lane of approaching traffic in order to gain enough turning radius to back into Pond Hill Road. After backing, it again moved forward making a left hand turn onto South Maple Avenue and thence proceeded northwesterly along that highway. The turnaround thus described was required by respondent in implementing its policy that no school bus route should traverse a railroad grade crossing. On recommendation of the Bernards Township Police Department, which found this procedure dangerous, the Board of Education altered the route to provide a less hazardous turning point with the result that the bus no longer passed petitioners' house.

It then became necessary for petitioners' children to walk to the next nearest school bus stop at the intersection of Hill Top Road and Riverside Drive, the entrance to a housing development known as "Ridge Acres." In order to reach this bus stop, petitioners' children must walk approximately three-tenths of a mile, most of it along South Maple Avenue.

The bus stop in front of petitioners' house was discontinued for the older child in February 1964. Thereupon, petitioners requested and were granted leave to appear before the Board of Education in March. They appeared with counsel and made known their concerns. Subsequently, by letter dated April 24, 1964, petitioners' counsel was informed by respondent that the request for continuation of the school bus stop in front of their home was denied. The text of the letter was as follows:

"Based upon a study by the Board of Education and the recommendation of the Chief of Police, both the high school and the elementary school buses will not stop at Pond Hill Road and South Maple Avenue to pick up Bernards Township public school children. Effective April 27, 1964, the children will be picked up at the intersection of Hill Top Road and Riverside Drive.

"The Board regrets that this action must be taken, but the backing of a school bus constitutes too great a hazard to the safety of our children."
(P-2)

The first issue in this case is stated as follows:

"Does the establishment of the school bus routes complained of in the petition of appeal constitute such an abuse of the Board's discretion as to warrant the Commissioner's intervention?"

Petitioners contend that the benefit afforded their children by the provision of transportation to school has been eclipsed by the dangers involved in walking to the bus stop. They claim that such a requirement is discriminatory as to their children in that the other pupils who board the school bus at the same "Ridge Acres" stop do not have to traverse a heavily traveled highway and, therefore, the convenience of access afforded petitioners' children is inferior to that of other pupils in the same classification. They further assert that respondent failed to evaluate the traffic and road conditions applicable to petitioners' children's access to the new school bus stop, and that it neglected to point out to the municipal authorities the traffic hazards and other dangers to which the children might be exposed. Such conduct, petitioners aver, constitutes an abuse of the discretion by respondent which requires intervention by the Commissioner.

The Commissioner finds no merit in petitioners' contentions. Respondent had a sound and valid reason for discontinuing the bus stop in front of petitioners' home. It could hardly have ignored the recommendation of the police authorities that such a stop and reversal constituted a grave hazard to the safety of an entire school bus load of children. A logical and reasonable solution was to require petitioners' children to board the bus at the next nearest bus stop. That this required petitioners' children to walk three-tenths of a mile of highway which carries a heavier burden of traffic than other roads in the Township is regrettable and a factor which the Board should and apparently did consider. It is not necessarily the controlling consideration,

however. Certainly all elements of the problem are to be taken into account, and the evidence is clear that the board did evaluate the situation and acted in accordance with its best judgment.

Petitioners' argument that the Board failed to notify the police or municipal authorities of the dangers attendant upon walking the subject portion of South Maple Avenue has little weight. This contention is based on the admission that no official communication was sent to the police or municipal authorities by the school authorities after the bus stop was discontinued. It is difficult to understand why such a communication would be thought necessary. If it is thought that the police department had some official role in determining the school bus route, this is not the case. Additionally, the police department was well aware of traffic conditions on the stretch of road in question, and kept a detailed report of accidents which occurred there. They had also made the recommendation which led the Board to decide to change the bus stop. Even though no written notices were exchanged, there certainly was no lack of communication with regard to this matter.

Petitioners' allegation that their children are treated differently from other pupils of similar classification, even if technically valid, fails to reach the magnitude of an improper discrimination. It is true that petitioners' children are members of a group of pupils who reside in a particular section of the municipality, attend the same school, and ride the same school bus. It is also true that they must walk three-tenths of a mile along a main thoroughfare to and from the school bus stop and that other pupils walk a lesser distance, along streets which carry much less traffic. There may be other pupils who walk a greater distance, although this was not established. Certainly there are differences with respect to the way in which petitioners' children and other pupils reach the school bus stop. One may choose to call such differences "discrimination" in the technical sense of the word, meaning as it does the distinguishing of differences. But such differences do not constitute improper discrimination. If carried to any length, petitioners' argument must fall of its own weight. It is obviously impossible to schedule a school bus route so that every child has the same walking distance, over exactly similar terrain and other like conditions in order to arrive at the bus stop. Otherwise it could be contended that when a bus stop is set up in front of one child's home and neighboring children on either side walk to the single pickup point, there is discrimination in favor of the child in front of whose home the bus stops. If this idea of discrimination were to prevail, it would render the selection of a bus route impossible as a practical matter. The Commissioner finds none of the elements of objectionable discrimination in respondent's action herein to set up a common school bus stop for a group of children in a general locality.

It must also be noted that petitioners have no statutory claim to transportation to and from school for two of their children. Should the Board of Education choose to revoke its policy of school bus transportation for less than "remote" distances, the hazards to which petitioners' children would be exposed would be greatly increased by reason of the greater distance they would have to walk to and from school.

Members of boards of education and school staff share the concerns of parents with respect to the safety of children on the way to and from school.

It is obvious, however, that it is not possible to remove every hazard of existence. It is a reasonable expectation however, that, through effective instruction at home and in school, children will develop knowledge and habits of safety which will reduce the possibility of accident to an absolute minimum even where some hazard exists. The school has a clearly established responsibility for such training, *R. S. 18:14-93* and *18:19-3*, and so do parents. It may also be expected that the municipal authorities will take every reasonable and practical means to eliminate or minimize dangerous conditions which threaten the safety of its citizens. The responsibility for safe conditions for travel about the community, whether by vehicle or on foot, clearly belongs to the municipal authorities. *Read v. Roxbury Township Board of Education*, 1938 *S. L. D.* 763, 765; *Iden v. West Orange Board of Education*, 1959-60 *S. L. D.* 96; *Schrenk v. Ridgewood Board of Education*, 1960-61 *S. L. D.* 185. If, therefore, remediable hazards exist along the stretch of highway which petitioners' children are required to walk, petitioners' recourse is to the local municipal authorities to have such conditions eliminated rather than to the Board of Education for additional school bus transportation service.

Petitioners raise a second question in this case: "Is respondent's policy for the establishment of transportation routes so arbitrary, capricious, and unreasonable in its effect upon petitioners as to warrant the Commissioner's intervention?"

Petitioners' contention attacks a policy of the Board of Education under which no school bus can be routed across a railroad grade crossing. They argue that if this policy were not so arbitrary and inflexible it would be possible to pick up their children at their door and route the school bus south on Pond Hill Road and thence by Haas Road, Stonehouse Road, and other streets to the appropriate schools. It is conceded that such a route could not be followed without traversing two railroad grade crossings. Petitioners allege that respondent, through rigid adherence to its policy, has given no consideration to such an alternate routing which would no longer necessitate the hazardous reversing of the bus at their corner. In their view such a circumstance requires the intervention of the Commissioner to restore the subject bus stop.

The Commissioner cannot agree. A policy which seeks to avoid railroad grade crossings is not required of local school authorities, but is well founded and reasonable if they choose to pursue it. Petitioners' allegation of unreasonableness appears to rest on their assertion that buses cross railroad grades in other districts, and on the fact that the Board's policy prevents a routing that would be advantageous to their children. The Commissioner finds no ground herein to support the charge that respondent's policies governing school bus transportation are other than proper and appropriate.

It is well established that the Commissioner will not substitute his judgment for that of the members of the local district board of education in matters, which, by statute, are within the exercise of their discretion. *Boult & Harris v. Passaic Board of Education*, 1949-50 *S. L. D.* 7, 13, affirmed State Board of Education 15, affirmed 135 *N. J. L.* 329 (*Sup. Ct.* 1947), 136 *N. J. L.* 521 (*E. & A.* 1948); *cf. Fiore v. Jersey City Board of Education*, decided by Superior Court, Appellate Division, January 14, 1965 (Docket

No. A-429-63). The determination of policies governing school bus transportation is clearly within the scope of the Board's authority. *R. S. 18:14-8, 18:14-8.1, 18:7-56* It is also well established that it is an improper exercise of the Commissioner's quasi-judicial function to interfere in the decisions of local boards of education unless they violate the law or abuse their discretionary authority. Abuse of discretion has been defined to mean "that the * * * ruling went far enough from the mark to become reversible error." *Hager v. Weber*, 7 *N. J.* 201, 214 (1951)

The Commissioner finds no such error herein. He concludes from his study of the evidence in this case that the Bernards Township Board of Education has exercised its authority and discharged its responsibility with respect to the provision of school bus transportation for petitioners' children to and from school in a proper and reasonable manner. The petition is dismissed.

COMMISSIONER OF EDUCATION.

February 19, 1965.

VI

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF WILLINGBORO, BURLINGTON COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for the election of three members to seats on the Willingboro Township Board of Education for the full term of 3 years each at the annual school election on February 9, 1965, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Ralph McCutcheon	1,349	5	1,354
Rinehart Potts	1,110	1	1,111
Steen Rondum	1,020	1	1,021
Diego Mederos	844	0	844
Elbert P. Neuenschwander	1,100	5	1,105
Bruce Hildreth	499	0	499
David E. Doerr	534	0	534
Bruno F. Dattilo	1,219	1	1,220
Howard Kalbach	995	5	1,000

Pursuant to a letter request from candidate Neuenschwander, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to inspect the voting machines used at the subject election and to check the tally of votes for the candidates listed above. The recheck was made at the storage depot of the Burlington County Board of Elections at New Lisbon on February 23, 1965, and confirmed the tally for each of the candidates as announced.

The Commissioner finds and determines that Ralph McCutcheon, Bruno F. Dattilo and Rinehart Potts were elected at the annual school election on February 9, 1965, to seats on the Board of Education of the Township of Willingboro for a full term of 3 years each.

COMMISSIONER OF EDUCATION.

February 26, 1965.

VII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF SPRINGFIELD, UNION COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three seats on the Board of Education of Springfield Township, Union County, for full terms of three years at the annual school election held February 9, 1965, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Sonya Dorsky	775	6	781
Canio Casale	615	6	621
Francis Shimshock	530	4	534
Harold Liebeskind	501	4	505
Howard Levin	460	2	462
Alvin Jay	236	1	237

Candidate Liebeskind's request to the Commissioner of Education for a recheck of the voting machines was granted. The recheck performed by the Assistant Commissioner in charge of Controversies and Disputes at the warehouse of the Union County Board of Elections in Scotch Plains on March 5, 1965, confirmed the announced tally above.

The Commissioner finds and determines that Sonya Dorsky, Canio Casale, and Francis Shimshock were elected to membership on the Springfield Township Board of Education for full terms of 3 years each.

COMMISSIONER OF EDUCATION.

March 10, 1965.

VIII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF FAIR LAWN, BERGEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three seats on the Board of Education of the Borough of Fair Lawn for full terms of 3 years, at the annual school election held February 9, 1965, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Frank Hart	2,547	6	2,553
Archie W. Aitchison	2,455	10	2,465
Margaret F. Bornstein	2,171	9	2,180
Martin Metz	2,175	4	2,179
Edmund I. Schwartz	2,173	6	2,179
Philip Mintz	2,061	4	2,065
Norman H. Samuels	1,253	5	1,258

Candidate Metz, by letter dated February 10, 1965, petitioned the Commissioner of Education to recheck the tally of the 18 voting machines used in this election. The Assistant Commissioner of Education in charge of Controversies and Disputes conducted the requested recheck on March 5, 1965, at the warehouse of the Bergen County Board of Elections in Carlstadt. The recheck of the voting machines confirmed the tally previously announced.

The Commissioner finds and determines that Frank Hart, Archie W. Aitchison and Margaret F. Bornstein were elected on February 9, 1965, to membership on the Board of Education of the Borough of Fair Lawn for full terms of 3 years each.

COMMISSIONER OF EDUCATION.

March 10, 1965.

IX

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE CAMDEN COUNTY CENTRAL REGIONAL SCHOOL DISTRICT (BOROUGH OF STRATFORD, Constituent), CAMDEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for one seat on the Board of Education of the Camden County Central Regional School District at the annual school election held February 2, 1965, in the constituent district of Stratford Borough, were as follows:

Harry C. Green	334
Ted L. Kerns	326

Candidate Kerns' request for a recount of the ballot was granted by the Commissioner of Education. The recount was conducted by the Assistant Commissioner in charge of Controversies and Disputes, at the office of the Camden County Superintendent of Schools on March 2, 1965.

The recount revealed that there were 659 ballots properly marked for one or the other of the candidates and 20 ballots set aside. The tally at this point stood:

Harry C. Green	334
Ted L. Kerns	325
Reserved	20
	<hr/>
	679

Examination of the 20 referred ballots showed that 17 contained no mark for either candidate and that 2 had been marked for both candidates. These 19 ballots having been for neither or both of the candidates cannot, of course, be counted for either one. There being no necessity to determine the one remaining ballot, since in any case it could not alter the result, it was left undetermined.

The final tally of the votes is determined to be as follows:

Harry C. Green	334
Ted L. Kerns	325
No vote	19
Undetermined	1
	<hr/>
	679

The Commissioner finds and determines that Harry C. Green was elected to membership on the Board of Education of the Camden County Central Regional School District as a representative from the constituent district of Stratford Borough for a full term of three years.

COMMISSIONER OF EDUCATION.

March 10, 1965.

X

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE
TOWNSHIP OF BERLIN, CAMDEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting for three seats on the Berlin Township Board of Education for full terms of three years each at the annual school election on February 9, 1965, were as follows:

Hilbert Dunning	365
Mattie M. Bowser	300
Paul W. Pike, Jr.	257
Robert T. Clyde	235
V. Scurti	21

Pursuant to a letter bearing the names of 28 citizens requesting an investigation of the conduct of this election, the Assistant Commissioner of Education in charge of Controversies and Disputes held an inquiry on February 24, 1965, at the Camden County Court House. Testimony was heard and the paper rolls from the two voting machines used in the subject election were examined.

Petitioners allege that their votes were not properly registered because of a malfunctioning of the voting machine and because the write-in votes were not properly counted. They ask that the election be set aside and a new election ordered.

Several voters testified that they had difficulty casting their ballots because they could not move the levers for the candidates they had chosen. One voter said the machine she used was jammed and voting levers on it could not be moved, even for the budget items. This condition was confirmed by the chairman of the election who closed down the machine and sent for a repairman. According to the repairman's testimony, he checked the machine and found it to be operating properly. He remained until several voters had cast their ballots without difficulty and then left. The machine continued in

service for the balance of the election. Members of the election board testified that there were complaints by voters thereafter from time to time that a particular lever could not be moved but that otherwise the election proceeded normally.

Both machines had personal choice votes written on the paper roll. Some confusion developed over the counting of these votes. The election officials did not tally all of the votes written in because of their belief that the paper roll had not turned far enough for each ballot. They testified that it was their understanding that when a personal choice was written and the vote registered, the paper roll turned from one red marginal number to the next. The result was that no matter how many write-in votes appeared, they restricted their count to only one for each space between the red marginal numbers.

Other than the one time when the repairman was summoned, complaints about the voting machine appear to have coincided with the casting of a write-in vote. The election officials testified that when a voter moved the levers for two candidates on the ballot and then made a write-in vote there was no difficulty, but when the write-in vote was made first and then the voter attempted to move two levers, there were complaints that only one lever would move. It is apparent that those who had such difficulty were unfamiliar with the making of a write-in vote and they opened the slide opposite the name of one of the candidates they intended to vote for. This would, of course, properly result in the locking of that candidate's lever. The testimony indicated clearly that there was little understanding of the operation of a voting machine with regard to casting a personal choice ballot. The Commissioner concludes that with exception of the one instance which appears to have been corrected by the repairman, the difficulties which arose were the result of lack of understanding on the part of voters and not because of machine failure.

A check of the personal choice votes recorded on the paper rolls shows that there were 77 votes written in. One was for R. T. Clyde, whose name also appears on the printed ballot. The Commissioner finds no necessity to determine the validity of this vote as in any event it could have no effect on the final result. The remaining 76 votes, although appearing in a number of forms and spellings, were obviously cast for a V. Scurti. Of these one must be declared void as the same name was written in twice on a single ballot.

Petitioners ask that this election be set aside. The inquiry, however, disclosed no grounds which would be sufficient to support such an action. Although there was confusion with regard to write-in votes and an error in the tally of the personal choice balloting, there is no showing that either had such an effect as would have altered the outcome. In order to declare an election invalid it must be shown clearly that the irregularities either thwarted the will of the people or made it impossible to determine.

“* * * 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 repressed or contravened a full and free expression of the popular will * * *.” *Sharrock v. Keans-*

burg, 15 *N. J. Super.* 11, 17 (*App. Div.* 1951) See also *Love v. Freeholders*, 35 *N. J. L.* 269, 277 (*Sup. Ct.* 1871), *In re Wene*, 26 *N. J. Super.* 363 (*Law Div.* 1953), affirmed 13 *N. J.* 185 (1953); *In re Clee*, 119 *N. J. L.* 310 (*Sup. Ct.* 1938).

There is no evidence here to warrant a conclusion that the will of the people was not expressed or cannot be determined. Had voters understood the proper procedure for casting a vote for a personal choice in combination with two candidates whose names appeared on the ballot, there might have been a change in the final tally. It is obvious, however, that such a supposition rests entirely on conjecture and cannot be validated. In the instant case, it is as reasonable to speculate that the margin of votes between any two candidates would be increased as it is to assume that it would be reduced, had whatever confusion that arose not occurred. The Commissioner concludes that the evidence educed will not support a claim that the will of the people was suppressed or could not be determined and the election, therefore, will stand.

The tally of votes is determined to be as follows:

Hilbert Dunning	365
Mattie M. Bowser	300
Paul W. Pike, Jr.	257
Robert T. Clyde	235
V. Scurti	75

The Commissioner finds that Hilbert Dunning, Mattie M. Bowser and Paul W. Pike, Jr., were elected to membership on the Berlin Township Board of Education for full terms of 3 years each.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

March 10, 1965.

XI

PETITION DISMISSED FOR FAILURE TO EXHAUST
REMEDIES BEFORE BOARD OF EDUCATION

JUDITH KNOECKEL, BY HER PARENT AND NATURAL GUARDIAN,
JEANNETTE KNOECKEL,

Petitioner,

v.

MIDDLESEX COUNTY VOCATIONAL AND TECHNICAL HIGH SCHOOL,
WOODBIDGE, MIDDLESEX COUNTY,

Respondent.

For the Petitioner, *Pro se*

For the Respondent, Wilentz, Goldman & Spitzer
(Francis X. Journick, Esq., of Counsel)

ORDER OF THE COMMISSIONER OF EDUCATION
ON MOTION TO DISMISS

Petitioner in this matter having complained in a petition of appeal filed on December 6, 1963, that on or about February 1963, Judith Knoeckel had been permanently suspended from school by the principal; and respondent having moved that such petition be dismissed on the ground of petitioner's laches in bringing her appeal, and on the further ground that petitioner has failed to exhaust her administrative remedies by appeal to the Board of Education of the Vocational Schools in the County of Middlesex; and the Commissioner having studied respondent's argument in support of its motion; and petitioner, having been duly advised of her right to enter opposing argument and having failed so to do; and the Commissioner holding that an appeal arising out of suspension or expulsion from school must be taken from a determination by a board of education and not by a principal of a school; and good cause being shown:

IT IS, on this 11th day of March, 1965, the finding of the Commissioner that petitioner has failed to exhaust her administrative remedies before the Board of Education of the Vocational Schools in the County of Middlesex; and therefore,

IT IS ORDERED, that the petition of appeal herein be and the same is hereby dismissed, without prejudice.

COMMISSIONER OF EDUCATION.

XII

PAINTERS EMPLOYED STEADILY ON HOURLY WAGE RATE
ENTITLED TO SICK LEAVE

PHILIP FISCHER, ANDREW BUTKOWSKY, AND MARTIN KAMINSKY,
Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WOODBRIDGE,
MIDDLESEX COUNTY,
Respondent.

For Petitioners, Mandel, Wysoker, Sherman & Glassner
(Marvin Feingold, Esq., of Counsel)

For Respondent, Foley & Manzione
(Francis C. Foley, Jr., Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Separate petitions of appeal were filed by three members of the maintenance staff of the Woodbridge Township Public Schools claiming entitlement to sick leave allowances and pay for past periods of illness. Because the issue raised in each appeal is similar, the three matters have been consolidated and will be considered as one case. Respondent denies petitioners' claim to sick leave and payment therefor.

Testimony was heard and exhibits received at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the Middlesex County Court House on November 4, 1964.

Petitioners Kaminsky and Butkowsky have been continuously employed by respondent since June 1957, as painters, assigned to the maintenance crew of the school district. Petitioner Fischer, a plumber, did not begin to work for respondent until June 1959, and left in June 1964. Arrangements for the employment were made through the local headquarters of the appropriate trade union. It was agreed that the men would work a 40-hour week and would be paid on a per diem basis at an hourly wage rate. It appears that the agreed upon hourly rate was somewhat lower than the regular union scale in recognition of the regular, full-time nature of the employment. There was apparently no discussion of or arrangements for vacation, illness, or leave of any kind. In addition to the hourly rate paid to the men a certain amount per hour was also to be paid to the welfare fund of their union.

The relevant minutes of the Board of Education submitted in evidence (R-1) disclose the following employment record for petitioners:

June 5, 1957	Martin Kaminsky and Andrew Butkowsky employed on a per diem basis at \$3.05 plus 15¢ per hour to Welfare Fund.
April 21, 1958 } May 19, 1958 }	Kaminsky and Butkowsky employed for 1958-59 school year on a per diem basis at \$3.20 plus 15¢ per hour effective May 1, 1958.

April 20, 1959	Philip Fischer employed on a per diem basis at \$2.55 per hour, starting date to be determined.
May 18, 1959	Kaminsky and Butkowsky employed for 1959-60 school year on a per diem basis at \$3.20 plus 15¢ per hour, Fischer at \$2.55 per hour.
June 15, 1959	Fischer's rate increased to \$3.06 per hour, effective June 6, 1959.
April 25, 1960	Petitioners employed for 1960-61 school year at \$3.30 plus 15¢ per hour for Kaminsky and Butkowsky; \$4.00 plus 15¢ per hour for Fischer.
April 3, 1961	Petitioners employed for 1961-62 school year at \$3.45 plus 20¢ plus 15¢ per hour for Kaminsky and Butkowsky; \$4.00 plus 20¢ for Fischer.

During the course of their employment each of the petitioners lost time from work because of personal illness or injury. According to their testimony, each one made inquiry at the time he was absent about his rights to sick leave with pay but, upon being told that there was no entitlement, he did not press the issue. It was not until the summer of 1963 that they met with the Board of Education to raise this question and subsequently made other inquiries which eventually led to the appeal herein.

Petitioners contend that they are employees of the school district and are entitled to sick leave without loss of pay as provided in the statutes. They claim that each time they made inquiry they were told that they were not eligible because such benefits did not extend to per diem employees. They ask that the Board be directed (1) to reimburse them for lost wages during previous periods of absence because of illness, (2) to credit them with the number of unused sick leave days, and, (3) except for Fischer, to give them credit for accumulated sick leave in the future.

Respondent asserts the defense of laches. It argues that it is now too late to determine the facts with respect to periods of absence some three or more years before. It points out that school appropriations budgeted for those past years have been expended and that petitioners failed at the time of absence to present any proper claim which could have been acted upon and satisfied from the funds then available. It cites its rule that "A physician's certificate must be filed following an absence of three or more successive days because of personal illness," and notes that petitioners filed no such certification.

Provisions for sick leave for board of education employees are set forth in Chapter 188 of the Laws of 1954 as amended, the pertinent portions of which read as follows:

R. S. 18:13-23.8

"All persons holding any office, position or employment in all school districts, regional school districts or county vocational schools of the State who are steadily employed by the board of education or who are protected in their office, position or employment under the provisions of sections 18:13-16 to 18:13-19 of the Revised Statutes or under any other

law shall be allowed sick leave with full pay for a minimum of 10 school days in any school year. If any such person requires in any school year less than this specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall be accumulative to be used for additional sick leave as needed in subsequent years."

R. S. 18:13-23.9

"In case of sick leave claimed, a board of education may require a physician's certificate to be filed with the secretary of the board of education."

R. S. 18:13-23.10

"Sick leave is hereby defined to mean the absence from his or her post of duty, of any such person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or of being quarantined for such a disease in his or her immediate household."

Petitioners' eligibility for the benefits of these statutes is apparently no longer in question. Respondent offered no argument on this issue. Apparently former boards of education considered the hourly amount paid to the union's welfare fund a sick leave contribution which took the place of any leave to which petitioners might have been entitled. It now appears that the Board of Education no longer takes this position. Petitioners testified that respondent has offered to recognize their rights to sick leave henceforth, and to credit them with whatever unused sick leave days they have accumulated since their employment began. The Commissioner agrees that this is a proper course. The statute plainly covers "all persons holding any office, position or employment" who are steadily employed by a public school board of education. To exclude petitioners it would be necessary to find that they were independent contractors rather than employees. The facts of their employment do not support such a determination.

Although respondent has consented to recognize petitioners' sick leave rights past and future, the agreement does not extend to reimbursement for wages lost during past periods of absence resulting from illness or injury. Petitioners' claim to such back pay and respondent's denial on the ground of laches therefore constitutes the sole issue in this case.

Laches is inexcusable delay in acting. The mere efflux of time alone is not sufficient to constitute laches. Material prejudice to one party's interest as a result of the delay is a necessary element.

"* * * Laches ordinarily connotes 'delay that works detriment to another.' * * * For laches to operate as a bar to relief otherwise available, in the words of Mr. Justice Heher, 'the delay must be for a length of time which, unexplained and unexcused, is altogether unreasonable under the circumstances and has been prejudicial to the party asserting it or renders it very doubtful that the truth can be ascertained and justice administered.' *Stroebe v. Jefferson Trucking and Rigging Co.*, 125 N. J. L. 484; 15 Atl. Rep. (2d) 805." *Board of Education of Garfield v. State Board of Education*, 130 N. J. L. 388, 393 (Sup. Ct. 1943)

Laches is also an affirmative defense and respondent in this case has the burden of proof. *John Hancock Co. v. Cronin*, 139 N. J. E. 392, 398 (E. & A. 1946) The validity of such a defense rests on the facts in the particular case. *Donnelly v. Ritzendollar*, 14 N. J. 96, 107 (1953) Respondent, therefore, must establish that petitioners' delay was inexcusable and that its interests have been prejudiced as a result of the time which has elapsed.

In the Commissioner's judgment the evidence herein fails to support a finding of laches. Petitioners testified that they made inquiry over the years about their rights to paid sick leave. Such inquiries were made through appropriate channels to their superiors and at least one officer of the Board of Education. They had a right to expect to be correctly informed of their statutory rights in response to their inquiries. Instead they were misinformed. Even if the misinformation was inadvertently conveyed (and there is no reason to believe it was otherwise), its effect was the same as if it had been deliberate. That petitioners relied on the advice of those in authority and, as a result, took no effective action until sometime later when they were correctly informed, should not bar their appeal at this time. It is clear furthermore that once they did come into possession of accurate knowledge, they initiated action promptly.

Moreover, the Commissioner is mindful of the distinction enunciated by the State Board of Education in the application of laches to different kinds of cases. See *Biddle v. Jersey City Board of Education*, 1939-49 S. L. D. 49, 52. No dismissal or abolition of a position is involved here, but only the payment of wages improperly denied. The Commissioner finds that under the circumstances of this case petitioners' delay was excusable and that respondent has suffered no change of position or material detriment thereby. He determines that petitioners were entitled to be paid for certain periods of time during which they were unable to work because of physical incapacitation and that such lost wages are due and owed to them by respondent.

The Commissioner concurs with respondent that it may be difficult after the lapse of this much time to verify and validate petitioners' claims. Records of days absent are no doubt easily available. It will probably not be as easy and may be impossible to determine the reasons for the absences. The testimony at the hearing was not complete in this respect and there was some indication that the causes of some absences might be questioned. On the other hand several of the exhibits indicate that certain of the absences for which petitioners claim sick leave allowances are bona fide.

The information before the Commissioner with respect to absences for which wages are claimed is not complete. In view of the present posture of the case, he will not attempt to certify the exact amounts to be paid to each of the petitioners. Instead, he will require and hereby directs each petitioner to submit his claim to respondent, supported by whatever validation is now possible. He orders respondent to reimburse petitioners for those periods of absence from work which can reasonably be established as coming within the scope of the statutory entitlement. Petitioners will be allowed 30 days from the date of this decision to submit their claims. Respondent will be permitted 30 days from receipt of each claim to reimburse the respective petitioner or, if any claim or portion thereof is disputed, to so notify the

Commissioner of such fact, whereupon the Commissioner will take appropriate steps to resolve the issues presented. For these purposes, the Commissioner will retain jurisdiction over this matter.

COMMISSIONER OF EDUCATION.

March 18, 1965.

XIII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF WASHINGTON, GLOUCESTER COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three seats on the Washington Township Board of Education, Gloucester County, for the full term of 3 years, at the annual school election on February 9, 1965, were as follows:

John W. Rhine	435
Samuel L. Ayling	421
Barbara J. Price	409
Frank P. Elwood, Jr.	408
David W. Peakes	365
Herbert H. Epstein	352
Dorothea L. Clark	63

Candidate Elwood, by letter dated February 12, 1965, requested a recount of the tally of the votes for the third seat on the Board. Such a recount, limited to the balloting for Candidates Price and Elwood, was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Gloucester County Superintendent of Schools on March 16.

At the conclusion of the recount, with 6 ballots remaining in contention and referred to the Commissioner for determination, the tally stood:

Barbara J. Price	407
Frank P. Elwood, Jr.	403

The six referred ballots group themselves into two categories as follows:

Exhibit A—5 ballots on which the cross (X) marks in the squares before candidates' names are somewhat less than perfectly made. In one instance, one leg of the cross (X) is not fully extended; in others the writer has retraced the cross (X) one or more times resulting in a heavier or rougher mark than would appear normally; and in one the cross (X) is very heavily marked with two of the legs extending beyond the limits of the square.

Such markings as these are common on ballots and represent nothing more than calligraphic idiosyncracies. Each of the marks is substantially a cross (X) and is substantially within the square. Further, there is no basis for belief that the marks, as made, were intended to distinguish the ballot. There being no reason to reject these ballots they will be counted and added to the tally.

Exhibit B—One ballot on which a proper mark has been made before the name of two candidates. A similar mark before the name of a third candidate has been erased but is still faintly visible.

In the Commissioner's judgment this ballot must be counted for the two candidates before whose name the mark is plainly made but cannot be counted for the third candidate before whose name the mark is erased. Despite the fact that the mark can be discerned and that only two other candidates were voted for, it is obvious that the voter erased the third mark for the purpose of altering his earlier intent.

Adding the votes cast by the 5 ballots in Exhibit A, the final tally is as follows:

	<i>Uncontested</i>	<i>Exhibit A</i>	<i>Total</i>
Barbara J. Price	407	2	409
Frank P. Elwood, Jr.	403	3	406

The Commissioner finds and determines that John W. Rhine, Samuel L. Ayling, and Barbara J. Price were elected on February 9, 1965, to membership on the Washington Township Board of Education for full terms of 3 years each.

COMMISSIONER OF EDUCATION.

March 22, 1965.

XIV

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY.

For Candidate Polhamus, J. P. Davidow, Esq.

For Candidates Tozer, Gerard, and Rafine, N. Douglas Russell, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three seats on the Maurice River Township Board of Education, Cumberland County, for full terms of three years at the annual school election on February 9, 1965, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Richard Polhamus	395	10	405
Samuel Veach	397	10	407
James Gerard	406	1	407
Carl S. Gant	389	10	399
Charles S. Tozer	415	1	416
Martin Rafine	403	1	404

By letter dated February 13, 1965, Candidate Polhamus requested that the tally of the votes be checked. Upon direction of the Commissioner of Education, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount of the ballots at the Cumberland County Court House on March 19, 1965. Appearances were entered for J. P. Davidow, Esq.,

representing Candidate Polhamus and for N. Douglas Russell, Esq., representing Candidates Tozer, Gerard, and Rafine.

At the conclusion of the recount there were 6 ballots voided by agreement and 11 challenged ballots referred to the Commissioner for determination. The tally of the uncontested ballots was as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Richard Polhamus	388	10	398
Samuel Veach	389	10	399
James Gerard	401	1	402
Carl S. Gant	382	10	392
Charles S. Tozer	412	1	413
Martin Rafine	399	1	400

The 11 contested ballots are described and their disposition determined as follows:

Exhibit A—5 ballots on which marks appear in the squares before the names of three candidates but the marks are imperfectly made. The voter, in some instances, has made several strokes instead of the usual one, resulting in a heavy, rough mark. In another instance, the voter apparently did not lift his pen in going from the end of one leg of his cross mark (X) to the top of the other line. In others the voter has apparently embellished his check mark with additional lines.

In the Commissioner's judgment these votes must be counted. While the marks are poorly made, it is possible to discern sufficient resemblance to a proper mark to assume that they were so intended. Such marks as these are not uncommon and are thought to result from unskilled calligraphy, infirmity, rough writing surface, or some such cause rather than any attempt to distinguish the ballot.

"* * * the rule may be stated broadly to be that, where there has been an attempt in good faith to follow the law in making the cross or other mark specified by the statute, the fact that the cross or other mark is imperfect will not prevent the ballot from being counted, provided the intention of the voter is ascertainable.

* * * * *

"Applying these general rules, it has been held that a ballot should not be rejected because the marking is double or irregular, or indistinct, blurred, or faint * * *." 29 *C. J. S.* 499, 500

See also *In re Special School Election in the Township of Tewksbury*, 1939-49 *S. L. D.* 96; *In the Matter of the Annual School Election in the Borough of Watchung*, 1960-61 *S. L. D.* 170.

The Commissioner finds and determines that the marks on the 5 ballots comprising Exhibit A sufficiently approximate either a cross or a check to be considered substantial representations of such symbols and they will, therefore be added to the tally.

Exhibit B—3 ballots properly marked for three candidates but with additional writings elsewhere. The word "yes" is written twice on one ballot, in

two of the blank spaces provided for personal choice candidates. A name, "A. Cimino," is written in a personal choice space on the second ballot. On the third, a cross (X) with a third line bisecting it horizontally, appears to the extreme right after the name of one of the candidates voted for.

In the Commissioner's opinion these ballots are valid and should be counted. While it can be argued that each of the ballots is identifiable because of the extra writing thereon, there is no showing or reason to believe that it was made with any intent to distinguish the ballot. With regard to the first ballot, it is reasonable to assume that the word "yes" was written in connection with the budget items even though it does not appear on that part of the ballot. The words "yes" or "no" are frequently found written by voters on ballots particularly where public questions are to be voted upon. It has been held in another jurisdiction that the written word "yes" or "no" does not constitute a distinguishing mark on a ballot per se. *Scribner v. Sacks*, 18 Ill. 2d 400, 164 N. E. 2d 431. In this instance the Commissioner finds no reason to hold that the writing was made with intent to distinguish the ballot and it will therefore be counted.

On the second ballot, it appears that "A. Cimino" is already a member of the Board. Although his name is written in, no mark was made in the square before it and marks appear in squares before the names of only two candidates. It appears more logical to assume that the voter wanted to insure Mr. Cimino's membership on the Board than that he intended to distinguish his ballot. His failure to place a mark before the name of a third candidate lends credence to the assumption that he wished to express a personal choice and did so. The fact that his personal choice candidate is already a member of the Board does not constitute reason to invalidate his vote for the two candidates properly marked.

On the third ballot in this exhibit, the mark is one often found on ballots and although there is no readily apparent explanation for it, there is at the same time no basis for assuming that it was made for purposes of identification. It could be assumed that the voter started to mark his choices on the right hand side of the ballot under the words "vote for three" instead of in the appropriate squares (a not uncommon phenomenon) and attempted to correct his error by drawing a horizontal line through the cross mark already made instead of erasing it. Such an assumption is as logical as one that he so marked the ballot in order to distinguish it for an improper purpose, and in the Commissioner's judgment, the doubt should be resolved in the voter's favor.

In his determination of contested school district elections, the Commissioner looks to Title 19, the Election Law, the decisions of the New Jersey Courts and, where they are silent, to other jurisdictions for guidance. With regard to this case he finds the following pronouncements to be relevant:

"* * * while a voter endangers the secrecy of his ballot by placing on it any mark or writing other than a cross, crosses, or other specified signs in the manner provided by law, the statutes relating to identifying or distinguishing marks should not be literally but liberally construed in favor of the voter, and the invalidation of what are otherwise good ballots, and the consequent disfranchisement of legal voters, should not rest on vague surmise or assumption not warranted by the record." 29 C. J. S. 529

"L. 1920, c. 366 §1, amending the General Election Act of 1920, provided that 'Any ballot which shall have either on its face or back, any mark, sign, designation or device whatsoever, other than is permitted by this act, shall be null and void, * * *.' In the following year, the 1921 Legislature passed *chapter 196, section 82* of which provided that

'* * * No ballot which shall have either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this act by which said ballot can be distinguished from another ballot, shall be declared null and void, unless the board canvassing said ballots, or the board or officer conducting the recount thereof, shall be satisfied that the placing of said mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish said ballot; * * *.'

"It would thus appear that in the interval between the two legislative sessions, the Legislature had decided *to make the test as to the voiding of the ballot, because marked, one of intention on the part of the voter*. The language of the 1921 act has been continued without significant change in N. J. S. A. 19:16-4." *In re Election in Bethlehem Township*, 74 N. J. Super. 460, 461 (*App. Div.* 1962) (Emphasis added)

"When out of a number of varying possible explanations for an unnecessary mark on a ballot, only one explanation can indict the mark as a symbol of identification, the ballot should not be invalidated on that elusive possibility. Every rationalization within the realm of common sense should aim at saving the ballot rather than voiding it. Speaking to this very point, Chief Justice Maxey stated in the Bauman case; 'The power to throw out a ballot for minor irregularities, like the power to throw out the entire poll of an election district for irregularities, must be exercised very sparingly and with the idea in mind that either an individual voter or a group of voters are not to be disfranchised at an election except for compelling reasons.'" *Appeal of Norwood*, 382 Pa. 547, 116 A. 2d 554, 555

The Commissioner finds no reason to suspect that the marks made on the ballots in Exhibit B were for the purpose of distinguishing the ballot and he determines therefore that they are valid and will be added to the tally.

Exhibit C—1 ballot on which proper marks appear before the name of two candidates. The name "Horace Bacon" is written in the first blank space reserved for personal choice and a cross appears in the square before the write-in.

The Commissioner finds no reason to question this ballot. The statute which prescribes the form of the ballot (*R. S. 18:7-30*) requires as many ruled blank spaces as there are members to be voted for. At the top of the ballot there are the following instructions:

"To vote for any person whose name is not printed upon this ballot write or paste the name in the blank space and mark a cross (X), plus (+) or check (✓) mark with black ink or black lead pencil in the place or square at the left of the name of such person. Do not vote for more candidates than are to be elected."

In this case the voter complied exactly with the instructions and voted for two candidates whose names were printed on the ballot and for a person whose name was not. The Commissioner finds and determines that the one ballot in Exhibit C is valid and will be counted.

Exhibit D—1 ballot with a check mark before the names of three candidates. Although part of the mark is within the square provided, both ends of the check extend well beyond the limits of the box.

The Commissioner finds no merit in the contention that the mark is not substantially within the square. All three marks are similar and represent nothing more than a calligraphic idiosyncrasy. The Commissioner finds and determines that there are proper marks substantially within the squares and the ballot will, therefore, be counted.

Exhibit E—1 ballot on which there are proper marks before the names of three candidates. A cross mark has been erased before the name of a fourth candidate. In the square before the name of a fifth candidate there appears a short diagonal line beginning at the upper right hand corner and extending to the center of the box.

The Commissioner finds no reason to invalidate this ballot because of the erasure. There is no ground for suspecting that the obliteration was intended to identify the ballot and every reason to assume that the voter either made an error or changed his mind. The erasure in this instance indicates nothing more than an intention not to vote for the particular candidate. Such being the case the ballot should not be invalidated because of the erasure. *R. S. 19:16-4. Goddard v. Kelly, 27 N. J. Super. 517 (App. Div. 1953)*

There remains the question of the short diagonal line in one of the voting squares. This mark invalidates the ballot if it is considered to be an intention to vote for a fourth candidate or a mark for the purpose of distinguishing the ballot. The Commissioner concludes that it is neither. It could not be considered as a vote for a candidate in any case for the reason that it does not meet the requirement of a cross, a plus or a check. Nor does it appear to have an identifying purpose. It is reasonable to assume in this case that the voter marked a cross before one candidate and started to do so for another. He then either changed his mind, discovered that he had erred or for some other reason altered his intention. Although he erased the complete symbol he presumably saw no reason to obliterate the partial mark. The Commissioner concludes that the intent of the voter can be clearly determined, and that there is insufficient ground to void this ballot. It will therefore be counted for those candidates properly marked.

Adding the contested ballots determined to be valid to the previous tally of the uncontested ballots yields the following final result:

	<i>Un-</i>		<i>Exhibits</i>					<i>Total</i>
	<i>Contested</i>	<i>Absentee</i>	<i>A</i>	<i>B</i>	<i>C</i>	<i>D</i>	<i>E</i>	
Richard Polhamus	388	10	5	1	..	1	..	405
Samuel Veach	389	10	5	1	..	1	..	406
James Gerard	401	1	..	2	1	405
Carl S. Gant	382	10	5	1	..	1	..	399
Charles S. Tozer	412	1	..	1	1	..	1	416
Martin Rafine	399	1	..	2	1	..	1	404

The Commissioner finds and determines that Charles S. Tozer and Samuel Veach were elected to full terms of 3 years each on the Board of Education of Maurice River Township.

The Commissioner further finds and determines that no other candidate received a plurality of votes sufficient for election (*R. S. 18:7-41*), and there has been, therefore, a failure to elect a member to the third vacant seat on the Board of Education. The Cumberland County Superintendent of Schools is authorized, pursuant to *R. S. 18:4-7d*, and directed to appoint a qualified citizen of Maurice River Township to a seat on the Board of Education to serve until the organization meeting following the next annual school election.

COMMISSIONER OF EDUCATION.

April 2, 1965.

Pending before State Board of Education.

XV

TEACHER'S TENURE IN DISTRICT NOT VOIDED
BY FAILURE TO ACQUIRE TENURE OF POSITION

HAROLD REINISH,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK
IN THE COUNTY OF BERGEN,

Respondent.

For the Petitioner, Cassel R. Ruhlman, Esq.

For the Respondent, Eznick Bogosian, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner contends that respondent's failure to re-employ him for the 1964-65 school year after six consecutive years of employment as a guidance counselor in respondent's school district is an illegal violation of his tenure rights. He prays the Commissioner to so find and to order his assignment to a position within the scope of his professional certificate for the 1964-65 school year. Respondent disclaims any illegal action with respect to petitioner, holding that he had acquired no tenure rights and that its decision not to re-employ him was an exercise of discretion within the scope of its authority.

There being no dispute as to the facts, the matter is submitted to the Commissioner by a Stipulation of Facts and Briefs of Counsel.

Petitioner began his employment in respondent's school district on September 1, 1958, as a guidance counselor and continued in that employment and assignment through successive academic years until June 30, 1964. During these six school years he held no other assignment. At the beginning of his employment he was issued a Limited Teacher's Certificate which authorized him "to serve as a counselor who is assigned full-time in carrying

out guidance and student personnel services.” This certificate was made permanent on May 22, 1961. It is also stipulated that petitioner is, and since 1958 has been, eligible for issuance of a Limited Secondary Teacher’s Certificate to teach Social Studies in grades 7 to 12. Respondent decided not to re-employ petitioner as guidance counselor for the 1964-65 school year and so notified him. Petitioner was not transferred to any other position in the school district nor offered any alternative assignment.

Petitioner contends that as a guidance counselor holding the appropriate certificate, and having met the statutory requirement of employment for more than three consecutive academic years, he has acquired tenure in respondent’s employ. He concedes that not having been employed as guidance counselor subsequent to July 1, 1964, he has not acquired protection in that particular assignment, but he does claim tenure in the general classification of teacher. Petitioner admits further that the decision not to continue him as guidance counselor was one that respondent had the authority to make. He contends, however, that relieving him of that assignment did not negate his rights to employment in the school district in the general category of teacher or relieve the Board of Education of the duty to reassign him to a position within the scope of his competence. He argues that *Chapter 231* of the *Laws* of 1962, amending the Teachers Tenure Act (*R. S. 18:13-16*) was not intended to diminish tenure rights but, to the contrary, was enacted to enlarge such protection.

Respondent’s position is that petitioner never acquired tenure as a guidance counselor, having failed to be reappointed to that position for more than two academic years subsequent to July 1, 1962, as required by statute. (*R. S. 18:13-16*) Petitioner’s entire service was as guidance counselor, a position which respondent contends was not covered by any tenure act prior to July 1, 1964. Respondent says that petitioner therefore was always in a non-tenured position and hence never acquired any tenure. It denies that petitioner acquired tenure as a teacher. In support of this contention it notes that on petitioner’s certificate the word “teacher” is crossed out and is replaced by the word “counselor” which is typed in. Respondent also notes that while petitioner may have been eligible for a certificate to teach Social Studies, one was never issued to him. It argues further that petitioner never having served as a teacher, there was no opportunity for respondent to observe and evaluate his competencies in such an assignment and that, therefore, petitioner never fulfilled a probationary period as a teacher as laid down in the law. Finally, respondent says, the tenure laws were not intended to protect employees in positions which they had never occupied and in petitioner’s case there is no position which he formerly held to which he can be reassigned.

The statute governing tenure of professional staff employees is *R. S. 18:13-16*, the relevant portion of which reads as follows:

“The services of all teachers, principals, assistant principals, vice-principals, superintendents, assistant superintendents, and such other employees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners, excepting those who are not the holders of proper certificates in full force and effect, shall be during good behavior and efficiency, (a) after the

expiration of a period of employment of 3 consecutive calendar years in that district unless a shorter period is fixed by the employing board, or (b) after employment for 3 consecutive academic years together with employment at the beginning of the next succeeding academic year, or (c) after employment, within a period of any 4 consecutive academic years, for the equivalent of more than 3 academic years, some part of which must be served in an academic year after July 1, 1940; provided, that the time any such employee had taught in the district in which he was employed at the end of the academic year immediately preceding July 1, 1962, shall be counted in determining such period or periods of employment in that district, except that no employee shall obtain tenure in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964. * * *

Respondent asserts and petitioner concedes that petitioner has no claim to tenure as a guidance counselor. Petitioner was not employed in that capacity on or after July 1, 1964, and according to the statute, *supra*, any tenure he obtained prior to that date would have to have been in one of four categories: teacher, principal, assistant superintendent, or superintendent.

Respondent errs, however, when it asserts that petitioner acquired no tenure during his more than 3 years of employment as a guidance counselor because such position was not covered by any tenure act. To so hold would void the rights of thousands of vice-principals, co-ordinators, supervisors, librarians, directors, and others who acquired tenure of employment in the general category of teacher. Were respondent correct in this contention, prior to July 1, 1964, tenure would have accrued only to superintendents, assistant superintendents, principals, and those assigned to classroom teaching. All other professional personnel would be excluded by definition. The Commissioner cannot believe that the Legislature ever intended to make such an artificial distinction between members of the professional staff of a school. Ever since the enactment of the first tenure act (*Chapter 243 of the Laws of 1909*) the word "teacher" has been interpreted to include all those faculty members who were not principals or supervising principals or later (*Chapter 236 of the Laws of 1952*), assistant superintendents and superintendents.

In the case of *Werlock v. Woodbridge Board of Education*, 1939-49 S. L. D. 107, 112, affirmed N. J. State Board of Education, affirmed 5 N. J. Super. 140 (*App. Div.* 1949) the Commissioner held:

"The position of Supervisor of Elementary Education is not mentioned specifically in the tenure statute. The positions mentioned are those of supervising principal, principal and teacher. The word 'teacher' in the tenure statute is broad enough to include supervisors. * * *

The New Jersey courts have clearly enunciated the same conclusion:

"The position of 'Supervisor to Supervise Grade Schools' is not recognized by the school laws of this State as extending to the holder thereof tenure other than as a teacher. In the case of *Werlock*, *supra*, the Commissioner of Education in a similar situation held that the position of 'Supervisor of Elementary Education,' not being mentioned specifically in the tenure statute, did not give to the holder of that position tenure of supervising principal or principal, but that the tenure protection enjoyed

by the petitioner was only that of a 'teacher,' * * *." *Lange v. Audubon Board of Education*, 26 N. J. Super. 83, 86 (App. Div. 1953)

"Appellant would have us treat this case as though both co-ordinator 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 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 * * *." *Lascari v. Lodi Board of Education*, 36 N. J. Super. 420, 430 (App. Div. 1955)

"Persons in any other categories, such as vice-principals, supervisors, etc., do not obtain tenure as such but only in the status of the incumbent as a teacher. * * *." *Moresch v. Bayonne Board of Education*, 52 N. J. Super. 105, 111 (App. Div. 1958)

The conclusion is inescapable that the word "teacher" as used in the tenure statutes is a general classification embracing many job titles such as co-ordinator, supervisor, vice-principal, department head, coach, librarian, and others. Such a classification would unquestionably include guidance counselor. Nor is the use of the noun "teacher" to designate a broad spectrum of school assignments a unique practice. In both the minimum salary act (R. S. 18:13-13.1 *et seq.*) and the Teachers' Pension and Annuity Fund act (R. S. 18:13-112.3 *et seq.*) the word "teacher" is given an even more inclusive meaning than that found in the tenure laws.

In the instant matter, petitioner has been employed by respondent for six consecutive academic years as a guidance counselor. Such a period of service more than fulfills the probationary time required by statute for the accrual of tenure of employment in the school district. As a guidance counselor he has acquired tenure in the general category of teacher and he is entitled to continue in his employment as a teacher in this school system. Respondent has no obligation to continue him in his assignment as guidance counselor but may in its discretion transfer or reassign him to any position on its staff for which he may be qualified. Should respondent continue him as guidance counselor he will, of course, then attain tenure in that specific position by the application of *Chapter 231* of the *Laws* of 1962. Respondent has obviously wished to avoid fixing petitioner permanently in the position of guidance counselor and has, therefore, not continued him in that capacity subsequent to July 1, 1964. It has every legal right to make this decision. It does not follow, however, that by its denial of tenure in the job of guidance counselor, respondent can also abrogate rights to employment in the school system which had vested in petitioner some years before. The decision to give tenure of employment to petitioner was made by the board of education which took office in February 1961, and which offered him employment for his fourth consecutive academic year commencing September 1961. That decision cannot now be rescinded by the current Board of Education except for good cause established by charges and a hearing thereon.

Respondent looks for support of its argument that petitioner was not a teacher, to the teacher certification procedures. It cites the fact that the word "teacher" is crossed out on the certificate issued to petitioner so that it reads

"This Certifies That *Harold Reinish* is authorized to serve as *teacher counselor who is assigned full time in carrying out guidance and student personnel services.*" (words not italicized are printed on the certificate; those italicized are made by typewriter)

The Commissioner takes notice, however, that it is standard practice in the Office of Teacher Certification to use a single printed form for the issuance of many kinds of certificates. This same form is also used for school librarians, school social workers, school speech correctionists, school occupational therapists, and other similar "special teachers." In each case the word "teacher" is crossed out by typewriter and the appropriate job title is typed in. It cannot be argued successfully that such employees are not teachers or that they do not come within the scope of the tenure act because of a routine practice on the part of clerks in the Office of Teacher Certification. It must be noted, too, that respondent's argument ignores the fact that the certificate itself bears the caption "Permanent Teacher's Certificate."

Nor is there any merit in the argument that even though petitioner may have been eligible for the issuance of a certificate to teach Social Studies, none was issued to him. This also is consistent with usual practice. Application for a certificate is made when employment is obtained and for the particular license needed. Petitioner, having no need of a Social Studies certificate, could not be expected to apply for its issuance until he had need for it. The fact that he qualified for such a certificate is enough. The Commissioner finds that petitioner has held an appropriate teacher's certificate and the mere omission of additional fields on the license already issued is no bar to the inclusion of such other areas of teaching competence as he may qualify for when and if needed.

Respondent contends further that it has had no opportunity to observe and evaluate petitioner as a classroom teacher and, therefore, the purpose of the statutory probationary period has not been fulfilled. In making this assertion, respondent ignores the fact that the decision to give or not to give petitioner tenure in the district was never its to make. That determination was made in petitioner's favor by the 1961-62 Board of Education. It must be presumed that that body knew what it was doing, made such observations and evaluations as it deemed necessary and appropriate, and made its decision in accordance with its best judgment. While it is true that boards of education, as non-continuous bodies, generally cannot by their actions bind their successors, *Skladzien v. Bayonne*, 12 N.J. Misc. 602 (Sup. Ct. 1934), affirmed 115 N.J.L. 203 (E. & A. 1935) the tenure laws by legislative pre-emption, provide one of the notable exceptions to this rule. Respondent Board of Education had the duty and responsibility to decide, after the 1962 amendment to the tenure law, whether petitioner should or should not acquire tenure as a guidance counselor. That decision it made against petitioner's interests and petitioner has accepted it. Its authority cannot now be stretched to cover a prior period and to abrogate a right already vested.

Finally, respondent argues that the tenure laws were not intended to protect employees in positions which they had never occupied and petitioner never held any other position to which he can now be reassigned. This contention must fall under the holding that petitioner has occupied a position as teacher and as such the tenure laws were enacted to protect and preserve

his employment rights. The Commissioner would observe also that it is not uncommon for boards of education to transfer teachers who are under tenure to new assignments and when such a reassignment occurs the teacher remains protected in his tenure. Lastly, it is admitted that petitioner held no other position in respondent's employ. Obviously he cannot, therefore, be reassigned to a former position and any assignment other than guidance counselor must, of necessity, be new.

The Commissioner agrees with petitioner's assertion that the intent of Chapter 231 of the *Laws* of 1962 was to enlarge the protection afforded members of school staffs in their employment rather than to diminish it. Prior to its enactment, persons in such positions as vice-principal, supervisor, counselor, etc., although protected in their general employment in the school system, were subject to arbitrary reassignment no matter how many years had been served. Elimination of such insecurity of position was one of the two primary aims of the 1962 amendment. The other objective was to overcome the reluctance of boards of education to promote from within the staff by providing an additional period of probation of two years in the new assignment before tenure in that position accrued. Finally, in order to give school districts time to organize their staffs in terms of the new provisions, a transition period of two years, from July 1, 1962, to July 1, 1964, was afforded before tenure in the added categories became operative. The total effect was to liberalize and enlarge the protection afforded and not to deprive employees of employment rights already won.

Respondent relies on two cases: *Weider v. High Bridge Board of Education*, 112 N. J. L. 289 (Sup. Ct. 1933) and *Becker v. Middleburgh Board of Education*, 211 N. Y. S. 2d 193 (Court of Appeals 1951). These cases are not in point. In *Weider* the teacher's job was abolished and she was unable to qualify for any other position. In the subject case the position of guidance counselor formerly held by petitioner was not abolished but still exists with the duties being performed by someone else. Furthermore, petitioner is qualified for other assignments in respondent's employ. The *Becker* case is not applicable to New Jersey because there are significant differences between the New York and New Jersey tenure laws. In *Becker* the New York court held that the teacher had not acquired tenure, although employed for 6 years, because she had not served the required probationary period in one "area of instruction." There is no such requirement in the New Jersey Statutes.

The Commissioner finds and determines that Harold Reinish has not acquired tenure as a guidance counselor but that he has acquired tenure of employment as a teacher in the Cliffside Park School District. The respondent Board of Education is directed to reinstate the petitioner as a teacher in its schools. The petitioner may make application for salary lost during the period of his illegal dismissal and until that issue is settled the Commissioner will retain jurisdiction over this matter.

COMMISSIONER OF EDUCATION.

April 22, 1965.

Pending before State Board of Education.

XVI

TEACHER'S TENURE IN DISTRICT NOT VOIDED
BY FAILURE TO ACQUIRE TENURE OF POSITION

CELINA G. DAVID,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CLIFFSIDE PARK
IN THE COUNTY OF BERGEN,

Respondent.

For the Petitioner, Joseph C. Woodcock, Jr., Esq.

For the Respondent, Eznick Bogosian, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner claims tenure as a teacher in the Cliffside Park School District and contends that respondent's action in terminating her employment as a guidance counselor is a violation of her rights. Respondent asserts that as guidance counselor petitioner acquired no tenure protection and her dismissal was a proper exercise of its discretion.

Both parties entered into a stipulation of facts which avoided the necessity of a hearing. Briefs of counsel were submitted and oral argument was heard by the Assistant Commissioner in charge of Controversies and Disputes on December 8, 1964, at Trenton.

Petitioner began her employment in respondent's school district on September 1, 1958, as a guidance counselor and continued in that employment and assignment through successive academic years until June 30, 1964. During these six school years she held no other assignment. At the beginning of her employment she was issued a Limited Teacher's Certificate which authorized her to serve as a counselor. This certificate was made permanent on August 12, 1959, and authorized her "to serve as a full-time counselor in carrying out guidance and student personnel services; including the coordination of said functions in a school system." Petitioner is, and since 1957 has been, eligible for issuance of a Limited Secondary Teacher's Certificate to teach French, English and German. Prior to June 30, 1964, petitioner was notified by the superintendent of schools on behalf of respondent that she would not be employed after that date. By letter dated July 16, 1964, petitioner was informed by respondent that she would no longer be employed as Director of Guidance and that her services had ended as of June 30, 1964. Petitioner was not transferred to any other position in the school district nor offered any alternative assignment.

Petitioner contends that as a guidance counselor holding the appropriate certificate, and having met the statutory requirement of employment for more than three consecutive academic years, she has acquired tenure in respondent's employ. She concedes that not having been employed as guidance counselor

subsequent to July 1, 1964, she has not acquired protection in that particular assignment but she does claim tenure in the general classification of teacher. Petitioner admits further that the decision not to continue her as guidance counselor was one that respondent had the authority to make. She contends, however, that relieving her of that assignment did not negate her rights to employment in the school district in the general category of teacher or relieve the Board of Education of the duty to reassign her to a position within the scope of her competence. She argues that *Chapter 231* of the *Laws* of 1962, amending the Teachers Tenure Act (*R.S. 18:13-16*) was not intended to diminish tenure rights but, to the contrary, was enacted to enlarge such protection.

Respondent's position is that petitioner never acquired tenure as a guidance counselor, having failed to be reappointed to that position for more than two academic years subsequent to July 1, 1962, as required by statute. (*R.S. 18:13-16*) Petitioner's entire service was as guidance counselor, a position which respondent contends was not covered by any tenure act prior to July 1, 1964. Respondent says that petitioner therefore was always in a non-tenured position and hence never acquired any tenure. It denies that petitioner acquired tenure as a teacher. In support of this contention it notes that on petitioner's certificate the word "teacher" is crossed out and is replaced by the word "counselor" which is typed in. Respondent also notes that while petitioner may have been eligible for a certificate to teach French, English and German, one was never issued to her. It argues further that petitioner never having served as a teacher, there was no opportunity for respondent to observe and evaluate her competencies in such an assignment and that, therefore, petitioner never fulfilled a probationary period as a teacher as laid down in the law. Finally, respondent says, the tenure laws were not intended to protect employees in positions which they had never occupied and in petitioner's case there is no position which she formerly held to which she can be reassigned.

The statute governing tenure of professional staff employees is *R.S. 18:13-16*, the relevant portion of which reads as follows:

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

in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964. * * *

Respondent asserts and petitioner concedes that petitioner has no claim to tenure as a guidance counselor. Petitioner was not employed in that capacity on or after July 1, 1964, and according to the statute, *supra*, any tenure she obtained prior to that date would have to have been in one of four categories: teacher, principal, assistant superintendent, or superintendent.

Respondent errs, however, when it asserts that petitioner acquired no tenure during her more than 3 years of employment as a guidance counselor because such position was not covered by any tenure act. To so hold would void the rights of thousands of vice-principals, co-ordinators, supervisors, librarians, directors, and others who acquired tenure of employment in the general category of teacher. Were respondent correct in this contention, prior to July 1, 1964, tenure would have accrued only to superintendents, assistant superintendents, principals, and those assigned to classroom teaching. All other professional personnel would be excluded by definition. The Commissioner cannot believe that the Legislature ever intended to make such an artificial distinction between members of the professional staff of a school. Ever since the enactment of the first tenure act (*Chapter 243 of the Laws of 1909*) the word "teacher" has been interpreted to include all those faculty members who were not principals or supervising principals or later (*Chapter 236 of the Laws of 1952*), assistant superintendents and superintendents.

In the case of *Werlock v. Woodbridge Board of Education*, 1939-49 S. L. D. 107, 112, affirmed N. J. State Board of Education, affirmed 5 N. J. Super. 140 (*App. Div.* 1949) the Commissioner held:

"The position of Supervisor of Elementary Education is not mentioned specifically in the tenure statute. The positions mentioned are those of supervising principal, principal and teacher. The word 'teacher' in the tenure statute is broad enough to include supervisors. * * *

The New Jersey courts have clearly enunciated the same conclusion:

"The position of 'Supervisor to Supervise Grade Schools' is not recognized by the school laws of this State as extending to the holder thereof tenure other than as a teacher. In the case of *Werlock*, *supra*, the Commissioner of Education in a similar situation held that the position of 'Supervisor of Elementary Education,' not being mentioned specifically in the tenure statute, did not give to the holder of that position tenure of supervising principal or principal, but that the tenure protection enjoyed by the petitioner was only that of a 'teacher,' * * *." *Lange v. Audubon Board of Education*, 26 N. J. Super. 83, 86 (*App. Div.* 1953)

"Appellant would have us treat this case as though both co-ordinator 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 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 * * *." *Lascari v. Lodi Board of Education*, 36 N. J. Super. 426, 430 (*App. Div.* 1955)

“Persons in any other categories, such as vice-principals, supervisors, etc., do not obtain tenure as such but only in the status of the incumbent as a teacher. * * *” *Mores v. Bayonne Board of Education*, 52 N. J. Super. 105, 111 (App. Div. 1958)

The conclusion is inescapable that the word “teacher” as used in the tenure statutes is a general classification embracing many job titles such as coordinator, supervisor, vice-principal, department head, coach, librarian, and others. Such a classification would unquestionably include guidance counselor. Nor is the use of the noun “teacher” to designate a broad spectrum of school assignments a unique practice. In both the minimum salary act (R. S. 18:13-13.1 *et seq.*) and the Teachers’ Pension and Annuity Fund act (R. S. 18:13-112.3 *et seq.*) the word “teacher” is given an even more inclusive meaning than that found in the tenure laws.

In the instant matter, petitioner has been employed by respondent for six consecutive academic years as a guidance counselor. Such a period of service more than fulfills the probationary time required by statute for the accrual of tenure of employment in the school district. As a guidance counselor she has acquired tenure in the general category of teacher and she is entitled to continue in her employment as teacher in this school system. Respondent has no obligation to continue her in her assignment as guidance counselor but may in its discretion transfer or reassign her to any position on its staff for which she may be qualified. Should respondent continue her as guidance counselor she will, of course, then attain tenure in that specific position by the application of Chapter 231 of the Laws of 1962. Respondent has obviously wished to avoid fixing petitioner permanently in the position of guidance counselor and has, therefore, not continued her in that capacity subsequent to July 1, 1964. It has every legal right to make this decision. It does not follow, however, that by its denial of tenure in the job of guidance counselor, respondent can also abrogate rights to employment in the school system which had vested in petitioner some years before. The decision to give tenure of employment to petitioner was made by the board of education which took office in February 1961, and which offered her employment for her fourth consecutive academic year commencing September 1961. That decision cannot now be rescinded by the current Board of Education except for good cause established by charges and a hearing thereon. In this connection the Commissioner notes a document submitted by petitioner which reads as follows:

“BOARD OF EDUCATION
CLIFFSIDE PARK, NEW JERSEY

ANNUAL NOTICE TO TEACHERS UNDER TENURE

Name *Celina David*

At a Regular Meeting of the Cliffside Park Board of Education held on June 14, 1962, your salary for the school year commencing September 1, 1962 and ending June 30, 1963, was fixed at the rate of \$7,750.00 per annum.

The signing of your name to this Notice indicates that you will serve as a *Teacher* in the Cliffside Park Public Schools for the school year 1962-1963 at the salary stated above.

Dated: June 14, 1962

Board of Education of the Borough of Cliffside Park, New Jersey.

Attest: /s/ *Edward J. Tirello*
Secretary

/s/ *Paul Rotondi*
President

Signed _____”

It is evident from the above that preceding Boards of Education considered and accepted petitioner as a teacher under tenure.

Respondent looks for support of its argument that petitioner was not a teacher, to the teacher certification procedures. It cites the fact that the word “teacher” is crossed out on the certificate issued to petitioner so that it reads

“This Certifies That *Celina G. David* is authorized to serve as teacher *a full-time counselor in carrying out guidance and students personnel services; including the co-ordination of said functions in a school system.*” (words not italicized are printed on the certificate; those italicized are made by typewriter).

The Commissioner takes notice, however, that it is standard practice in the Office of Teacher Certification to use a single printed form for the issuance of many kinds of certificates. This same form is also used for school librarians, school social workers, school speech correctionists, school occupational therapists, and other similar “special teachers.” In each case the word “teacher” is crossed out by typewriter and the appropriate job title is typed in. It cannot be argued successfully that such employees are not teachers or that they do not come within the scope of the tenure act because of a routine practice on the part of clerks in the Office of Teacher Certification. It must be noted, too, that respondent’s argument ignores the fact that the certificate itself bears the caption “Permanent Teacher’s Certificate.”

Nor is there any merit in the argument that even though petitioner may have been eligible for the issuance of a certificate to teach French, English and German, none was issued to her. This also is consistent with usual practice.. Application for a certificate is made when employment is obtained and for the particular license needed. Petitioner, having no need of a certificate to teach French, English and German, could not be expected to apply for its issuance until she had need for it. The fact that she qualified for such a certificate is enough. The Commissioner finds that petitioner has held an appropriate teacher’s certificate and the mere omission of additional fields on the license already issued is no bar to the inclusion of such other areas of teaching competence as she may qualify for when and if needed.

Respondent contends further that it has had no opportunity to observe and evaluate petitioner as a classroom teacher and, therefore, the purpose of the statutory probationary period has not been fulfilled. In making this assertion, respondent ignores the fact that the decision to give or not to give petitioner tenure in the district was never its to make. That determination was made in

petitioner's favor by the 1961-62 Board of Education. It must be presumed that that body knew what it was doing, made such observation and evaluations as it deemed necessary and appropriate, and made its decision in accordance with its best judgment. While it is true that boards of education, as non-continuous bodies, generally cannot by their actions bind their successors, *Skladzien v. Bayonne*, 12 N. J. Misc. 602 (Sup. Ct. 1934), affirmed 115 N. J. L. 203 (E. & A. 1935), the tenure laws by legislative pre-emption, provide one of the notable exceptions to this rule. Respondent Board of Education had the duty and responsibility to decide, after the 1962 amendment to the tenure law, whether petitioner should or should not acquire tenure as a guidance counselor. That decision is made against petitioner's interests and petitioner has accepted it. Its authority cannot be stretched to cover a prior period and to abrogate a right already vested.

Finally, respondent argues that the tenure laws were not intended to protect employees in positions which they had never occupied and petitioner never held any other position to which she can now be reassigned. This contention must fall under the holding that petitioner has occupied a position as teacher and as such the tenure laws were enacted to protect and preserve her employment rights. The Commissioner would observe also that it is not uncommon for boards of education to transfer teachers who are under tenure to new assignments and when such a reassignment occurs the teacher remains protected in her tenure. Lastly, it is admitted that petitioner held no other position in respondent's employ. Obviously she cannot, therefore, be reassigned to a former position and any assignment other than guidance counselor must, of necessity, be new.

The Commissioner agrees with the petitioner's assertion that the intent of Chapter 231 of the Laws of 1962 was to enlarge the protection afforded members of school staffs in their employment rather than to diminish it. Prior to its enactment, persons in such positions as vice-principal, supervisor, counselor, etc., although protected in their general employment in the school system, were subject to arbitrary reassignment no matter how many years had been served. Elimination of such insecurity of position was one of the two primary aims of the 1962 amendment. The other objective was to overcome the reluctance of boards of education to promote from within the staff by providing an additional period of probation of two years in the new assignment before tenure in that position accrued. Finally, in order to give school districts time to organize their staffs in terms of new provisions, a transition period of two years, from July 1, 1962, to July 1, 1964, was afforded before tenure in the added categories became operative. The total effect was to liberalize and enlarge the protection afforded and not to deprive employees of employment rights already won.

Respondent relies on two cases: *Weider v. High Bridge Board of Education*, 112 N. J. L. 289 (Sup. Ct. 1933) and *Becker v. Middleburgh Board of Education*, 211 N. Y. S. 2d 193 (Court of Appeals 1951). These cases are not in point. In *Weider* the teacher's job was abolished and she was unable to qualify for any other position. In the subject case the position of guidance counselor formerly held by petitioner was not abolished but still exists with the duties being performed by someone else. Furthermore, petitioner is qualified for other assignments in respondent's employ. The *Becker* case is not applicable to New Jersey because there are significant differences between the

New York and the New Jersey tenure laws. In *Becker* the New York court held that the teacher had not acquired tenure, although employed for 6 years, because she had not served the required probationary period in one "area of instruction." There is no such requirement in the New Jersey Statutes.

The Commissioner finds and determines that Celina G. David has not acquired tenure as a guidance counselor but that she has acquired tenure of employment as a teacher in the Cliffside Park School District. The respondent Board of Education is directed to reinstate the petitioner as a teacher in its schools. The petitioner may make application for salary lost during the period of her illegal dismissal, and until that issue is settled the Commissioner will retain jurisdiction over this matter.

COMMISSIONER OF EDUCATION.

April 22, 1965.

Pending before State Board of Education.

XVII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE BOROUGH OF TOTOWA, PASSAIC COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the voting for 3 members of the Board of Education of the Borough of Totowa for 3-year terms at the annual school election on February 9, 1965, were as follows:

Carmen J. Gaita	723
Lawrence Mawhinney	658
John L. Trumbour	629
Andrew A. Malatesta	683
Joseph V. Naughton	518
Joseph S. Lami	794
Lester Ravitz	493

A petition for a recount was received by the Commissioner of Education on February 18, 1965. On February 19 the Assistant Commissioner of Education in charge of Controversies and Disputes attempted to make a recheck of the tallies on the four voting machines used in this election. Unfortunately, only two machines could be read because, through inadvertence, the other two had been cleared and the counters returned to zero. This mischance was explained to the petitioners and others present by the Assistant Commissioner and by the Chairman of the Passaic County Board of Elections. Candidates Mawhinney, Ravitz and Naughton thereafter filed the subject petition which prays for a new election on the grounds that (1) the results of the election could not be verified because of the clearing of two of the voting machines; (2) there was a discrepancy of 100 votes for Candidate Ravitz between the tally publicly announced and the written Report of the Proceedings; (3) a request to read the counters on the voting machines made by one of the candidates following the close of the election was refused; and (4) the elec-

tion board neglected to compare the signatures in the poll book with those in the signature copy register during the course of the election.

(1) Resetting the counters to zero on two of the voting machines was an unfortunate mischance. Totowa Borough is a constituent of the Passaic County Regional High School District. As such, its citizens participated in two school elections a week apart. The regional election occurred first and the voting machines used for it, some of which were located in polling places in Totowa, were returned to the County Election Board warehouse. Other machines were sent to Totowa for use in the local school district election on February 9. These also were returned to the warehouse. All of the machines assigned to Totowa were tagged "Totowa Borough" whether they were used in the regional or the local school election. It so happened, when the time came to clear the machines used in the regional school election, that the custodians cleared two of those used in Totowa Borough for local school election purposes before becoming aware that they had confused them with those used in the regional school election, which were due to be cleared. Such a mischance is regrettable and, of course, irremediable. However, no evidence was educed nor is there any reason to believe that it was other than inadvertent and a matter of human fallibility.

The Commissioner knows of no similar instance in which the results of a contested referendum could not be verified. However regrettable this may be it cannot now be remedied. The Commissioner will look, therefore, to other available evidence to determine the validity of this election.

(2) On the second count, the 100 vote discrepancy, the testimony is clear and convincing. Those who testified on this issue were sure that the tally for Candidate Ravitz announced by the election workers at the conclusion of the voting at polling place #2 was 238 votes. The Report of the Proceedings filed with the secretary of the Board of Education showed 338. This variation of 100 votes was unexplained and formed grounds for questioning the accuracy of the election, according to petitioners.

The chairman of the election board at polling place #2 testified that it is her practice to read the counters slowly and to have the secretary call each tally back as it is recorded. It is also her custom, she asserted, to repeat this procedure at least twice on each machine, and she is sure that this was done in this instance. Both the chairman and the secretary had still in their possession, papers on which they had made notations of the tallies. From these personal records and their own recollection they testified that the correct count for Candidate Ravitz at polling place #2 was 238 and not 338 as it appears on the Report of the Proceedings. The secretary was certain that the number on the Report should have been 238 and that she made the error in transcribing it.

Except for the shadow of doubt which it tends to cast on the validity of this election, this discrepancy has no substance. Whichever number of votes Candidate Ravitz received could make no difference in the ultimate outcome because of the margin of difference between his tally and the three highest candidates. However that may be, the Commissioner is convinced from the testimony that the discrepancy was the result of an error in transcribing the results which is now satisfactorily explained.

(3) The testimony discloses that sometime after the close of the election Candidate Gaita asked to see the counters on the machines in polling place #2. It appears that this request was refused because it came too late. The chairman of the election board stated that after the counters had been read and the Report completed and there appeared nothing more to be done, she locked the two machines. The request to look at the back of the machines was made to the secretary of the Board of Education who properly disclaimed authority. The election board chairman testified that she would have permitted an inspection of the tallies while the machine was open by anyone who asked but that once it was locked she was without authority to open it and it would have been improper for her to do so. She testified that there was ample time for such an inspection before she locked the machine. The Commissioner finds nothing irregular about this procedure.

(4) It is evident that the election officials made no comparison of signatures of voters. According to the testimony, when a voter appeared his name and address was asked and then verified in the signature copy register. If he was properly registered he was permitted to sign the poll list and given a ballot. No attempt was made to compare the signature in the poll list book with that previously made on the signature copy register.

In this omission the election board in both polling places erred. The relevant statute, R. S. 18:7-35.6, provides:

“After the voter shall have so signed and before an official ballot shall be given to him, one of the election officers shall compare the signature made in the poll list with the signature theretofore made by the voter in the signature copy register, and if the signature thus written in the poll list is the same or sufficiently similar to the signature in the signature copy register, the voter shall be eligible to receive a ballot.”

In passing it may be noted that this omission was corrected in the subsequent election held to resubmit the unapproved budget. However that may be, there is no evidence or any charge that votes were illegally cast as a result of this omission. In the absence of such proof, the Commissioner finds no ground in this charge to challenge the validity of the election.

Petitioners pray for an Order of the Commissioner declaring the subject election null and void and scheduling a new election in its stead. They argue that although any one of the irregularities taken singly may be insufficient to set the election aside, the total effect gives rise to enough doubt that the will of the people was fairly determined to invalidate the results and permit the electorate to vote again.

The Commissioner cannot agree. Imperfections in any election are always to be deplored and admittedly there were a number in the one at issue. He concurs that any one of them, standing alone, must be considered insufficient to challenge the election successfully. He concludes, further, that even taken as a whole, the effect falls short of that needed to invalidate an election. It is well established that elections are to be given effect whenever possible, and are not to be set aside unless it can be shown that the irregularities were of such a nature that the will of the people was thwarted, was not properly expressed, or could not be fairly determined.

“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 Edition of School Law Decisions, at page 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 effect to elections when possible. And it has been held that gross irregularities when not amounting to fraud do not vitiate an election.’” *In the Matter of the Recount of the Annual School Election in Ocean Township*, 1949-50 *S. L. D.* 53, 55

See also *Love v. Freeholders of Hudson County*, 35 *N. J. L.* 269 (*Sup. Ct.* 1871).

There is no such showing here. The testimony discloses that except for their omission of signature comparison the two election boards performed their duties conscientiously and competently during the balloting and in the reading of the results. With the exception of the error on the Report of the Proceedings, the tally for each candidate on each machine was in agreement with the notations made by those who testified. There appears to be no room for question that the counters were read accurately and the results correctly determined even though actual verification was not possible.

Much of the questioning of this election rests on conjecture and suspicion resulting from rumors which apparently were rife. For example, there was talk that one of the machines had jammed, that a machine had been closed down because it would not tally more than 500 votes, and that the vote on one machine was much less than should have been true and the results on it did not follow the “pattern of voting” on the other three. All such conjectures, rumors and questions were explained and dispelled during the course of the testimony. Even were this not so, mere suspicion of improper conduct is not enough to void an election. *Groth v. Schlemm*, 65 *N. J. L.* 431 (*Sup. Ct.* 1900); *In re Clee*, 119 *N. J. L.* 310 (*Sup. Ct.* 1938); *Hackett v. Mayhew*, 62 *N. J. L.* 481 (*Sup. Ct.* 1898)

Failure of election workers to compare signatures as provided by statute cannot be upheld or condoned. It does not constitute an irregularity for which the election in this case can be set aside, however, absent a showing that the omission resulted in the casting of illegal votes which could have affected the outcome. *Purdy v. Roselle Park Board of Education*, 1949-50 *S. L. D.* 34; *In re Clee*, *supra*; *In re Wene*, 26 *N. J. Super.* 363 (*Law. Div.* 1953); *Sharrock v. Keansburg*, 15 *N. J. Super.* 11 (*App. Div.* 1951)

Finally, the Commissioner finds no statutory ground on which the prayer of petitioners for a new election can be granted. There is no statutory provision for the holding of a second election except for the resubmission of rejected appropriation items under *R. S.* 18:7-81. To order a new election would require some ground tantamount to a deliberate action on the part of a board of education to deprive the electorate of an opportunity to express its will such as occurred in the case of *In the Matter of the Special School*

Election in Clayton Borough, 1960-61 *S.L.D.* 157, affirmed State Board of Education 1960-61 *S.L.D.* 164. In the subject case, the only relief which could be afforded would be to set the election aside and declare a failure to elect, if the Commissioner were satisfied that because of fraud or irregularities the will of the people was suppressed and could not be fairly determined. As has been said above, there is no such showing and the Commissioner does not so find.

The Commissioner finds and determines that Joseph Lami, Carmen J. Gaita and Andrew A. Malatesta were elected to seats on the Totowa Borough Board of Education on February 9, 1965, for full terms of 3 years each.

COMMISSIONER OF EDUCATION.

April 28, 1965.

XVIII

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY.

For the Petitioner, Meyner & Wiley
(G. Douglas Hofe, Jr., Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for three members of the Randolph Township Board of Education for full terms of 3 years at the annual school election held February 9, 1965, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Willard Hedden, Jr.	660	2	662
Richard Scharer	548	1	549
Harry R. McKinney	429	---	429
Anthony E. Fowler	360	---	360
Sally Winer	549	2	551
Lawrence C. Gordon	550	1	551

Five letters, one containing the names of 17 residents, requesting a recount of the votes were received by the Commissioner of Education. In addition, a formal request that the ballots be recounted was filed by attorney Stephen B. Wiley in behalf of these and additional citizens. Pursuant to these requests and at the direction of the Commissioner, the Assistant Commissioner in charge of Controversies and Disputes conducted a recount at the office of the Morris County Superintendent of Schools on March 3, 1965.

By agreement of the parties the recount was limited to a tally of the votes cast for Candidates Scharer, Winer and Gordon. At the conclusion of the recount with all ballots accounted for and with 34 ballots referred to the Commissioner for his determination, the tally of the uncontested ballots stood as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Richard Scharer	538	1	539
Sally Winer	540	2	542
Lawrence C. Gordon	547	1	548

The ballots referred to the Commissioner were grouped into 11 categories and are decided as follows:

Exhibit A: 15 ballots each of which is voted for more than three candidates.

These ballots obviously cannot be counted for any candidate for the three-year term as only three are to be elected and it is impossible to determine the voter's choice. Title 19, to which the Commissioner looks for guidance in determining disputed elections, provides in *R. S. 19:16-3f* as follows:

"If a voter marks more names than there are persons to be elected to an office * * * his ballot shall not be counted for that office * * * ." See also *R. S. 19:16-4*.

The Commissioner finds that these 15 ballots cannot be counted.

EXHIBIT B: 3 ballots on each of which appear cross or check marks to the right and following the name of candidates but no mark of any kind is made in the square where the vote is required to be recorded in front of the name of the candidate.

These ballots cannot be counted as the mandatory statutory requirement to cast a vote has not been met. *R. S. 19:16-3c* provides:

"If no marks are made in the squares to the left of the names of any candidate in any column, but are made to the right of said name, a vote shall not be counted for the candidates so marked * * * ."

The Commissioner determines that these 3 ballots cannot be counted. *In the Matter of the Annual School Election in Union Township, 1939-49 S. L. D. 92*

EXHIBIT C: 6 ballots on which proper marks appear before the names of three candidates. On 5 of these ballots a mark has also been made in a fourth square but with a heavy line then drawn through both the square and its mark and the name of the candidate. This same heavy crossing-out appears on the 6th ballot but below in the section provided for voting for another office, in this case an unexpired one-year term.

The only basis for rejecting these ballots would be a finding that they were so marked by the voter for the purpose of identifying his ballot. Part of *R. S. 19:16-4* is relevant to this question:

"No ballot which shall have, either on its face or back, any mark, sign, erasure, designation or device whatsoever, other than is permitted by this Title, by which such ballot can be distinguished from another ballot, shall be declared null and void, unless the district board canvassing such ballots, or the * * * officer conducting the recount thereof, shall be satisfied that the placing of the mark, sign, erasure, designation or device upon the ballot was intended to identify or distinguish the ballot."

On these ballots it appears clear that the voter merely attempted to correct his vote because he had made an error, changed his mind, or for some other reason. It is probable that the pencils used had no erasers and the only alternative was to cross out non-intended votes by drawing lines through them. There is no reason to suspect that these marks were made with the intent to distinguish the ballot and these votes will therefore be counted and added to the tally. *In re Annual School Election in the Borough of Bloomingtondale*, 1955-56 S. L. D. 103

The Commissioner finds these 6 ballots valid and the votes properly marked for candidates thereon will be added to the tally.

EXHIBIT D: 1 ballot on which proper marks are made in the square before three candidates; cross marks also appear to the extreme right after the names of the same three candidates.

This kind of marking is specifically covered by R. S. 19:16-3b as follows:

"If proper marks are made in the squares to the left of any names of any candidates in any column and in addition thereto, proper marks are made to the right of said names, a vote shall be counted for each candidate so marked; but if the district board canvassing the ballots or the * * * officer conducting a recount thereof, shall be satisfied that the placing of such marks to the left and right of the names was intended to identify or distinguish the ballot, then the ballot shall not be counted and shall be declared null and void."

The Commissioner finds no reason to believe that this ballot was so marked in order to distinguish it. Such markings are commonly found on ballots. *In the Matter of the Annual School Election in Ocean Township*, 1949-50 S. L. D. 53

The Commissioner determines that this ballot is valid and the votes indicated thereon will be added to the tally.

EXHIBIT E: 1 ballot on which no mark is made before any candidate whose name is printed on the ballot. In the three spaces for personal choice the voter has written the names of three candidates whose names are printed above and has marked a cross in the square before each name so inscribed.

The statutes make it clear that this ballot cannot be counted. Any argument that the intent of the voter is clear is not sufficient in the face of a statutory proscription of such marking. The pertinent excerpt of R. S. 19:16-3f provides:

"If a voter * * * writes or pastes the name of any person in the column designated personal choice, whose name is printed upon the ballot as a candidate under the same title of office, * * * his ballot shall not be counted for that office * * *."

The Commissioner determines this ballot to be void and the vote thereon will not be counted.

EXHIBIT F: 1 ballot on which proper marks are made for 3 candidates. The square before a fourth candidate has been filled in with black ink. A hand written message also appears in the left margin before the voting squares.

All parties agree that this ballot should be rejected. In any event it cannot affect the results as it is marked for each of the three contestants herein.

The Commissioner determines that this ballot is invalid and will not be counted.

EXHIBIT G: 2 ballots each of which has been marked in the square before three candidates. The marks are very roughly made with the line obviously made repeatedly.

R. S. 19:16-3g states:

"If the mark made for any candidate or public question is substantially a cross \times , plus $+$ or check \checkmark and is substantially within the square, it shall be counted for the candidate * * *."

The marks on these ballots although imperfectly made are intended to be cross (\times) marks and in the Commissioner's judgment they meet the test of substantiality required by the statute, *supra*. There is no basis for assuming that they were so made in order to identify the ballot. Such marks, frequently found on ballots, may be the result of an uneven writing surface, poor vision or visibility, infirmity, emotional reaction, lack of skill, or a variety of other reasons. In this case, the marks simulate a cross sufficiently to be acceptable and their rough appearance results from no suspected improper purpose. *In re Special School Election in the Township of Tewksbury, 1939-49 S. L. D.* 96

The Commissioner finds these two ballots valid and the votes thereon will be added to the tally.

EXHIBIT H: 3 ballots each voted for three candidates. On one ballot in one square there appear both a check mark and a cross mark. On the other two ballots the voter has marked both a cross mark and a plus mark, one superimposed on the other.

The double mark on the first ballot appears before the name of a candidate other than the parties herein and there is no need to make a determination of it as it cannot affect the result. The ballot is valid with respect to the other two candidates and will be counted.

The Commissioner finds no reason to believe that the double markings on the other two ballots were intended to identify the ballot. In his judgment this eccentric marking appears to be an individual characteristic. While it may be argued that the superimposition of a cross (\times) and a plus ($+$) resulted in a mark which is neither one, in this case the Commissioner is satisfied that the marks are substantially those required and were not made in this fashion for an improper purpose.

The Commissioner determines that the ballots in Exhibit H are valid and their votes will be added to the tally.

EXHIBIT I: 2 ballots on each of which marks have been made for three candidates. An erasure has been made in the square before the name of a fourth candidate. Several of the marks are imperfectly made, the voter evidently having retracted them more than once. One ballot is marked with blue ink.

It is reasonable to assume that the erasures on these ballots were made by the voter for a valid reason and were not intended to distinguish the ballot. Erasures for proper reasons do not render a ballot invalid. *R. S. 19:16-4, supra*. The marks, while somewhat imperfect, are easily recognizable as crosses (X) and are much less rough than those in Exhibit G, *supra*. Nor is the mere use of blue ink sufficient to void a ballot. *R. S. 19:16-4* states in part:

“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.”

See also *In re Annual School Election in the Borough of Sayreville, 1951-52 S. L. D. 47*; *In re Annual School Election in the Borough of Florham Park, 1960-61 S. L. D. 165*.

The Commissioner determines these two ballots to be properly marked and the votes will be added to the tally.

EXHIBIT J: 3 ballots on which the marks before the names of three candidates are roughly made. In some cases the mark has been retraced resulting in an extra line. In others the pencil has not been lifted clearly at the end of a stroke. On one ballot the voter has apparently made a check mark and then bisected it with another line to form a cross (X).

In the Commissioner's judgment, these marks represent nothing more than individual calligraphic idiosyncrasies. Such markings are commonly found. In this case there can be no doubt that they are substantially cross (X) marks. *In re Annual School Election in Monroe Township, 1957-58 S. L. D. 79*

The Commissioner finds no reason to reject the ballots in Exhibit J. These votes will be added to the tally.

EXHIBIT K: 2 ballots each marked for 3 candidates with cross marks, one or more of which are not perfectly made. In several instances one of the diagonal lines is not as long as the other or one part of it has not been completely extended.

Such markings as these also appear frequently. They represent nothing more than individual characteristics in inscribing these particular symbols. There is little question that they comply with the requirement that the mark be substantially one of the three permitted.

The Commissioner finds no reason to question the validity of these ballots and their votes will be added to the tally.

When the votes on the contested ballots determined to be valid are added to the tally, the final result is as follows:

	<i>Uncontested</i>	<i>C</i>	<i>D</i>	<i>G</i>	<i>H</i>	<i>I</i>	<i>J</i>	<i>K</i>	<i>Total</i>
Richard Scharer -----	539	5	1	1	2	---	---	1	549
Sally Winer -----	542	6	1	1	2	1	---	---	553
Lawrence C. Gordon	548	1	---	1	1	2	3	2	558

The Commissioner finds and determines that Willard Hedden, Jr., Lawrence C. Gordon, and Sally Winer were elected on February 9, 1965, to seats on the Randolph Township Board of Education for full terms of three years each.

COMMISSIONER OF EDUCATION.

May 3, 1965.

XIX

FAILURE TO DEFEND AGAINST CHARGES CERTIFIED UNDER TENURE HEARING ACT MAY RESULT IN DISMISSAL

IN THE MATTER OF THE TENURE HEARING OF JOSEPH TROTTER,
CALDWELL-WEST CALDWELL, ESSEX COUNTY.

ORDER OF THE COMMISSIONER OF EDUCATION

The Board of Education of the School District of Caldwell-West Caldwell having certified charges, pursuant to the Tenure Employees Hearing Act, against Joseph Trotter, a custodian in the employ of said district; such charges alleging that on September 15, 1964, March 16, 1965, and April 7, 1965, said Joseph Trotter was under the influence of intoxicating liquor or beverages while on duty and in the performance of his duties at the Washington School; and said Joseph Trotter having notified the Commissioner of Education that he will not offer any defense against such charges, and having further notified the Commissioner and the Trustees of the Teachers Pension and Annuity Fund that he desires to withdraw his membership contributions to said Fund; now therefore, for good cause shown,

IT IS ORDERED, on this 5th day of May, 1965, that the Board of Education be and hereby is authorized to dismiss Joseph Trotter from its employ.

COMMISSIONER OF EDUCATION.

XX

APPLICATION FOR FEDERAL LIBRARY FUNDS REJECTED WHEN FILED AFTER DEADLINE DATE

IN THE MATTER OF THE APPLICATION OF THE TOWNSHIP OF CEDAR GROVE
FOR LIBRARY APPROPRIATION, ESSEX COUNTY.

For the Township of Cedar Grove, Clive S. Cummis, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This is an appeal to the Commissioner of Education to reverse the denial by the New Jersey State Librarian of an application of the Township of Cedar Grove for an allocation of funds under *Public Law 597, 84th Congress, 2d Session*, as amended and renamed by *Public Law 88-269*, for the construction of public library facilities.

A hearing on this appeal was conducted by the Assistant Commissioner in charge of Controversies and Disputes, at the State Department of Education, Trenton, on March 4, 1965. The right to file a supplemental affidavit reserved to counsel for petitioner at the close of the hearing was subsequently abandoned.

Under the provisions of *Public Law 597, 84th Congress, 2d Session*, as amended, Federal funds were made available to the State of New Jersey for the development of public library services. In accordance with that law, a State Plan for the distribution and use of the funds was prepared by the New Jersey State Department of Education and was submitted to and approved by the United States Commissioner of Education. Responsibility for administration of the program was assigned to the Division of the State Library under the supervision of the State Librarian.

The testimony discloses that prior to the passage of the Federal legislation, the State Librarian took steps to alert local librarians in New Jersey to the imminence of its enactment and the possibility of financial assistance for public library construction. Subsequently, by letter in late June 1964, local libraries were asked to indicate whether they were interested in receiving information about procedures for making application for such a grant.

The Cedar Grove librarian responded affirmatively and received a set of instructions and forms for applying for a construction grant. The State Librarian also held a meeting on August 19, 1964, in Trenton for the purpose of explaining procedures and answering questions, which meeting petitioner's librarian attended.

The Cedar Grove librarian testified that the local library board completed the sections of the application for which it could supply data and she then delivered it to the Township manager sometime in late August. It appears that plans for construction of a library had been under way for some time and prior to the enactment of the Federal legislation. The Township Council had in fact taken bids and let contracts for such purpose but was being urged to consider enlarging the project to provide a more adequate library and one which could qualify for a financial assistance grant. During September 1964, the Council revised its plans, increased the size of the proposed library and its cost from \$150,000 to \$170,000. In its revised form, the project met the criteria for a financial grant. An ordinance to provide the additional municipal funds was introduced on October 8, 1964, and was passed on the second reading on October 22 to become effective, according to law, twenty days thereafter.

Petitioner's application for a financial grant was dated October 27, and was received by the State Librarian on November 4, 1964. Early in December Cedar Grove was notified that its application had been rejected because it had not been filed prior to October 15, 1964, the deadline date set up for the receipt of applications. Cedar Grove then asked for and was granted an informal hearing before the State Librarian, who thereafter declined to reverse the rejection. Application for a formal hearing before the Commissioner of Education pursuant to *R. S. 18:3-14* and in accordance with provision therefor in the aforesaid State Plan was then made and granted.

The need for improved public library facilities in the Township of Cedar Grove is unquestioned in these proceedings. In the same vein, there is

present herein no attack upon the State Plan for administering the Federal funds or its incidents. Nor is any allegation made to the effect that all relevant knowledge with respect to the State Plan and its administration was not available to the petitioner or its officers or employees. All persons concerned appear to have been adequately informed. The only issue herein is the sufficiency of the denial of petitioner's application for the sole reason that it was not submitted on or before October 15, 1964.

Petitioner argues that such a deadline date is not a requirement of the Federal law, that October 15 was an arbitrary date which the State Librarian had the authority to waive, and that, in the particular circumstances of the Cedar Grove application, his refusal to do so is an exercise of poor judgment which the Commissioner should set aside.

In support of its argument, petitioner says that it could not have submitted the information required within the time limit imposed because the law governing municipalities does not permit the adoption of an ordinance for the appropriation of public funds until after a minimum number of days has elapsed. Adoption of such an ordinance would have been impossible between October 8 when it was first introduced and October 15 when the application was required to be filed and, in fact, the ordinance was accomplished within the minimum possible time. It says further that it took the action to enlarge its original project with the expectation of receiving the financial assistance which has now been denied.

In support of his rejection of petitioner's application, the State Librarian asserts that the funds available under this legislation were insufficient to fill all applications. According to his testimony, the total amount available to New Jersey was \$940,000 and the requests made therefor totaled \$1,300,000. Under such circumstances, he asserts his belief that the criteria established have to be more rigidly applied than would be the case were unused monies available. He points also to the fact that though his was the ultimate decision, he had the advice of an Advisory Board of three persons, who concurred in the rejection of the Cedar Grove application. In support of the need for a deadline date, he cites the fact that the Federal funds must be firmly allocated before June 30, 1965, or be lost to New Jersey. The date of October 15, 1964, as a cut-off time for receipt of applications was necessary, in his opinion, to permit review and evaluation, notification, hearings on rejections, and any necessary reallocations before the end of the fiscal year. In his judgment, the need for and adherence to the October 15 deadline was not arbitrary and was a valid exercise of his discretionary authority under the approved State Plan for disbursement of the available Federal appropriation. He states further that there was no requirement of final adoption of an ordinance in order to submit an application, and a declaration of intent to provide proper financing would have sufficed. Final approval could have waited upon whatever procedures were necessary in order to appropriate the funds locally.

After considering all the facts in this case, the Commissioner finds no sufficient reason to reverse the decision of the State Librarian. It is evident that ample information with regard to the Federal assistance program, the State Plan, the information for applicants including the October 15 deadline, and the procedures for making application was supplied to all communities, including petitioner. It is also clear that petitioner could have filed its appli-

cation in time by indicating its intention to finance the enlarged project by means of an appropriate ordinance. Such a procedure would have satisfied the application need. Apparently there was a lack of communication or understanding on this point among those concerned at the local level and an unfortunate assumption that October 15 was a general target date instead of a deadline. As a result the application was filed late and rejected.

The Commissioner understands and is in sympathy with petitioner's position. It is to be regretted that Cedar Grove is foreclosed from participating in this Federal assistance program by these circumstances. He is also aware that a decision such as that made herein by the State Librarian and his Advisory Board may appear to persons in the local municipality to be arbitrary or at least easily waived or corrected, which is to say reversed. The Commissioner must point out, however, that this is not always true in the administration of State-wide programs. In this case other communities are involved and must be considered. Rules and criteria fairly arrived at and understood by all must be administered fairly and uniformly. The Commissioner concludes that this has been done in this case, and he finds no reason to question or to set aside the determination made by the State Librarian.

The Commissioner finds and determines that the rejection of an application by the Township of Cedar Grove for an allocation of funds for the construction of a public library was a proper exercise of the discretionary authority of the State Librarian, consistent with the approved State Plan for the disbursement of Federal funds appropriated to New Jersey under the Library Services and Construction Act (*P. L. 597, 84th Congress, 2d Session*) and in accordance with the rules and regulations adopted pursuant thereto.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

May 11, 1965.

XXI

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF HILLSBOROUGH, SOMERSET COUNTY.

For the Petitioner, William L. Bunting, Esq.

For the Respondent, Arthur B. Smith, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of the balloting for the election of three members of the Hillsborough Township Board of Education for full terms of three years at the annual school election on February 9, 1965, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Edward F. Jacobs	516	5	521
George F. Stahl, Jr.	426	5	431
Stanley L. Stacy, Jr.	582	5	587
Marian Fenwick	393	---	393
Ralph Griesenbeck	338	---	338

Candidates Jacobs, Stahl, and Stacy filed nominating petitions and their names appeared on the ballot on the voting machines used in this election. The tally for Mrs. Fenwick and Mr. Friesenbeck resulted from personal choice votes written in by voters. Such votes will be referred to hereinafter by their statutory term "irregular ballots."

By letter petition, dated February 20, 1965, Candidate Fenwick requested the Commissioner of Education to investigate irregularities which she alleged to have occurred in this election. She asserts her belief that had the irregularities complained of not occurred, the result might have been different and she prays the Commissioner to order a new election.

A hearing was held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the Somerset County Superintendent of Schools on March 25, 1965. Sworn testimony was heard and exhibits were received in evidence.

Petitioner testified that she decided to seek a seat on the Board of Education after the time had expired for filing a nominating petition. To advance her candidacy she prepared a single page campaign leaflet (P-1) on which there appeared information about the election, personal data, including her picture, and instructions to voters on the manner of casting an irregular ballot for her. The pertinent excerpt from this printed material is as follows:

"To vote for Marian Fenwick You Must Write In Her Name! Here's How!

* * * * *

"2. In upper left corner of voting machine find large slot identified by the words 'Personal Choice,' and the number 1 beneath.

"3. With one hand slide up the metal slot cover which exposes paper.

Write 'Marian Fenwick' on paper. Close metal slot cover. That's it."

Before preparing this material, petitioner visited the storage depot of the Somerset County Board of Elections, inspected a voting machine, and conferred with the custodian in charge. As a result of this visit, she testified, she instructed those who favored her candidacy to record their choice in irregular ballot slot #1. Approximately 2400 leaflets containing this suggestion were mailed by her to residents of the Township. It appears that the second write-in candidate, Mr. Griesenbeck, also prepared a campaign flyer on which he instructed voters to write his name in slots #2 to #9.

On the morning of the election the Hillsborough Township Superintendent of Schools and the Somerset County Superintendent of Schools conferred with the voting machine custodian. Question arose as to the use of slot #1. This first opening is approximately 3 times larger than the other 39 slots for irregular ballots. The County Superintendent testified that he noted that it would be easily possible to write more than one name in the large slot #1. He expressed his concern that that might occur with two write-in candidates running and result in the voiding of such irregular ballots. In order to avoid such a contingency he suggested that slot #1 be locked out. The custodian then went to the polling districts at or near the start of the election at 2 p.m. and did what was necessary to make slot #1 inoperable.

At about 2:30 petitioner telephoned the custodian and discussed the change with him. She then prepared signs measuring approximately 1" x 12" (P-4) which stated "Write-Ins Use Slots 2 to 9." These were placed on the voting machines. Another sign, approximately 4" x 12" with the same caption was placed on the table used by the election officials. These signs were removed at about 5 p.m. by the Township Chief of Police on orders of the attorney for the Township.

Petitioner contends that citizens were denied their right to vote secretly at this election and were unable to vote for her because her instructions to them could not be followed as a result of the change made on the voting machines. She cites the confusion which occurred during the election proceedings as contributory to this denial and prays that a new election be ordered.

The Commissioner is impressed with the sincere desire on the part of all persons concerned to examine this election in order to avoid difficulties in future ones. In order to serve that purpose the following observations are made.

The unfortunate chain of events which created confusion and doubt in this election is even more regrettable when it is apparent, as it became during the course of this inquiry, that the actions taken were not intended to create problems but to avoid them. There is no indication that anyone involved acted with other than the best of intentions and proper motives. It is unfortunate that the well-meaning efforts of a number of persons aimed at avoiding confusion had an opposite effect.

There appears to be no clear practice with respect to the use of irregular ballot slot #1 among the various election boards of the State. This larger write-in space is provided primarily for use in presidential elections in which the voter may want to write the names of a series of electors. Use of this slot in school district elections varies among counties. In some areas slot #1 is locked out and small slots equal in number to the candidates whose names appear on the ballot are able to be opened. In other sections none of the slots are locked out and a voter may write an irregular ballot in any one of 40 openings. The Commissioner has observed, in his experience in re-counting contested elections, that where large slot #1 is not locked out it is often necessary to void a ballot because more than one name has been written in this space. From his experience, the Commissioner would recommend that slot #1 not be used in school elections.

It is, of course, unfortunate that the decision to lock out slot #1 was made at such a late date and after petitioner had examined a machine and issued her instructions. In retrospect, it might have been better to leave the machine unchanged. How many irregular ballots might have been cast improperly can only be a matter of conjecture. It is a fact that the machines were altered and that a certain amount of confusion resulted. The Commissioner is also satisfied that the decision to make the change was not motivated by any intention to injure petitioner's candidacy but with the sole intention, misguided or not, of avoiding improper balloting.

The confusion with respect to the propriety of petitioner's signs is also to be regretted. The Commissioner must point out that once a school election

has been declared open the responsibility for its conduct rests with the election board appointed for that purpose. Local law enforcement officials have the right and duty to preserve order and to exercise authority when there is a violation of the election laws. That authority does not extend, however, to intervention in controversial questions or matters of judgment with respect to the election proceedings. Such decisions lie within the discretionary authority of the officials appointed to conduct the election. This would include what signs or instructions, if any, are permitted. In this case, petitioner should have submitted her signs to the chairman of the election board in each polling place and the decision whether they could be used or not was his to make. His decision may be challenged then or later but his authority may not be usurped.

Petitioner asks that a new election be ordered. The Commissioner knows of no authority by which this can be done. The only provision for a second election in the statutes is in the case of the resubmission of defeated items of appropriation under *R. S. 18:7-81*. Where there is a clear showing that election irregularities were of such a nature that the will of the people was thwarted or could not be fairly determined, the Commissioner may act to set the results aside and to declare a failure to elect. In such case the County Superintendent of Schools is directed to fill the vacancies until the next annual election (*R. S. 18:4-7d*).

There is no such clear showing here. Although there was confusion with respect to the casting of irregular ballots it has not been shown that voters in sufficient number to have altered the result were prevented from casting such a vote. Rather it appears that although some of the confusion centered around slot #1, much of it was a normal concomitant of irregular balloting. There can be little doubt that irregular balloting on voting machines is difficult and confusing for many voters. As the Court said in the case of *In re Borough of South River*, 26 *N. J. Super.* 357, 361 (*Law. Div.* 1953):

“Any person familiar with the voting machines is aware of the difficulty in placing names either by writing or any other means upon the receptacle or device on the machine for that purpose. * * *”

The testimony of one of the election officials bears this out, as follows (Tr. 45, 46):

“Q. Was there a great deal of confusion, would you say, among voters with respect to this election?”

“A. I honestly would have to say I don't think there was a great deal of confusion caused by Slot Number 1 being closed. There was confusion due to the fact that people had not had experience writing in anywhere in an election and it took much longer to vote. The lines were long and the people were excited. They didn't know how to spell the names and this, too, created confusion. Questions such as: Do I have to fill in the entire full name or will you count the last name? And we agreed to count the last name. If Fenwick were in the window, it would be counted as one vote.

But I could not honestly say that closing that window created confusion to the extent that the election should be thrown out.

"Q. Did you have any number of voters who complained that they were unable to cast a vote at all or could not vote for the candidates of their choice for any reason?

"A. I can recall no one who actually made that statement to me." It is well established that elections are to be given effect whenever possible.

"Elections should never be held void unless clearly illegal. It is the duty of the court to give effect to them, if possible." *Love v. Board of Freeholders*, 35 N. J. L. 269, 277 (Sup. Ct. 1871)

See also *Application of Wene*, 26 N. J. Super. 363 (Law Div. 1953), affirmed 13 N. J. 185 (1953); *In re Clee*, 119 N. J. L. 310 (Sup. Ct. 1938).

It is also clear that the acts of unauthorized persons, errors on the part of election officials, or other irregularities, do not constitute grounds for voiding an election unless it is shown that the will of the people was thwarted or suppressed thereby. *Tehlback v. Haynes*, 54 N. J. L. 77 (Sup. Ct. 1891); *Wene v. Meyner*, 13 N. J. 185 (1953); *Sharrock v. Keansburg*, 15 N. J. Super. 11 (App. Div. 1951); *In re Clee*, *supra*. No evidence has been submitted in this case on which to ground such a finding. There is no proof that the results would have been altered had the incidents recited above not occurred. Nor can such a reasonable and sufficient presumption be made in the light of all the testimony. After considering all of the facts in this case, the Commissioner concludes that despite the incidents which marred the orderly progress of this election and whatever confusion may have resulted, the will of the people was fairly expressed and determined and the results as announced will stand.

The Commissioner finds and determines that Stanley L. Stacy, Jr., Edward F. Jacobs, and George F. Stahl, Jr., were elected on February 9, 1965, to seats on the Hillsborough Township Board of Education for full terms of 3 years each.

COMMISSIONER OF EDUCATION.

May 13, 1965.

XXII

ORAL AGREEMENT INADEQUATE AS NOTICE OF TERMINATION OF EMPLOYMENT CONTRACT

CHARLENE FEASTER,

Petitioner,

v.

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

Respondent.

For the Petitioner, Cassel R. Ruhlman, Jr., Esq.

For the Respondent, Wilbert J. Martin, Jr., Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case alleges that her employment as a teacher in respondent's school was improperly terminated and she claims back pay for the period during which she was willing but not permitted to teach.

Witnesses were examined and exhibits received at a hearing before the Assistant Commissioner of Education in charge of Controversies and Disputes on November 17, 1964, at the office of the Ocean County Superintendent of Schools in Toms River. Briefs of counsel were submitted thereafter.

Petitioner was employed to teach in respondent's schools for the 1963-64 school year at a salary of \$4,200 under a contract which contained, *inter alia*, the standard provision for termination as follows:

"It is hereby agreed by the parties hereto that this contract may at any time be terminated by either party giving to the other 60 days' notice in writing of intention to terminate the same * * *."

Toward the end of November 1963, petitioner notified her principal that she was pregnant. Later on, early in January 1964, the principal conferred with her and asked how long she planned to continue working. Petitioner expressed her wish to teach until the end of March and, if a teacher to replace her had not then been found, her willingness to postpone her leaving until mid-April. The principal said that he would begin to look for a replacement, that it was uncertain when one might be found and for that reason he thought it best not to set a definite date when petitioner would be released. He expressed his belief that keeping the termination date flexible would make it possible to replace petitioner without having a series of substitute teachers and thereby reduce to a minimum any interruption of the continuity of instruction. He testified that he told petitioner he might have to give her short notice when he found a replacement and according to him, petitioner indicated her understanding and agreement. Petitioner, however, denies that she entered into any agreement to leave before the end of March.

Thereafter, on February 25, the principal told petitioner that he had found a teacher to take her place beginning March 2. On February 27, petitioner's husband made a protest to the principal of such short notice. On Friday, February 28, the board of education met informally to discuss the matter and authorized its secretary to write petitioner the following letter (R-2):

"In accordance with your verbal agreement with principal Elliott in January of this year, to the effect that in view of your pregnancy condition, you would resign as soon as the board could find a replacement and as you were advised this week, a new teacher is starting March 2, 1964.

"Therefore the board has decided to terminate your employment as of and including February 28, 1964.

"However as you also agreed with Mr. Elliott that you would stay for one week as a substitute, to help the new teacher become acclimated, conditions permitting, and if you wish to do so, the board has agreed to allow this for the period from March 2nd. to March 6th., 1964 inclusive and will pay you at your regular rate which would be \$105.00 for the week."

This action was ratified by the board at its regular meeting on Monday, March 2, 1964. The board also received the following communication from petitioner (R-3):

"In the interest of fulfilling the terms of my contract as teacher of the third (3rd) grade for the school year 1963-64 at Lacey Township

I hereby submit my resignation to the Lacey Township Board of Education.

"By the terms of the contract this resignation becomes effective sixty (60) days from this the 28th day of February 1964."

Petitioner assisted the newly employed teacher during the week beginning March 2 and was paid for that time. She continued to report for work each day thereafter, although she was not permitted to teach, until she was requested to cease doing so by the respondent. Thereafter she taught as a substitute teacher in a nearby school district on 6 to 8 days, the last ones at the end of April.

Petitioner contends that at no time did she agree to terminate her employment before the end of March. She testified that it was not until she began to prepare her written notice of resignation on February 28 that she discovered that her contract called for 60 days' notice instead of 30 days as she had thought. This, she said, left her no alternative than to give notice as of the last of April rather than the last of March as she had planned.

Respondent contends that it relied on petitioner's oral agreement with its principal at their January conference to leave on short notice when a replacement became available. It points to its practice in the past of relieving teachers for maternity purposes on such an informal basis, flexible as to time, and asserts that the manner in which the instant case was handled differed in no material aspect from other similar instances over the years. Respondent claims that petitioner knew of this policy and had in fact accepted its application to her until her notice of February 28.

It is well established that boards of education have the power to adopt rules and regulations governing leaves of absence and termination of employment for reasons of maternity. *Mateer v. Fairlawn Board of Education*, 1950-51 S. L. D. 63, affirmed State Board of Education, 1951-52 S. L. D. 62; *Prince v. Kenilworth Board of Education*, 1938 S. L. D. 579, affirmed State Board of Education, 581

Respondent board admittedly has not adopted any such rules nor has it reduced to writing any policy or practice pertaining to leave or termination on account of prospective motherhood. By its own admission its practice has been to work out an arrangement with the teacher involved. That such arrangements did not specify a particular date for termination but provided a degree of flexibility depending on the availability of a replacement, is not relevant. The point is that the arrangement in each case was a mutual agreement accepted by both parties. Petitioner here denies, and respondent has not clearly established, any such accord. This case illustrates once more the unfortunate results of inadequate communication. It appears that after the January conference the principal assumed that petitioner was ready to relinquish her job at any time he found a replacement and that he relied on this belief. Petitioner, on the other hand, apparently had no intention of leaving until the end of March but was willing to continue and accept short notice after that time.

When the principal gave petitioner one week's notice at the end of February, petitioner sent respondent a written notice of resignation giving 60 days'

notice from February 28, 1964. Her employment would have ended then at the end of April. According to the principal, however, she had expressed a wish to leave at the end of March. Petitioner explained this disparity by testifying that she preferred to leave at the end of March and would happily have done so but in giving written notice she believed she had to comply with the 60 days' notice term of her contract which would bring her termination to the end of April.

After weighing the testimony, the Commissioner concludes that respondent erred in its assumption that petitioner had agreed to accept short notice prior to the end of March and its action to cancel her contract in less than the agreed upon time was improper. He notes, however, that at their January conference both parties had agreed to a termination time: the end of March. Although this agreement was not reduced to writing, it is clear that both the principal and the teacher were in complete accord that this was a reasonable and acceptable time. Subsequent misunderstandings gave rise to earlier termination on the one side and formal longer notice on the other. Much the same situation occurred in a recent case in Colorado in which the state's Supreme Court ruled that a pregnant teacher had been illegally dismissed. See *School District #4 in County of Baca v. Propes*, 392 P. 2d 292 (1964).

The Commissioner concludes that the interests of justice indicate that the termination of this case might well rest on the agreement reached by both parties at their January meeting. At that time there was a meeting of the minds that petitioner would leave at the end of March. Instead, for whatever reason, her last day of employment was March 6, 1964. If the agreement had been carried out, petitioner would have left at the end of March. The Commissioner concludes that petitioner should have been continued in her employment until that time and is therefore entitled to be paid in full for the month of March.

The Commissioner would urge all boards of education to adopt policies with respect to personnel matters of this sort. By permitting all concerned to have a clear and complete understanding, such policies serve as guides to procedure and eliminate the kind of unfortunate misunderstanding such as occurred herein.

The Commissioner finds and determines that petitioner's employment was terminated improperly by respondent, that petitioner was entitled to continue in respondent's employ for the balance of the month of March 1964, and is entitled to salary for that period of time.

COMMISSIONER OF EDUCATION.

May 24, 1965.

XXIII

COMMISSIONER WILL NOT DECIDE MOOT ISSUE.

ALFRED G. BROWN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY,
Respondent.

For the Petitioner, Walter H. Jones, Esq. (Frederick L. Bernstein, Esq.,
of Counsel).

For the Respondent, William De Lorenzo, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

ORDER OF DISMISSAL

Petitioner in this matter having appealed the determination of respondent that he had abandoned his employment on November 13, 1952; and it now appearing that by virtue of a resolution of respondent dated April 13, 1965, changing the date of abandonment to August 14, 1962, the issue raised in the petition of appeal has been rendered moot; and counsel for petitioner having notified the Commissioner by letter that petitioner will not seek to litigate his case against the respondent further; now therefore, for good cause shown,

It Is ORDERED, on this 10th day of June 1965, that the petition of appeal of Alfred G. Brown against the Board of Education of the Borough of Bogota be and is hereby dismissed.

COMMISSIONER OF EDUCATION.

XXIV

RIGHTS OF TEACHER UNDER CONTRACT ARE LIMITED
BY THE TERMS OF THE CONTRACT

EDWARD G. MOLINA,

Petitioner,

v.

BOARD OF EDUCATION OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,
Respondent.

For the Petitioner, James M. Kenihan, Esq.

For the Respondent, Alton W. Read, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

ON MOTION TO DISMISS

Petitioner was a teacher under contract in respondent's schools. The contract covered the period from September 1, 1963, to June 30, 1964, and contained the customary release clause of 60 days' notice. On May 11, 1964, the superintendent of schools suspended him with pay from his duties as a

teacher. On the same day, he submitted a letter of resignation, effective in 60 days. By resolution on May 14, 1964, respondent Board of Education affirmed his suspension for the remainder of the contract period. Petitioner asserts that the suspension was invoked without due or proper cause, and prays that the Commissioner vacate and annul the suspension.

Respondent moves that the petition be dismissed on the ground that it does not state a cause of action upon which relief can be granted. The affidavit of the superintendent setting forth the facts of the suspension, resignation, and resolution, as well as a memorandum of law, are submitted in support of respondent's motion. An answering memorandum, with the affidavit of petitioner, asserts that the suspension was without notice, reason, hearing or formal or informal charge, and raises the question of whether such suspension was pursuant to and within the provisions of the statutes.

It is not necessary for the Commissioner to reach this question. Petitioner does not deny that on May 11 he submitted his resignation, giving 60 days' notice as required by his contract for the termination of his employment. Neither does he deny that he was paid for the full term of his contract. It was optional with respondent Board whether petitioner should continue to teach during the notice period. *R. S. 18:13-11.1* reads as follows:

"If the employment of any teacher is terminated on notice pursuant to a contract entered into between the teacher and the board of education, it shall be optional with the board of education whether or not the teacher shall teach during the period between the time of the giving of the notice and the date of termination of employment fixed therein."

Petitioner enjoys no rights beyond the terms of his contract with the Board of Education. At the expiration of his annual contract, which occurred in this instance prior to the full running of the 60-day notice, the employment relationship ceased to exist, without any legal duty on the part of the Board to re-employ him. *Zimmerman v. Board of Education of Newark*, 38 N. J. 65, 75 (1962). It follows, therefore, that there is no effective relief which the Commissioner can grant, and the Commissioner so finds.

Respondent's motion is granted and the petition is dismissed.

COMMISSIONER OF EDUCATION.

June 10, 1965.

EDWARD G. MOLINA,

Appellant,

v.

PARSIPPANY-TROY HILLS TOWNSHIP BOARD OF EDUCATION,

Respondent.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION
ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE APPEAL

This matter coming on to be heard on the 22nd day of November 1965, on the motion of this Court to dismiss pursuant to Rule A-11 for want of prosecution, on due notice to the attorneys of the parties, and no cause being shown to the contrary;

IT IS ORDERED on this 23rd day of November, 1965, that this cause is dismissed.

XXV

BOARD MAY WITHHOLD SALARY INCREASE
IN ACCORDANCE WITH ITS SALARY GUIDE RULES

VINCENT MASSARO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY,--
Respondent.

For the Petitioner, Francis R. Giardiello, Esq.

For the Respondent, Major and Major (James A. Major, Esq., of Counsel).

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a teacher under tenure in respondent's schools whose salary increment and adjustment for the 1964-1965 school year were withheld by respondent. He asserts that the denial of his salary increase was arbitrary and based on matters of hearsay, prejudice and personal animosity of one or more Board members. Respondent denies these allegations, and avers that petitioner's performance record is such as to justify it, in the exercise of sound discretion, in withholding his salary increase.

A hearing was held by the Assistant Commissioner of Education in charge of Controversies and Disputes on December 18, 1964, and January 22, 1965, at the County Administration Building in Hackensack. Briefs of counsel were submitted.

Petitioner has been employed as a teacher in respondent's schools since 1957. Under the normal operation of the salary guide adopted by respondent for the school year 1964-65, a teacher having petitioner's educational qualifications, years of creditable teaching experience, and salary for 1963-64, would be eligible for an increment of \$250 and an adjustment of \$500 to bring him to proper position on the current guide. At an executive meeting of respondent Board on March 3, 1964, the superintendent recommended that petitioner's increment be withheld. After discussion of petitioner's record, including review of evaluations made by his principal and experiences of some of the members of the Board, either personal or through comments made to them by others, it was concluded that petitioner's salary adjustment should also be withheld. In this conclusion, the superintendent testified he concurred.

On the following day, March 4, the superintendent conferred with petitioner, notifying him of respondent's intention to withhold his increment and adjustment on the basis of its dissatisfaction with the manner in which he communicated with parents of his pupils. (Tr. 39, 49). On March 10, 1964, respondent at its regular meeting adopted its salary guide and approved salary changes for the 1964-65 school year, with no change in salary being approved for petitioner.

On March 24, at petitioner's request, respondent met briefly with petitioner and representatives of the local teachers association, at which petitioner read a prepared statement requesting an explanation of respondent's denial of his salary increase and asserting his belief that his performance as a teacher had been satisfactory and that he "had had no parent difficulties to speak of in the past several years." (Tr. 159) The president of the Board engaged in some colloquy with petitioner as to the latter's knowledge and information concerning the Board's dissatisfaction with his relationships with parents. There was no further meeting between the parties, and the petition herein was received by the Commissioner on July 22, 1964.

Testimony was heard from all members of the 1964 Board of Education and from one other former member. It is clear that the matter of petitioner's manner of communication with parents had come to the attention of board members from time to time, from petitioner's first year of employment in the school system down to an incident which occurred during the early part of the 1963-64 school year in which the son of a Board member was the parent involved. Two other Board members testified that they had had personal contacts, as parents, with petitioner in which they were displeased with his "cold attitude" and "the manner in which he conveyed his thoughts." (Tr. 95, 244) Each of the members who had participated in the March 10 determination also testified that he had no personal bias or animosity toward petitioner and that the incidents involving themselves personally or the son of a former Board member had not loomed any larger in reaching their decision than any other incident that had come to their attention.

The evaluations of petitioner by his principal, when examined in the light of her testimony as to what she meant by them, are inconclusive except as to the fact that intermittently over the years the question of petitioner's relationships with parents received some form of special or unusual notation. (P-1, P-4.)

The Commissioner finds that petitioner's allegation that respondent was arbitrary or motivated by matters of hearsay, prejudice or personal animosity is not supported by the evidence. He further finds that respondent acted in the exercise of its discretion upon information available to it and after a reasonable determination that petitioner's relationship with parents fell short of the standard of performance which warrants a salary increase. *Kopera v. Board of Education of West Orange*, 60 N. J. Super. 288, 297 (App. Div. 1960); *Id.* 1960-61 S. L. D. 57, 62. Absent a clear showing of abuse of discretion by respondent, the Commissioner will not substitute his judgment for that of the Board of Education. *Boult and Harris v. Board of Education of Passaic*, 1939-49 S. L. D. 7, 13, affirmed State Board of Education 15, affirmed 135 N. J. L. 329 (Sup. Ct. 1947), 136 N. J. L. 521, 523 (E. & A. 1947)

There remains the question of whether respondent acted in violation of its own rules governing the granting and withholding of increments and adjustments. Boards of education are given authority by statute (R. S. 18:13-5) "to make rules and regulations * * * governing * * * salaries and the time and mode of payment thereof," and with respect to the State Minimum Salary Law (R. S. 18:13-13.7) "to increase for any teacher or classification of teachers included in any schedule, the initial salary or the amount of any increment or the number of increments." In consonance with

the principles laid down by the court in *Kopera, supra*, the Commissioner has maintained the position that when a board of education adopts rules with respect to the application of a salary guide, then it must apply them without bias or prejudice. *Kopera v. Board of Education of West Orange*, 1958-59 S. L. D. 96, 97. Therefore, in *Wachter v. Board of Education of Millburn*, 1961-62 S. L. D. 147; *Goldberg v. Board of Education of West Morris Regional District*, decided by the Commissioner May 20, 1964; and in *Belli v. Clifton Board of Education*, decided by the Commissioner March 20, 1963, the issue of the board's right to withhold a salary increment turned on the provisions in the local salary guides for such action. In *Earl v. Board of Education of Mendham Township*, the Commissioner in an order dated June 1, 1964, denied respondent's motion to dismiss and directed petitioner to make an offer of proof that he had been denied an increment in violation of respondent's rules with regard to the application of its salary guide.

In the instant matter, petitioner contends that his increment and adjustment were withheld in contradiction of respondent's rules concerning withholding, which read as follows (P-R-1):

"A. Increments will not be automatic but will be granted for satisfactory services upon the recommendation of the Superintendent of Schools, subject to the approval of the Board of Education. Failure in any year to grant an increment does not create any future obligation to restore the increment.

"B. In any year, a teacher whose work is deemed unsatisfactory may, on the request of the Principal and the recommendation of the Superintendent of Schools, have his increment withheld and thereby lose a step on the guide. Before making such recommendation to the Board, the Superintendent of Schools shall send the teacher written notice of such intention and give him an opportunity to discuss the reason for such action.

"C. In any year in which there is an upward revision of the salary guide, adjustment to the proper place on the guide may be withheld in whole or in part. Before making such recommendation to the Board, the Superintendent of Schools shall send the teacher written notice of such intention and give him an opportunity to discuss the reason for such action. Future increases after withholding an adjustment will depend entirely upon the recommendation of the Superintendent and the approval of the Board of Education."

The testimony establishes that the superintendent, without a request from the principal, recommended the withholding of petitioner's increment, and that the Board of Education, with the superintendent's concurrence, decided to withhold his salary adjustment as well. Petitioner contends that respondent's failure to adhere to all the procedural steps set forth in sections A, B, and C of its rules, *supra*, constitutes such a defect as to warrant the Commissioner's ordering the restoration of both increment and adjustment. Petitioner points in particular to these procedural omissions:

- (1) The absence of a request by the principal that an increment be withheld.
- (2) The failure of the Superintendent to give petitioner advance notice and opportunity to discuss the reasons for his recommendation that an increment be withheld.

(3) The absence of a specific recommendation from the Superintendent with advance notice to petitioner and opportunity for discussion, concerning the withholding of the adjustment portion of the salary increase.

The Commissioner does not agree that the provisions of rules A and B, *supra*, are interrelated in such a way that the superintendent's authority to recommend under rule A is restricted by the procedures in rule B. The Commissioner construes these two rules as describing two separate ways of effecting a withholding of an increment. The advance notice and discussion required in rule B provides both the teacher and the superintendent a safeguard under conditions where the recommendation is not initiated by the superintendent out of his own personal knowledge of the reasons for withholding the teacher's increment.

As to the withholding of the adjustment, the Commissioner finds that a similar rationale must be applied in determining the meaning of rule C. The first sentence of the rule permits the Board to withhold an adjustment on its own motion. The second sentence requires that when the superintendent recommends that an adjustment be withheld, he shall send the teacher written notice of such an intention and provide opportunity to discuss the reason for his recommendation. The two steps are not dependent upon one another except that in either procedure the approval of the Board of Education is required. The Commissioner finds, therefore, that the withholding of petitioner's salary guide increment upon recommendation of the superintendent and the withholding of a salary adjustment by respondent without prior recommendation therefor by the superintendent were actions consistent with respondent's rules for the administration of its salary guide.

The Commissioner finds and determines that the withholding of petitioner's salary increment and adjustment for the school year 1964-65 was a proper exercise of its discretionary authority and in accordance with its own rules.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

June 10, 1965.

Pending before State Board of Education.

XXVI

BOARD OF EDUCATION MAY REASSIGN TENURE TEACHER
WITHIN THE SCOPE OF HIS CERTIFICATION

JOHN C. McGRATH,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK, HUDSON COUNTY,
Respondent.

For the Petitioner, Seymour Goldstaub, Esq.

For the Respondent, Francis A. Castellano, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a teacher under tenure in respondent's schools. He protests that a resolution transferring him from the position of dean of boys to a classroom teaching assignment violates his seniority rights, is arbitrary, capricious, an act of bad faith, an abuse of discretion, politically motivated, and a denial of due process of law. Respondent denies that petitioner enjoys any rights which were violated by its resolution, which it contends was in every respect legal and proper.

A hearing was conducted by the Assistant Commissioner in charge of Controversies and Disputes at Jersey City on September 4 and October 26, 1964. Briefs and memoranda were submitted by counsel.

Petitioner has been employed in respondent's schools since 1928 and holds tenure as a teacher in the district. Since 1960 he has held the position of dean of boys in the high school. On November 27, 1963, petitioner was notified by the Teachers' Pension and Annuity Fund that if he wished to take advantage of the special benefits of *Chapter 108* of the *Laws* of 1962, it would be necessary for him to file application for retirement before January 1, 1964, and to retire not later than July 1, 1964. The privilege of canceling the application was allowed up to June 30, 1964. Petitioner filed for retirement and, on or about May 22, 1964, received notice that his application had been approved. On June 13, petitioner wrote to the Pension Fund canceling his application for retirement.

Respondent was aware of petitioner's application for retirement, since it was processed in part through the school district administrative offices. (Tr. 60) By a general bulletin, the superintendent of schools, in February, asked those of the staff who had filed for retirement to notify him as soon as they had made a definite decision in order that he could have some advantage in securing replacements. In March he addressed personal letters to four teachers who had not responded to the bulletin, including petitioner. In his reply, petitioner said, in part:

"Reference is made to your letter of March 3, 1964 concerning notification to you of an intention to resign or retire. Please be assured that

such notification of my intentions in this matter will be given as soon as I have made a definite decision.” (Ex. R-1)

Thereafter, petitioner sent no further communication to respondent with respect to retirement, nor, after he had canceled his application on June 13, 1964, did he apprise respondent of that fact. He does assert, however, that late in May, after he had failed to receive a notification of salary for the next school year which other employees had received, he told the secretary to the superintendent of schools that he “had not contemplated retiring.” (Tr. 42)

The testimony establishes that when the prior Board of Education was preparing the budget for the 1964-65 school year it had in mind to reduce the number of deans from five (three for boys and two for girls) to four. (Tr. 85) It is also clear that as early as May 14, 1964, a draft of a resolution rescinding petitioner’s appointment as dean of boys was mailed to one of the members of respondent Board who was hospitalized. On June 2, 1964, respondent adopted a resolution rescinding the 1960 appointment of petitioner to the position of dean of boys and restoring him “to his normal position as teacher at the annual salary presently fixed and determined solely for his regular teaching duties.” The resolution was made effective as of June 27, 1964. (Ex. P-7)

The title of petitioner’s position, “dean of boys,” while not unique to West New York, is one not commonly used in New Jersey public schools. To determine its meaning and scope, the Commissioner has looked beyond nomenclature to the actual duties performed. *Wall v. Jersey City Board of Education*, 1938 S. L. D. 614, 623, affirmed 119 N. J. L. 308 (Sup. Ct. 1938); *DeBros v. West New York*, 1939-49 S. L. D. 167, 169, affirmed State Board of Education 171; *Phelps v. State Board of Education*, 115 N. J. L. 310 (Sup. Ct. 1935), affirmed 116 N. J. L. 412 (E. & A. 1936)

The evidence in this case shows that petitioner, as dean of boys, carried on pupil guidance and personnel services similar to those performed in other school systems under the title of “guidance director” or “guidance counselor.” Such a position requires special training and qualification for a special certificate. There appears to have been some question with regard to whether petitioner held the appropriate certificate for a position as guidance counselor. To clear up this point the Commissioner has examined petitioner’s file in the Office of Teacher Education and Certification and finds that petitioner held a proper certificate which entitled him to perform pupil guidance services as dean of boys.

The original petition in this matter, received on June 26, 1964, complained that the aforesaid resolution was adopted without notice to petitioner, that he was denied opportunity to be heard by respondent, and that the resolution deprived him of the opportunity to acquire tenure in his guidance position. In an amendment to the petition, filed on July 27, 1964, petitioner further charges that respondent has failed to accord him seniority rights provided in R. S. 18:13-19.

Much of the testimony presented by petitioner was designed to show that respondent’s removal of petitioner as dean of boys was inspired by the personal and political animosity of the high school principal, who is also a town commissioner, and by the political allegiance of the members of the Board

of Education to the Town Commission. In the Commissioner's judgment, the proofs fall short of establishing such a causal relationship. But even were there clear evidence of such political motivation, this would not be grounds sufficient to set aside a legal action of the Board of Education. In the case of *Barnes et al. v. Board of Education of Jersey City*, decided by the Commissioner February 28, 1962, affirmed in part, reversed in part by the State Board of Education December 4, 1963, affirmed 85 *N. J. Super.* 42 (*App. Div.* 1964), the State Board held:

"Since the Jersey City Board of Education employees were not covered by Civil Service in 1958, the acts of the Board in terminating certain employees were valid even if selections were made for political reasons.

"* * * as long as * * * a board of education * * * acts within the authority conferred on * * * it by law, the courts are without power to, or will not, interfere with, control, or review * * * its action and decisions in matters involving the exercise of discretion, in the absence of clear abuse thereof or error, nor is the wisdom or expediency of an act, or the motive with which it was done, open to judicial inquiry or consideration, where power to do it existed." 78 *C. J. S.* 920.

"In the absence of clear abuse of the discretionary power of the Board, the Commissioner shall not interfere. * * *"

The Commissioner does not find in the actions of respondent the elements of arbitrariness, capriciousness and unreasonableness which would sustain a charge of abuse of discretion. Petitioner gave respondent no sound basis to doubt that he contemplated retirement after he had filed formal application therefor prior to December 31, 1963. His indefinite answer to a direct request from the superintendent for information as to his intentions; his statement to the superintendent's secretary that "he had not contemplated retirement," in direct contradiction to his filed application for retirement; and his failure to notify respondent that he had canceled his application for retirement, even though this followed the Board's resolution—all had the effect of creating uncertainty about his plans for future employment in the West New York school system. It is not unreasonable, therefore, as respondent contends, that in view of its plan to reduce its guidance staff from five to four, it should retain those whom it had reason to expect to be available for service in the 1964-65 school year.

Petitioner argues that respondent's resolution should be set aside as an act of bad faith. The charge here seems to rest on the personal and political animosities to which reference has already been made and on which the Commissioner has already stated his finding. In further exposition of the limits of judicial review of allegations of bad faith, however, the Commissioner is guided by the statements of the State Board and the courts in this connection:

"Can we go behind the record of the proceeding and the action of the Board to question the motives which actuated its members? The general principle appears to be against such proposition.

"* * * Even though motive was corrupt or the act was done for the purpose of spite or revenge, an action of a board is immune from

judicial interference if it is within the range of the board's legal discretion. *Iverson v. Springfield, etc., Union Free High School Dist.* 186 *Wis.* 342; 202 *N.W.* 788.'” *Downs v. Board of Education of Hoboken*, 1938 *S.L.D.* 515, reversed in part State Board of Education 519, 526, affirmed 12 *N.J. Misc.* 345 (*Sup. Ct.* 1934), affirmed 113 *N.J.L.* 401 (*E. & A.* 1934)

And further:

“I desire to make clear that I express no opinion as to the policy employed by the majority in the selection which they made or in the manner in which they made their selection effective. That is their responsibility to those whom they govern. Courts cannot compel governing officials to act wisely, but it can and does compel them to act in good faith. And to say that governing officials must act in good faith is merely equivalent to saying that they must act honestly.” *Peter's Garage, Inc. v. Burlington*, 121 *N.J.L.* 523, 527 (*Sup. Ct.* 1939)

And finally, in much the same context as the instant matter:

“The prosecutor contends that the transfer was not made in good faith but by reason of personal animosity and for political reasons. Some nine hundred pages of depositions were presented on this question. * * *

“A reading of the record leads to the conclusion that probably neither party has been entirely frank and fair in the treatment of the other. But we are not persuaded that there has been shown bad faith or such a shocking abuse of discretion as to call for the intervention of this court in matters that are by statute delegated to the governing body of the municipality. We will not substitute our judgment for that of the commissioners. It is not our function to do so.” *Murphy v. Bayonne*, 130 *N.J.L.* 336, 337 (*Sup. Ct.* 1943)

In the instant matter, the Commissioner does not find proof of that element of bad faith which would warrant his intervention.

The main issue herein involves two statutes often referred to as the Teachers' Tenure Act and the Seniority Act. The first, *R.S.* 18:13-16, provides protection of tenure after a probationary period of employment to teachers, principals, assistant superintendents, and superintendents, and by the enactment of *Chapter 231* of the *Laws* of 1962, to assistant principals, vice-principals, and to

“* * * such other employees of the public schools as are in positions which require them to hold an appropriate certificate issued by the Board of Examiners * * * except that no employee shall obtain tenure in a position other than as a teacher, principal, assistant superintendent or superintendent prior to July 1, 1964.”

The amendment of 1962 further provides:

“Other provisions of this section notwithstanding, any employee under tenure or eligible to obtain tenure pursuant thereto, who is transferred or promoted with his consent to another position covered by this section on or after July 1, 1962, shall not obtain tenure in the new position until (a) after the expiration of a period of employment of 2 consecutive

calendar years in the new position unless a shorter period is fixed by the Board, or (b) after employment for 2 academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year, or (c) after employment in the new position within a period of any 3 consecutive academic years, for the equivalent of more than 2 academic years; provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such employee, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district, such employee shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion."

It should be noted that the second portion of the statute, *supra*, has no application to petitioner herein who was incumbent in the position of dean of boys before July 1, 1962.

It is clear that had petitioner been continued in the position of dean of boys after July 1, 1964, he would have acquired tenure in that assignment. It is also clear that up until that date he held tenure as a teacher and as such, respondent had the authority to transfer him to any other assignment for which he was certificated within the general category of teacher, including the teaching position he formerly held. Such a transfer from one assignment in the tenure category of teacher (although labeled "dean of boys") to another position in the same category, would necessarily have to be made without reduction of salary. The Commissioner holds that respondent had the authority, under *R.S. 18:13-16*, to transfer petitioner from dean to teacher without reduction in salary prior to July 1, 1964, in order to avoid tenure in the position of dean or for any other valid reason. *Lascari v. Lodi Board of Education*, 1954-55 *S.L.D.* 83, affirmed State Board of Education 89, affirmed 36 *N.J. Super.* 426 (*App. Div.* 1955), 116 *A.2d* 209

Petitioner contends, however, that respondent acted not within the authority of *R.S. 18:13-16* but under the provisions of *R.S. 18:13-19*. This statute provides for reductions in personnel and the seniority priorities which prevail in such case. The relevant excerpt follows:

"Nothing contained in sections 18:13-16 and 18:13-17 of this Title or any other provisions of law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of superintendents of schools, assistant superintendents, principals, teachers, or other employees holding tenure pursuant to section 18:13-16 employed in the school district whenever, in the judgment of the board of education it is advisable to abolish any office, position or employment for reasons of a reduction in the number of pupils, economy, a change in the administrative or supervisory organization of the district, or other good cause. Dismissals resulting from such reduction shall not be by reason of residence, age, sex, marriage, race, religion or political affiliation. Any dismissals occurring because of the reduction of the number of persons under the terms of this section shall be made on the basis of seniority according to standards to be established by the Commissioner

of Education with the approval of the State Board of Education. In establishing such standards, the commissioner shall classify, in so far as practicable, the fields or categories of administrative, supervisory, teaching or other educational services which are being performed in the school districts of this State and may, at his discretion, determine seniority upon the basis of years of service and experience within such fields or categories of service as well as in the school system as a whole. Whenever it is necessary to reduce the number of persons covered by this section, the board of education shall determine the seniority of such persons according to the standards established by the Commissioner of Education with the approval of the State Board of Education and shall notify each person as to his seniority status. * * *

Petitioner argues that respondent chose to reduce the number of deans of boys from 3 to 2 for reasons of economy. He says further that it then elected to retain two of the incumbents in the remaining positions of dean, dismissed petitioner as dean and assigned him to classroom teaching at a reduced salary despite the fact that he had seniority in the position of dean over those who were retained. Such action was in violation of his rights, according to petitioner.

This case turns then on the question whether the Board acted to reassign petitioner under *R. S. 18:13-16* or *18:13-19*.

The evidence fails to support petitioner's claim. While it appears true that the 1963-64 Board of Education considered a reduction in the number of guidance positions and prepared a budget for the ensuing year with that in mind, there is no evidence that the 1964-65 Board, which is the respondent herein, ever acted upon the suggestion. Had respondent moved under *R. S. 18:13-19* to abolish one or more of its guidance positions, petitioner's seniority would have had to be taken into consideration and his claim would have had validity. But there is no evidence that respondent took any such action. The more or less informal discussions and considerations of its predecessor Board in preparing the budget may not bind this Board. *Skladzien v. Bayonne Board of Education*, 12 *N. J. Misc.* 602 (*Sup. Ct.* 1934), affirmed 115 *N. J. L.* 203 (*E. & A.* 1935)

The action taken by respondent with respect to petitioner's assignment was by resolution adopted at the meeting of June 2, 1964, as follows:

"This Board having considered the teaching situation as created by many retirements of the teaching staff in Memorial High School, and for the betterment of the teaching service in said high school, it is hereby

"RESOLVED, that the Resolution heretofore adopted by the Board of Education, dated April 5, 1960 appointing John C. Mc Grath Dean of Boys in Memorial High School, effective as of September 1, 1960, be and the same hereby is rescinded, annulled and revoked and the said John C. Mc Grath is relieved of his duties as Dean of Boys and restored to his normal position as teacher at the annual salary presently fixed and determined solely for his regular teaching duties. This Resolution relieving the said John C. Mc Grath of his duties as Dean of Boys in Memorial High School hereby rescinds and annuls the aforesaid Resolution of April 5, 1960 and is effective as of June 27, 1964."

The resolution clearly rescinds the earlier assignment of petitioner as dean of boys and returns him to his former position as teacher. Nowhere is there any mention of or reference to a reduction in the number of guidance positions. Nor has evidence of any other resolution or act of the Board been produced to show that it acted to abolish a position or reduce the number of its guidance personnel. Absent such a showing it must be presumed that the Board acted, in the exercise of its discretion, to reassign petitioner to a teaching position leaving a vacancy in its guidance staff which it may fill or vacate later. Such a transfer is clearly within the authority of the Board of Education under R. S. 18:13-16 for whatever reason it deems sufficient. The Commissioner finds that respondent acted under the authority of R. S. 18:13-16 and except for the reduction of petitioner's salary, finds no legal defect in respondent's procedure.

The Commissioner finds and determines that the Board of Education of the City of West New York acted within the scope of its discretionary authority in relieving John C. Mc Grath of his duties as dean of boys and reassigning him as a classroom teacher. The Commissioner further finds that respondent's action was a transfer of petitioner from one assignment to another within the general category of teacher and as such he could not suffer a reduction in salary without cause. The Board of Education is directed, therefore, to restore petitioner to his proper place on its salary schedule and to reimburse him for salary lost as a result of its illegal reduction.

COMMISSIONER OF EDUCATION.

June 15, 1965.

Pending before State Board of Education.

XXVII

BOARD OF EDUCATION NOT RESPONSIBLE FOR CONTRACTOR'S LOSS DUE TO AVOIDABLE ERROR IN BIDDING

K-FORTE OIL COMPANY, INC.,

Petitioner,

v.

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

Respondent.

For the Petitioner, Bryan B. McKernan, Esq.

For the Respondent, John F. Russo, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This case concerns the refusal of respondent to pay petitioner the amount of \$973.77 for fuel oil delivered under a contract between the two parties. Respondent withheld the money from its final payment under the contract, on advice of its attorney, on the ground that it had been billed for #4 Fuel Oil at the posted tank *wagon* price whereas the petitioner's bid offered to deliver the oil at the posted tank *car* price on the day of delivery. Petitioner claims

that the use of the word "car" in its bid instead of "wagon" was an error, and that the illustrative figure of \$0.0961 per gallon was the tank wagon price on the day on which the bid was submitted.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes at the office of the County Superintendent of Schools in Toms River on March 12, 1965. Petitioner's bid, respondent's acceptance, and correspondence between the parties relating to this cause were either stipulated or received in evidence. Briefs of counsel were submitted.

At a conference of counsel held in the office of the Assistant Commissioner in charge of Controversies and Disputes on March 19, 1964, it was agreed that the first question to be considered by the Commissioner is whether he has jurisdiction to decide this matter.

The relevant statutes are *R. S. 18:3-14*, which reads in part as follows:

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

R. S. 18:7-64, which reads in part:

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

and *R. S. 18:7-65*, which reads:

"No bid for building or repairing schoolhouses or for supplies shall be accepted which does not conform to the specifications furnished therefor, and all contracts shall be awarded to the lowest responsible bidder."

Thus, controversies and disputes arising out of the statute requiring boards of education to advertise for bids for supplies (*R. S. 18:7-64, supra*) and in connection with the awarding of contracts therefor (*R. S. 18:7-65, supra*), are properly within the jurisdiction of the Commissioner, and over the years he has decided many such controversies. See, for example, *Reid v. Board of Education of Bayonne*, 1938 S. L. D. 253; *Black Diamond Coal Company v. Board of Education of Bloomfield*, 1938 S. L. D. 261; *Shore Gas and Oil Company, Inc. v. Board of Education of Belmar*, 1951-52 S. L. D. 41; *Taylor, et al. v. Board of Education of Gloucester Township*, 1955-56 S. L. D. 71; *Panna Construction Company v. Board of Education of Somerdale, et al.*, 1955-56 S. L. D. 138; *Bailey Fuel Company v. Board of Education of Commercial Township*, 1961-62 S. L. D. 114.

The controversy herein relates to the formation of the contract itself, and not to performance thereunder. It is the opinion of the Commissioner, therefore, that determination of this controversy is within the purview of his statutory responsibility.

Respondent originally received bids for various petroleum products on August 14, 1962. Petitioner was the only bidder on #4 Fuel Oil, and bid tank wagon price at date of delivery, less one-half cent per gallon discount. Respondent rejected all bids and readvertised. Bids were received on September 27, 1962. Again petitioner was the only bidder on #4 Fuel Oil, his bid for that item reading as follows:

"The price for TEXACO 'FUEL CHIEF' #4 Fuel Oil will be the posted tank car price in effect on date of delivery. The today's posted tank car price is \$0.0961 per gallon, which would make you a today's delivered price of \$0.0961 per gallon." (Petitioner's Exhibit #1)

On November 12, 1962, respondent awarded petitioner the contract for its fuel oil and gasoline supplies "at prices and conditions submitted in [petitioner's] bid." (Petitioner's Exhibit #2)

Between November 26, 1962, and May 23, 1963, petitioners made 13 deliveries of #4 Fuel Oil, aggregating 76,675 gallons, for which respondent was billed at \$0.0977 per gallon, for a total of \$7,491.15. Bills for deliveries were rendered monthly. Duplicate delivery slips, on which the delivery price had been filled in (P-1) accompanied the monthly invoices. Except for the final invoice, payment by the Board of Education was made monthly.

Testimony was offered that the member of the Board of Education who customarily checked the invoices was ill during most of the heating season, and during his absence the invoices were not checked in the usual manner. It was after his return to active participation in Board business, according to testimony, that he discovered that the deliveries had been billed at tank wagon rather than tank car prices.

On September 6, 1963, the secretary of respondent Board addressed the following letter to petitioner:

"Please be advised that we have withheld final payment to you until we receive a reply *in writing* from you as to why we were charged tank wagon price instead of tank car price on fuel oil. Your immediate reply will be appreciated and will facilitate prompt attention to your invoice." (Respondent's Exhibit #1)

Petitioner contends, and so indicated in its reply to respondent's letter and in a later communication from its attorney (Respondent's Exhibits #2 and #3), that the expression "tank car" was a typographical error for "tank wagon," and that its true intent to bid tank wagon price was demonstrated by its illustration of the "today's price" in its bid, which was the tank wagon price for that date. Petitioner argues further that the previous bid submitted on August 11, 1962, which was rejected by respondent, offered to furnish #4 Fuel Oil at tank wagon price less a discount, and that this earlier bid provides further evidence of its true intent.

Respondent, on the other hand, takes the position that it accepted a bid at tank car price; that the illustrative price given in the bid had no meaning as to the price at the date of future delivery; and that at the time it opened and accepted bids it had neither the means nor occasion to check the accuracy of petitioner's illustrative figure and discover the discrepancy in the bid.

Respondent therefore asserts that the mistake is unilateral, and that to pay petitioner a higher price than that which respondent accepted in the bid would be contrary to the intent and purpose of R. S. 18:7-64 and 65, which require that contracts for school supplies shall be awarded to the lowest responsible bidder.

Respondent asserts that it became aware of the difference between the accepted bid price (tank car) and the billed price (tank wagon) only after its receipt of the final bill. It is well established that in the absence of a clear showing of fraud or inequitable conduct by one party, a unilateral mistake by the other party will not provide the grounds for equitable relief. *Asbestos Fibres, Inc. v. Martin Laboratories, Inc.*, 12 N. J. 233, 244 (1953); *Ehnes v. Monroe Loan Society*, 120 N. J. Eq. 599, 602 (E. & A. 1936); *Millhurst Milling and Drying Co. v. Automobile Insurance Co.*, 31 N. J. Super. 424, 433 (App. Div. 1954); *Whelen v. Osgoodby*, 62 N. J. Eq., 571, 575 (Ch. 1901) Although the Commissioner does not condone the failure of respondent to find other means of checking the accuracy of invoices during the illness of one member of the Board, he does not find in such failure the clear showing of fraudulent or inequitable conduct by one party in the face of a unilateral mistake by the other which would constitute grounds for the relief sought by petitioner.

Nor is relief available where the mistake is one which could have been avoided by reasonable care and diligence. *Millhurst Milling and Drying Co. v. Automobile Insurance Co.*, *supra*, at page 434; *Moro v. Pulone*, 140 N. J. Eq. 25, 29, 30 (Ch. 1947); *Asbestos Fibres, Inc. v. Martin Laboratories Inc.*, *supra*, at page 244 In the instant matter, the use of the word "car" twice in the same paragraph instead of "wagon" can hardly be ascribed to typographical error, especially since elsewhere in its bid petitioner offers to supply gasoline and a different grade of fuel oil at "tank wagon" prices.

Absent a clear showing of fraud or inequitable conduct by one of the parties, or an unavoidable or excusable mistake by the other party, the language of the contract itself is controlling.

"There is no occasion to determine whether there was here a mutual or a unilateral mistake, or the legal consequence of either. Suffice it to say, in this regard, that the contract has been performed in substantial part, and that it is the general rule that a unilateral material mistake of fact, unknown to the other party, is not ordinarily ground for avoidance or rescission. * * *

"It is fundamental that where, as here, the parties have made a memorial of their bargain, their actual intent unless expressed in some way in writing is ineffective, except through the medium of a reformation of the writing. While the intention of the parties is sought, it can be found only in their expression in the writing. In effect, it is not the real intent but the intent expressed or apparent in the writing that controls. * * * The writing is the exclusive repository of the common intention." *New York Sash and Door Co., Inc. v. National House and Farms Assoc., Inc.*, 131 N. J. L. 466, 469, 470 (E. & A. 1943)

The Commissioner finds and determines that petitioner contracted to supply #4 Fuel Oil at tank car price at the time of delivery, and that respondent paid for such fuel oil, by means of a deduction from the final bill, at the contracted price. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

June 17, 1965.

XXVIII

BIDDER WHO IS NOT SECOND LOWEST IS WITHOUT STANDING
TO CONTEST AWARD OF CONTRACT

DAVID A. MUIR,

Petitioner,

v.

BOARD OF EDUCATION OF CALDWELL-WEST CALDWELL, ESSEX COUNTY,

Respondent.

For the Petitioner, *Pro se*

For the Respondent, Stickel & Stickel (Harold M. Kain, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case is an unsuccessful bidder for a contract to provide bus transportation for pupils under respondent's jurisdiction. He attacks the award to the lowest bidder on the grounds that said bid did not conform to respondent's specifications. Respondent contends that the low bid was in substantial compliance with its specifications, and that in any event, petitioner is without standing to challenge the award of the contract.

A hearing in this matter was held by the Assistant Commissioner in charge of Controversies and Disputes at the New Jersey Department of Education Building in Trenton on August 24, 1964.

Bids for transportation were received by respondent on June 22, 1964. In its advertisement for bids respondent reserved the right to reject any or all bids and stated that no contract would be awarded "until all State regulations have been complied with and approved by the Essex County Superintendent of Schools." The specifications required also, *inter alia*:

"V. Basis of Bid

A. The bidder shall submit his proposal on the total annual cost or contract amount. He shall also give a breakdown of per diem costs for each pupil transported to the school address as shown. If additional pupils are enrolled during the school year, or if a pupil is no longer to be transported during the school year, the contract shall be amended to either increase or decrease the basic contract in accordance with the per diem schedule submitted."

Four bidders submitted bids on all four routes advertised by respondent, as follows:

Kevah Konner, Inc.	\$6,970.60
Caldwell Taxi Company	\$10,152.50
David A. Muir	\$11,369.20

Alternate proposal: "If awarded all routes 1 thru 4 inclusive, the total cost would be \$7,940.00 divided by 180 days for a per diem rate. There will be no allowable for drop outs. Should the total number of pupils be increased on any given route, there will be an additional charge of \$1.00 per diem per pupil."

Oak Service	\$10,370.36
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The last-named bid was rejected because it was not accompanied by a check for 5% of the amount of the bid, as required by law. *R. S. 18:14-11*

Two other bids on single routes were submitted, but both of these bids were higher than the Konner bid on the same route.

In bidding the prices shown above, all three bidders complied with respondent's specification that a per diem rate be shown, and that provision be made for adjustment of the price to accommodate increases and decreases in the number of pupils to be transported. On this basis, therefore, petitioner's bid is the third lowest bid. As to petitioner's "alternate proposal," respondent points out that its specifications made no provision for the submission of alternates, but that in any event, petitioner's alternate proposal cannot be considered because it does not conform to the specification that the per diem rate be adjusted to allow for a decrease in the number of pupils requiring transportation.

Respondent challenges petitioner's standing to attack the award of the contract to Kevah Konner, Inc., the lowest bidder, on the grounds that since petitioner is not the second lowest bidder, he could not be awarded the contract even if the contract with Konner were to be found improper. The courts have established authority for respondent's position. In the case of *Home Coal Co., Inc. v. Board of Education, Bayonne*, 12 *N. J. Misc.* 728 (*Sup. Ct.* 1934), the Court said, at page 729:

"* * * In the situation disclosed by the proofs in this case, it does not appear that prosecutor is entitled, if all the claims of illegality in the bid and award of the contract are sustained, to receive the contract over the other seven bidders. *Critchfield v. Jersey City et al.*, 4 *N. J. Mis. R.* 299; 132 *Atl. Rep.* 321; *Jersey Central Power, &c. v. Spring Lake et al.*, 6 *N. J. Mis. R.* 253; 140 *Atl. Rep.* 677."

Also:

"* * * It is well settled that the standing of a prosecutor as an unsuccessful bidder rests upon his right to have his bid accepted. *Atlantic Gas and Water Co. v. Atlantic City et al.*, 73 *N. J. L.* 360; *Home Coal Co., Inc. v. Board of Education, &c.*, 12 *N. J. Mis. R.* 728." *Kingston Bituminous Products et al. v. Trenton*, 134 *N. J. L.* 389, 390 (*Sup. Ct.* 1946)

The Commissioner finds and determines that petitioner is not the second lowest bidder on his base bid, and has failed to conform to specifications in an unsolicited alternate proposal. He is therefore without standing to appeal the award of the transportation contract on which he bid.

It therefore becomes unnecessary for the Commissioner to consider other questions raised in this matter. The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

July 16, 1965.

XXIX

SENDING DISTRICT BOARDS OF EDUCATION MAY RECOVER EXCESS TUITION PAID IN MISTAKE OF LAW

BOARD OF EDUCATION OF THE BOROUGH OF SHREWSBURY, MONMOUTH COUNTY,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,
Respondent.

BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RED BANK, MONMOUTH COUNTY,
Respondent.

For the Board of Education of Shrewsbury, Doremus, Russell, Fasano
and Nicosia (Robert H. Otten, Esq., of Counsel)

For the Board of Education of Eatontown, Arnone and Zager (Abraham
J. Zager, Esq., of Counsel)

For the Respondent, Theodore D. Parsons, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Two actions have been brought by the Boards of Education of the Boroughs of Shrewsbury and Eatontown, respectively, seeking to recover tuition fees allegedly overpaid to the Board of Education of the Borough of Red Bank for the school year 1958-59. By agreement, the two cases have been consolidated for the purpose of the Commissioner's determination.

The facts in this matter have been stipulated. Each of the parties has submitted a brief or memorandum of law.

Except for one major difference, the facts in these cases are the same as those which formed the basis for the Commissioner's decision in *Board of Education of Red Bank v. Board of Education of Shrewsbury Township*, decided January 7, 1963, in which the Board of Education of Little Silver was an intervener.

In 1958-59, Red Bank was the receiving high school district for the petitioners herein, as well as for Shrewsbury Township and Little Silver. On December 12, 1957, all the sending district boards of education received a letter from the Red Bank Board stating that the tuition rate for the school year 1958-59 "was set at \$510.00 per pupil. This cost is less than the actual amount of cost." On July 8, 1958, the Commissioner sent to all boards of education a copy of a State Board rule describing the formula for determining "actual cost" for tuition purposes, and setting forth a procedure by which an "estimated tuition rate" could be established for the following year. On December 16, 1958, Red Bank sent to all its sending districts a letter which referred to the State Board rule, and concluded as follows:

"The Red Bank Board of Education has directed me to notify the Sending Districts that the tentative rate for the School Year 1958-59 shall be set tentatively at \$536.00. Each District in 1958-59 is paying \$510. per pupil. It is imperative to us in Red Bank to know immediately whether the Sending Boards will pay this difference in the coming school year or if the Boards wish to pay half in 1959-60 and the other half in 1960-61. We, in Red Bank, cannot finish our budget until your decision is known. Unless we hear from you to the contrary by December 22nd, we shall assume that the Boards will pay the additional fee in the School Year 1959-60.

"It must be emphasized that the \$536. is an estimated figure and that if the tuition cost is less than \$536.00 a credit or refund will be forthcoming to the Sending Districts for any over-estimate."

On April 4, 1960, after receiving from the County Superintendent the report of the State Department audit which showed actual cost per pupil for tuition purposes for 1958-59 to be \$550.28, the Red Bank Board of Education billed each of its sending districts for the difference between that figure and the \$510.00 rate previously paid, or \$40.28 per pupil. The amounts billed to petitioners herein were \$5,349.18 for the Borough of Shrewsbury and \$4,249.54 for the Borough of Eatontown.

It was at this point that the major factual difference between the instant matter and the case of *Red Bank v. Shrewsbury Township*, *supra*, occurred. The Boards of Education of Shrewsbury Township and Little Silver refused to pay the bills sent to them, and in the action against them by the Red Bank Board of Education the Commissioner determined that the Red Bank Board had no authority under the statutes and State Board rules to charge a higher tuition rate for 1958-59 than the rate of \$510 set by Red Bank on December 10, 1957. In reaching this conclusion, the Commissioner said:

"* * * While the amended rule of the State Board of Education became operative as of July 1, 1958, its effectiveness at that date could by the language of the rule apply only the mathematical formula for computing 'actual cost per pupil' for tuition purposes. The section of the rule having to do with setting a tentative rate (Part D, *supra*) was clearly prospective. It provided a procedure for (a) fixing a tentative rate by agreement between receiving and sending districts not later than January 1 preceding the school year in which the rate would be effective, and so notifying the Commissioner or (b) if no agreement can be reached, basing the tentative rate on the actual cost per pupil for the completed

school year immediately preceding. Clearly, petitioner's action in December 1958, modifying the rate already set for 1958-59 according to revised estimates of costs for *that* year, cannot be regarded as taken in fulfillment of the procedures required in the rule. Nor indeed was it possible for respondent to follow the rule with respect to a tentative rate for 1958-59, since the setting of such a rate would have had to take place prior to the adoption of 1958-59 school budgets, before the amended rule was in existence. On these grounds, the Commissioner finds that petitioner's claim for additional tuition for 1958-59, based upon the provisions of the State Board of Education rule allowing the fixing of a tentative rate, is without merit. * * *

The Boards of Education of Eatontown and the Borough of Shrewsbury, on the other hand, promptly paid the extra tuition to the respondent herein. After the decision of the Commissioner in the Shrewsbury and Little Silver cases, petitioners by letter requested a refund of the extra tuition that they had paid. The request was denied by respondent, upon advice of counsel that no return of tuition can be made under existing statutes. There followed the petitions of appeal, received from the Board of Education of the Borough of Shrewsbury on October 18, 1963, and from the Board of Education of Eatontown on October 25, 1963.

The decision of the Commissioner in the previous case, *Red Bank v. Township of Shrewsbury*, *supra*, establishes by way of collateral estoppel that petitioners herein could not legally be required to pay the additional tuition requested by respondent in April 1960. See also *Board of Education of Cape May v. Board of Education of the Township of Lower, et al.*, decided by the Commissioner January 7, 1963; *Board of Education of Franklin Township v. Board of Education of Clayton*, decided by the Commissioner January 22, 1965.

Had petitioners refused to make the payments, then it is reasonable to presume that they would have been respondents or respondents-interveners along with Shrewsbury Township and Little Silver in the previous unsuccessful effort of the Red Bank Board of Education to secure an order from the Commissioner compelling the payment. It must, therefore, be concluded that petitioners paid as a result of a mistake of law, being aware of the facts but ignorant of their legal effect.

"* * * Although it is sometimes difficult to distinguish between mistake of the law and of fact, a mistake of law occurs where a person is truly acquainted with the existence or nonexistence of facts, but is ignorant of or comes to an erroneous conclusion as to their legal effect. *Ibid.* [70 *C. J. S., Payment*] § 156 (c), p. 366; 40 *Am. Jur., Payment* § 207, p. 857 (1942)." *Flammia v. Maller*, 66 *N. J. Super.* 440, 459 (*App. Div.* 1961)

Petitioners were aware that the extra charges for tuition were made by respondent under the purported authority of the 1958 State Board rule, *supra*, to adjust estimated tuition rates to actual per pupil costs. They did not know, at the time they made the payments, that the State Board rule could not legally be applied to tuition rates fixed for the 1958-59 school year.

The question is thus raised whether petitioners may recover monies paid under mistake of law. The general rule is that in transactions between

private individuals, payments made under mistake of law are not recoverable. 70 *C. J. S.* § 156, p. 362. However, this rule does not apply with equal force to payments by public officers or bodies.

“Although there are decisions to the contrary, the general rule is that payments made by public officers under mistake of law may be recovered back, and that action may be maintained to recover public funds paid without authority, although paid under a mistake of law, regardless of the good faith of the payee.” *Ibid.*, p. 365

The Commissioner is not aware of any decisions of New Jersey courts clearly on this point. Reference to decisions in other jurisdictions leads the Commissioner to the conclusion that public policy requires that the taxpayers be not penalized for the error of their officers.

“* * * Different reasons have been given for the rule that payments by public officers under mistake of law may be recovered (*Woodward, Law of Quasi Contracts*, § 40); but, however stated, the basic reason * * * is that the public officers who made the payments were not dealing with their own property, but with funds belonging to the taxpayers, and held by the public officers as trustees, and that, consequently, the erroneous or wrongful payment constituted a misuse of trust funds and might be recovered as such by their owners.” *Chrysler Light & Power Co. v. City of Belfield*, 224 *N. W.* 871, 876; 63 *A. L. R.* 1337

See also 40 *Am. Jur.* § 209, pp. 858-859.

Even if this were not the case, equitable considerations would require that respondent should not be enriched at the expense of petitioners, who paid the extra tuition charges voluntarily and in good faith, when like charges against two other sending districts have been determined to be unlawful.

Respondent argues that it has not been enriched by petitioners' payments, since they have received the full value of the educational services provided by tuition at actual cost. To permit petitioners to recover the sums sought in their petition, respondent contends, would enrich petitioners at the expense of the taxpayers of Red Bank. Such a contention, the Commissioner finds, denies the facts stipulated in this case. In its letter of December 12, 1957, announcing the tuition at \$510, respondent wrote: “This cost is less than the actual amount of cost.” It thus indicated at the time that for reasons then sufficient to the Board, the receiving district was willing to absorb a portion of the tuition cost. Such a right is implicit in the statutes. *R. S.* 18:14-7 reads in part:

“The boards of education of the districts containing high schools so designated shall determine the tuition rate to be paid by the boards of education of the districts sending pupils thereto, but in no case shall the tuition rate exceed the actual cost per pupil. * * *”

No board is obliged under the statute to charge the full actual cost per pupil, and it is apparent from the letter quoted, *supra*, that the Red Bank Board of Education elected to fix a tuition rate which it knew in advance would be less than actual cost. It ill befits respondent now to complain of a burden it voluntarily assumed.

Finally, respondent argues that if the contested tuition payments are considered in the same category as taxes, then Red Bank would have no right to return them in the absence of a statute prescribing such repayment, citing *Edgewater v. Corn Products Co.*, 136 N.J.L. 664 (E. & A. 1947); *Suburban Development Stores v. East Orange*, 47 N.J. Super. 472 (App. Div. 1957). Respondent offers and the Commissioner can find no basis for considering tuition payments in the same category as taxes.

The Commissioner finds and determines that petitioners are entitled to recover the excess of tuition paid to respondent, in the amount of \$5,349.18 by the Board of Education of the Borough of Shrewsbury and \$4,249.54 by the Board of Education of the Borough of Eatontown. Since the sending-receiving relationship between Eatontown and Red Bank has now been terminated, refund to the Board of Education of the Borough of Eatontown must necessarily be made in cash. With respect to the refund to the Board of Education of the Borough of Shrewsbury, the Commissioner directs that respondent may make a cash refund, or, at its option, credit the Shrewsbury Board in the amount of the refund.

COMMISSIONER OF EDUCATION.

July 19, 1965.

XXX

DISMISSAL OF NON-TENURE JANITOR SUBJECT TO TERMS
OF EMPLOYMENT CONTRACT

JAMES MIGNONE,

Petitioner,

v.

BOARD OF EDUCATION OF WEST ORANGE,
ESSEX COUNTY,

Respondent.

For the Petitioner, Querques, Mintz & Isles
(Daniel E. Isles, Esq., of Counsel)

For the Respondent, Samuel A. Christiano, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner, a janitor under contract of employment with respondent, protests that he was illegally suspended from his position and seeks reinstatement and back pay. Respondent asserts that petitioner breached his contract and enjoys no rights either under the terms of the contract or under the statutes relating to the employment of janitors.

This case is presented to the Commissioner of Education in a stipulation of facts and is argued in briefs of counsel.

Petitioner's employment for the period between July 1, 1961, and June 30, 1962, was by virtue of a contract which states, *inter alia*,

“This employment is for a definite period and terminates on the date stated above. Any employment beyond June 30, 1962 will be for a definite period of time. It is also an expressed condition of your employment under this, or any subsequent term, that either party to this contract may terminate it at any time, on giving thirty days’ notice in writing.”

On or about September 22, 1961, petitioner was arrested on the High School grounds and charged in a complaint with bookmaking and having football lottery tickets in his possession. On October 2, 1961, respondent in a special meeting adopted a resolution suspending petitioner without pay, effective immediately, “until the final determination of the criminal charges now pending against him.” On the following day the secretary of the Board notified petitioner by letter that he had been so suspended. The Essex County Grand Jury returned an indictment against him, charging him with bookmaking. The case never came to trial. On March 20, 1964, upon motion of the Essex County Prosecutor, the Court dismissed the indictment. On June 8, 1964, respondent in a further resolution deeming it in the best interests of the students of the school system that petitioner not be rehired, made permanent the suspension originally imposed in the resolution of October 2, 1961. It is admitted that petitioner did not receive copies of either resolution until about July 15, 1964, and then at the request of his attorney. The petition herein was filed with the Commissioner on August 6, 1964.

It is petitioner’s contention that his suspension was illegal *ab initio* under the provisions of R. S. 18:5–67, which reads as follows:

“Except as provided by section 18:5–66.1 of this Title, no public school janitor in any school district shall be discharged, dismissed or suspended, nor shall his pay or compensation be decreased, except for neglect, misbehavior, or other offense and after a written charge of the cause or causes has been preferred against him, signed by the person or persons making the same, and filed with the secretary of the board of education having control of the school in which the service is being rendered, and after the charge has been examined into and found true in fact after a hearing conducted in accordance with the Tenure Employees Hearing Act. Charges may be filed by any person, whether a member of the school board or not.”

Petitioner urges that since no written charges were ever filed against him and thus were never certified to the Commissioner to be examined into pursuant to the Tenure Employees Hearing Act (R. S. 18:3–23 *et seq.*), his suspension was both procedurally and substantively illegal. He further argues that the contract of employment heretofore described could not deprive him of the protection of R. S. 18:5–67, *supra*, and that the earliest date at which his employment could be terminated except by dismissal under the Tenure Employees Hearing Act would be June 30, 1962, and then only upon 30 days’ notice in writing. Failure to exercise such a right of termination, and continuation of the suspension until June 8, 1964, constitutes a waiver of respondent’s right to claim that the contract was terminated, petitioner contends, and entitles him not only to reinstatement in his position but also to back pay during the period of suspension, including salary increases which he would have received, but mitigated by such earnings as he has received at other employment since October 2, 1961.

Among its defenses to petitioner's charges, respondent raises but does not argue the defense of laches. The Commissioner does not find laches in this case. Petitioner was suspended, and was so notified, "until such time as the criminal charges preferred against you * * * are finally determined." Approximately a month after the dismissal of the indictment against him, petitioner, through counsel, applied for reinstatement. The formal appeal from respondent's second resolution making the suspension permanent followed promptly upon the adoption of the resolution. Since respondent elected by its own terms to condition the suspension upon the "final determination" of the criminal charges, it cannot now claim that petitioner failed to assert his rights with reasonable promptitude after such a determination was reached.

Respondent rests its defense chiefly upon its contention that by accepting a contract of employment for a definite term petitioner waived any tenure rights, and that by his conduct he breached the contract, thereby absolving respondent of any obligation to terminate his employment upon 30 days' notice in writing.

What is sometimes called the Janitors' Tenure Law (*R. S. 18:5-67, supra*) had its origin in *Chapter 44, Laws of 1911, § 2*. While this law underwent minor changes in the general revision of the statutes in 1937, and was materially changed as to the procedures for hearing upon charges by *Chapter 137, Laws of 1960, § 2*, the protection afforded by the statute has remained unchanged from the time of its original adoption. In several cases which have come before the Commissioner involving the application of the statute, it has been invariably held that

"* * * the protection conferred by the * * * law extends during the term of employment of a public school janitor, and accordingly an appointment for an indefinite term would carry with it protection indefinitely." *DeBolt v. Board of Education of Mount Laurel Township, 1932 Supplement to School Law Decisions of 1928, page 930, at 931*

See also *Calverley v. Board of Education of Landis Township, 1938 S. L. D. 706*, affirmed State Board of Education 709; *Lynch v. Board of Education of Irvington, 1938 S. L. D. 703*, affirmed State Board of Education 705; *Ratajczak v. Board of Education of Perth Amboy, 1938 S. L. D. 709*, affirmed State Board of Education 711, affirmed 114 *N. J. L. 577 (Sup. Ct. 1935)*, 116 *N. J. L. 162 (E. & A. 1936)*; *Whitehead v. Board of Education of Morristown, 1949-50 S. L. D. 65*.

The rationale of these decisions was grounded on the decisions of the courts upon *Chapter 155 of the Laws of 1895*, protecting the employment of "honorably discharged union soldiers, sailors, and marines" (now commonly referred to as the Veterans' Tenure Act, *R. S. 38:16-1*). In the cases of *Horan v. Orange, 58 N. J. L. 534 (Sup. Ct. 1896)* and *Hardy v. Orange, 61 N. J. L. 620 (E. & A. 1898)*, the courts found that plaintiffs, both honorably discharged Union soldiers, having accepted appointments for definite terms, had no protection under the law beyond the terms for which they were appointed. In *Hardy, supra*, the court said, at page 622:

"* * * The act of 1895 * * * does not preclude the appointing power from limiting the duration of the incumbency by making the appointment

for a fixed period. The appointment for a specified time to a position in the municipal service whose term is not fixed by law, and the acceptance of such appointment, constitute a contract between the municipality and its appointee, the terms of which are binding upon both of the parties to it. *Chase v. City of Lowell*, 7 Gray 33; *Horan v. Orange*, 29 Vroom 533. And there is nothing in the Act of 1895 which prevents a veteran Union soldier or sailor from making such a contract and being bound by its terms. That statute was passed solely for the benefit of the class of persons named in it, and it is entirely settled that a statute which confers merely a personal privilege or benefit may be waived by the beneficiary. *Quick v. Corlies*, 10 Vroom 11; *Fraleay v. Feather*, 17 *Id.* 429.”

In the instant matter, the contract between petitioner and respondent was for a definite term, ending on June 30, 1962, and providing for earlier termination *at any time*, by either party, upon giving 30 days’ notice in writing. Applying the reasoning of the court in *Hardy v. Orange*, *supra*, and of the Commissioner, State Board of Education, and the courts in the cases cited, the Commissioner holds that the rights of the parties herein are precisely limited by the terms of the contract between them, and governed by R. S. 18:5–67. Certain conclusions necessarily follow:

1. Petitioner has no employment rights extending beyond June 30, 1962. The fact that his suspension continued almost two years beyond that date did not automatically extend his employment pending the final determination of the criminal charges against him. This aspect of petitioner’s claim was similar to that posed by the petitioner in *Zimmerman v. Board of Education of Newark*, 1960-61 S. L. D. 128, affirmed State Board of Education 1961-62 S. L. D. 249, 38 N. J. 65 (*Sup. Ct.* 1962). In that case Zimmerman, a teacher, sought a determination that he had acquired tenure because he was suspended during the third academic year of his employment and the litigation resulting therefrom was not finally disposed of until after the beginning of the next academic year. In its affirmance of the finding below that Zimmerman’s employment ceased at the expiration of his third annual contract, despite the fact that he was in suspension status at that time, the Supreme Court said, at page 75:

“Accordingly, unless Zimmerman by an affirmative act of the Board was re-employed subsequent to June 30, 1955, he cannot be said to have been employed for three consecutive academic years ‘together with employment at the beginning of the next succeeding academic year.’ N. J. S. A. 18:13–16.”

There is nothing in the record herein to indicate affirmative action of respondent to employ petitioner subsequent to June 30, 1962. Whatever employment rights he possessed ceased at that date.

2. Petitioner enjoys the full protection of R. S. 18:5–67 for the term of his contract. Suspension, dismissal, or reduction of salary except for cause and upon a hearing in accordance with the provisions of the statute are prohibited by the terms of the act. No charges were ever preferred against petitioner before respondent, and thus the first procedural step in the sequence to bring about his suspension or dismissal was never accomplished. His suspension was therefore illegal and must be set aside. Had respondent

elected to terminate the contract upon 30 days' notice in writing, it could have done so. See *Hardy v. Orange, supra*. But in choosing to suspend petitioner without the filing and certification of charges, it violated his rights under the law. A similar situation was presented to the Commissioner in *Eggers v. Board of Education of Elizabeth*, 1932 *Supplement to School Law Decisions of 1928*, page 934, affirmed in part, reversed in part State Board of Education 937. Petitioner had been suspended without pay and without charge or hearing in April. In July he was given a hearing on charges filed subsequent to his suspension. With respect to petitioner's claim that he had been improperly suspended, the Commissioner said:

"In the case under consideration there is no denial of the fact that prior to his suspension as janitor without salary on April 9, 1926, no charges were preferred against appellant, and no opportunity to be heard was given him as required by law. The Commissioner is, therefore, of the opinion that such suspension of appellant by the Elizabeth Board of Education on April 9, 1926, was in violation of the section of the School Law above quoted and, therefore illegal."

Having so found, the Commissioner directed that Eggers' salary be paid from April 9, 1926.

3. In the light of his finding that petitioner's suspension was illegal, the Commissioner also finds that the resolution making the suspension permanent is likewise illegal. Respondent urges that by his conduct petitioner breached his contract and thereby lost any rights he may have had under it. Quoting the language of the Commissioner *In the Matter of the Tenure Hearing of Joseph McDonald*, decided October 25, 1963, respondent asserts that a janitor

"* * * like the teacher and all other personnel with whom pupils come in contact, must be an exemplar, and to the extent that he neglects to set standards for children to emulate, he fails to discharge an important aspect of his responsibilities."

The Commissioner reaffirms his statement, but fails to find in the record herein either the filing and certification of charges against petitioner on which the Commissioner could have made a finding as to his conduct, or even any finding by the Board itself that petitioner's conduct was unacceptable. Rather, respondent chose to rest its position upon the determination of criminal charges against petitioner. Then when the charges were dismissed, respondent said, in its resolution of June 8, 1964,

"* * * the Board of Education, *nevertheless*, deems it in the best interest of the students in the school system that said James Mignone not be rehired." (Emphasis added)

It is well established in the law that acquittal in a criminal case does not prevent a departmental trial. *Borough of Park Ridge v. Salimone*, 36 *N. J. Super.* 485, 498 (*App. Div.*, 1955), affirmed 21 *N. J.* 28 (1956). In *DeBellis v. Orange Board of Education*, 1960-61 *S. L. D.* 148, 150, the Commissioner said:

"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."

And at page 151:

"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."

But respondent herein did not elect to seek a hearing on charges at the departmental level. Having relied upon the determination of the courts, it cannot now, in summary fashion, conclude that petitioner had breached his contract.

Having found (1) that petitioner has no employment rights beyond June 30, 1962; (2) that petitioner enjoys full protection of R.S. 18:5-67 for the term of his contract and that his suspension without cause and hearing on October 2, 1961, was illegal; (3) and that in the absence of charges and hearing thereon in accordance with law, respondent had no basis in law or in fact for concluding that petitioner had breached his contract, the Commissioner determines that petitioner was illegally deprived of employment under his contract from October 2, 1961, to June 30, 1962. He directs that petitioner be paid his proper salary for that period, less the sum of \$2,786.70 which upon petitioner's affidavit is the amount he earned at other employment during the period of his illegal suspension.

COMMISSIONER OF EDUCATION.

August 10, 1965.

XXXI

LOWEST RESPONSIBLE BID MUST BE ACCEPTED IF IN COMPLIANCE WITH SPECIFICATIONS

JOHN RUSMAN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF BOGOTA, BERGEN COUNTY,
Respondent.

For the Petitioner, *Pro Se*

For the Respondent, DeLorenzo and Garofalo (William DeLorenzo, Jr.,
Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner was a bidder on two pupil transportation routes advertised by respondent. He was the lowest bidder on one of the routes, and was awarded a contract for that route. He was second lowest bidder on the other route, and protests in this case the award of a contract to the lowest bidder on the grounds that specifications were not available in proper time and that the

lowest bidder did not comply with the specifications. Respondent denies that specifications were not properly available, and asserts that the lowest bid was in substantial compliance with the specifications. The lowest bidder was not made a party to this action.

A hearing was held by the Assistant Commissioner in charge of Controversies and Disputes at the County Administration Building, Hackensack, on November 19, 1964.

Respondent advertised for transportation bids in a newspaper published on July 30, 1964. The advertisement stated that specifications could be obtained at the office of the secretary of the Board of Education, and that bids would be received at 8 p. m. on August 11, 1964. The advertisement also required that each bid must be accompanied by a certified check for 10% of the total amount of the bid, or in the alternative, by a bid bond for the entire amount of the bid. The specifications required that the bid be made on a per diem rate "for every day that class is in session."

Testimony as to the availability of the specifications offered in the advertisement is contradictory. It is admitted by respondent's witnesses that copies of the specifications were not available for distribution on the date the advertisement appeared. Petitioner contends that he was unable to obtain a copy until August 10, when he received a copy in the mail. One of his witnesses, however, testified that he had been told by the Board secretary that the specifications would not be put in the mail until August 10. Respondent's witnesses, on the other hand, testified that copies of the specifications had been mailed to nine prospective bidders, including petitioner, on Friday, July 31. The Commissioner finds, in the face of conflicting testimony, that the weight of the evidence is in the favor of respondent's assertions. He further finds that in any event, petitioner offered no testimony to show that his position as a bidder was different from that of any other bidder or that he suffered any disadvantage *vis-a-vis* his competitors in the bidding because of the time he received his copy of the specifications, whenever it occurred. While the Commissioner would caution boards of education that specifications should be available to bidders as advertised, he does not find in the present case any evidence of unequal treatment of bidders that would warrant an order directing that all bids be rejected and the transportation routes be readvertised for bids, as asked by petitioner.

Petitioner challenges the sufficiency of the lowest bidder's compliance with the specifications on two counts. He asserts, in the first place, that the requirement of a certified check for 10% of the total bid means that the basis for computing the amount of the check must be for a 190-day school year. In the case of the lowest bidder, the check submitted was computed on a 182-day school year. In a resolution awarding the contract to the lowest bidder (R-5), respondent notes that the bidder's check was for 10% of the total bid based on 182 days, the length of the school year in the district to which transportation was to be furnished. It further notes that the State Board of Education *recommends* a bid form which uses a 190-day base, but that State law requires only a 5% deposit. Respondent's resolution waives "the defect" in the lowest bidder's check in the interest of making a substantial saving. Nothing could control the base upon which the percentage would be computed more precisely than the language of the specifications them-

selves: "for every day that class is in session;" that is, the actual number of days in the school calendar for which transportation would be required. In the absence of any other requirement in the specification, the successful bidder was justified in using the school calendar as the basis for his computation. The Commissioner holds that respondent's action is within its discretionary authority to determine that in respect to the amount of the certified check, the lowest bid is in substantial compliance with the specifications.

"* * * Further, a municipal body has a greater function in dealing with irregularities in such matters than merely exercising a ministerial and perfunctory role. It has inherent discretionary power, and what is more, a duty to secure, through competitive bidding, the lowest responsible offer, and to effectuate that accomplishment it may waive minor irregularities." *Bryant Construction Company, Inc. v. Board of Trustees, etc., of Montclair*, 31 N. J. Super. 200, 206 (App. Div. 1954)

See also *Faist v. City of Hoboken*, 72 N. J. Super. 361 (Sup. Ct. 1905); *Appollo Associated, Inc. v. Board of Education of Lakewood*, 1958-59 S. L. D. 93; *Taylor v. Board of Education of Gloucester*, 1955-56 S. L. D. 71, affirmed State Board of Education 75.

The second ground for petitioner's challenge of the sufficiency of the lowest bid is that the bidder failed to describe "the most direct route" for the transportation to be provided. The specifications give the following instructions to bidders:

"All bidders will use the following form of proposal on their letter-head:

'Having read the specifications entitled "Bogota Board of Education Transportation Specifications—1964-1965 School Year." I do hereby propose to transport _____ (name) _____ from his home at _____ (address) _____ to _____ (destination) _____ every day that class is in session from the date of signing of a contract until June 30, 1964 at the rate of \$ _____ per day, over the most direct route _____ and to furnish necessary insurance, bond, and other information required by New Jersey State Law. Enclosed herein please find (certified check in an amount equal to 10% of the bid) or (a bid bond for the entire amount of the bid)'."

Petitioner contends that the bid form, as printed, requires each bidder to describe the route which he would travel between the home of the named pupil and the school destination, and in his bids he provided such a description (R-2). The low bidder did not describe the route, and his failure to do so, petitioner contends, constitutes such a substantial non-compliance with the specifications as to warrant setting aside the award of the contract. Petitioner's secretary testified that she had telephoned the Board secretary and was instructed to "insert the route." (Tr. 56) The Board secretary, on the other hand, denied that she had given any oral instruction to any bidder (Tr. 126), and explained that so far as she could ascertain, the blank space following the words "the most direct route" was the result of a typist's misinterpretation of the hiatus caused by a few words crossed out on the draft copy. (Tr. 129)

Boards of education may, of course, describe and specify a route to be followed. In the instant matter, the transportation to be provided was for one pupil to a special class in Ridgewood. There could be but one "most direct" route in such a circumstance. Since the bid form in all other respects clearly defines by a parenthesized word or other sign the kind of information required in the blank space, the Commissioner concludes that the blank space following the words "the most direct route" is superfluous and without meaning. He holds, therefore, that in this instance no defect in the lowest bid is generated by the absence of a verbal description of "the most direct route."

The Commissioner finds and determines that (1) petitioner has failed to demonstrate that his position as a bidder was prejudiced by the failure of respondent to have copies of the advertised transportation specifications available on the date of the advertisement, or that he was treated differently from other bidders with respect to the availability of such specifications; and (2) the bid of the lowest bidder complied in all essential respects with respondent's specifications.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

August 11, 1965.

XXXII

IN THE MATTER OF THE SPECIAL SCHOOL ELECTION HELD IN THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY.

DECISION OF THE COMMISSIONER OF EDUCATION

The announced results of a special referendum held in the Northern Valley Regional High School District on June 29, 1965, for an authorization to issue bonds of the district for school plant expansion purposes, were as follows:

	<i>At Polls</i>	<i>Absentee</i>	<i>Total</i>
Yes	2011	60	2071
No	2039	11	2050

Pursuant to a letter request from the Demarest Taxpayers Association dated June 30, 1965, the Commissioner of Education directed the Assistant Commissioner in charge of Controversies and Disputes to check the tally of the voting machines and to determine the facts with regard to the irregularities alleged. The recheck and inquiry were held at the voting machine depot of the Bergen County Board of Elections, Carlstadt, on August 5, 1965.

The recheck of the voting machines confirmed the announced results in all respects.

At the inquiry which followed, two questions were raised:

1. Why was there a difference of 6 votes between the sum of the Yes and No votes and the number of persons who voted at polling place #3 in Demarest?

2. Why was the report of the votes at polling place #8 in Old Tappan delayed by an hour and fifteen minutes after the polls were closed?

With regard to the first question, two voting machines were used at polling place #3 in Demarest. During the course of the balloting in mid-afternoon, a malfunction developed in machine #39023, with the result that it could not be operated. A repairman was sent for and pending his arrival voting continued on the second machine. The repairman found that a switch in the electrical circuit had failed and accordingly, he adjusted the machine so that it could be operated manually. The chairman of the election board cast her ballot in lieu of a test ballot and the repairman determined that the machine was functioning properly. Balloting proceeded on this machine by manual operation until the close of the polls. At the conclusion of the election the counters on this machine read: public counter—266; Yes—112; No—148. The fact that the sum of the votes was 260 and the public counter indicated 266 persons had voted gave rise to the question whether the machine had failed to tally the votes of 6 persons.

There is no way to determine the exact reasons for this variance. The most logical assumption is that 6 persons failed to move the voting lever of their choice after entering the machine, or by indecision or lack of understanding, returned the appropriate voting lever to its non-recording position before leaving the machine. Instances such as this are not uncommon in machine elections. The testimony of the voting machine custodians was unequivocal that the machine, except for the need to be operated manually instead of electrically, was in complete working order and that no failure to tally a vote could have occurred if the voter had expressed his choice by means of the appropriate lever.

The Commissioner is convinced that the 6-vote variation was the result of some failure on the part of the voters to express their choice and not a result of a machine malfunction or error of any kind on the part of the machine custodians. Even if it is conceded, however, that there were 6 votes which were not tallied, the result of the referendum cannot be affected thereby as the margin of approval was 21 votes. Even had 6 persons been deprived of their votes, as petitioners conjecture (and there is no proof of any kind that this was so) it would not constitute an irregularity sufficient to invalidate the entire election. The Commissioner finds no basis on this count to question the results of the referendum.

As to the second question, the delay in reporting the results from polling place #8 in Old Tappan was explained by the chairman of that election board. According to her, after the polls closed, the tally of the votes, the number of names on the poll list, and the number of persons voting were in complete accord, but there was one "voting authority" coupon in excess. The election board then rechecked all its work, ultimately concluding that two coupons had, by some mischance, become stuck together. In any case, the result of the election was in no way affected, either by the extra coupon or the delay in reporting. The Commissioner would, in fact, commend the members of the election board for their extra efforts to insure the correctness of their report.

Two questions were raised in the initial letter request of the Demarest Taxpayers Association. Both were directed against the validity of the

absentee ballots. It was explained to those present at this hearing, that the Commissioner of Education exercises no jurisdiction over absentee balloting. As he said *In the Matter of the Recount of Ballots Cast at the Annual School Election in the Borough of Little Ferry, Bergen County, 1960-61 S. L. D. 203*:

“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 at the referendum on June 29, 1965, the proposal authorizing the issuance of bonds of the Northern Valley Regional High School District for purposes of school plant expansion was approved.

COMMISSIONER OF EDUCATION.

August 11, 1965.

XXXIII

BOARD MAY MAKE REASONABLE PLAN FOR ASSIGNMENT
OF PUPILS TO SCHOOLS IN THE DISTRICT

KENNETH ALNOR AND WAYNE ALNOR, MINORS, BY HERBERT ALNOR, JR.,
THEIR PARENT AND NEXT FRIEND; KENNETH BURDZY, KAREN BURDZY
AND KEVIN BURDZY, MINORS, BY BARBARA ANN BURDZY, THEIR PARENT
AND NEXT FRIEND; BRUCE REID AND WAYNE REID, MINORS, BY
LOREN L. REID, THEIR PARENT AND NEXT FRIEND; KAREN
CELESTE, A MINOR, BY NICHOLAS M. CELESTE, HER PARENT
AND NEXT FRIEND; LION'S HEAD LAKE SCHOOL COMMITTEE,
AN UNINCORPORATED ASSOCIATION OF THE STATE OF
NEW JERSEY,

Petitioners,

v.

THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE,
PASSAIC COUNTY,

Respondent.

For the Petitioners, A. Michael Rubin, Esq.

For the Respondent, Salvatore J. Ruggiero, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This action is brought in the name of a group of public school pupils residing in the Lion's Head Lake section of Wayne Township, by their parents and next friends, and by the Lion's Head Lake School Committee, an unincorporated association of the State of New Jersey, to protest a school assignment plan which transferred certain pupils, including petitioners, from Pines Lake School to other schools in the Wayne Township School District. Petitioners charge that the plan as adopted for the 1964-65 school year is an arbitrary, capricious, and unreasonable abuse of respondent's discretionary powers, and that its adoption was motivated by political influence and personal bias, and is characterized by acts of favoritism, bias, deception and deceit. Petitioners ask that the plan be set aside, and that respondent be directed either to adopt an alternative plan submitted by the Lion's Head Lake School Committee or to prepare another plan in consultation with said committee which will eliminate the undesirable features alleged to exist in respondent's plan. Respondent asserts that its plan was adopted after careful study and consideration of several plans, including that of petitioners, and that its action is in all respects a proper exercise of its discretionary authority.

Testimony was heard and exhibits received in evidence at a hearing before the Assistant Commissioner in charge of Controversies and Disputes at the County Administration Building, Paterson, on December 9, 1964, and January 26, 1965.

Wayne Township has experienced rapid growth in recent years. The Commissioner's records show that in the ten school years from 1954-55 to

1963-64 the public school enrollment has grown from 3,839 pupils using 106 classrooms to 9,357 pupils utilizing 347 classrooms. The current rate of enrollment growth, it was testified, is from 800 to 1,000 pupils per year. For several years in the past it has been necessary to have some part of the enrollment on split sessions. The anticipated completion of a new elementary school in September 1964 made it possible to provide full-time schooling for all the pupils of the district. In order to accomplish this result, of primary importance to the school administration, it became necessary to redraw attendance area lines in some instances and to transfer some pupils across area lines in other instances.

In January 1964, school administrative officials began work on a pupil assignment plan for the 1964-65 school year. Their work continued over a five months' period, and on June 11, 1964, respondent adopted as a tentative proposal the plan hereafter referred to as the Administration Plan. This proposal, *inter alia*, required the transfer of the petitioning pupils and others living within a mile of the Pines Lake School to two other schools more than two miles distant from their homes. In the weeks following, objections and protests to the proposed plan were received by respondent from parents in the Lion's Head Lakes section and other sections of the Township. On July 9, 1964, respondent decided to create a Citizens' Classroom Organization Committee to review the Administration Plan and to recommend changes or other plans. This committee, made up of representatives of the several sections of the Township, including two representatives elected by the Lion's Head Lake School Committee, worked intensively over a two-week period, reviewing data and proposals. Among others they reviewed two plans proposed by residents of the Lion's Head Lake section, which they rejected. However, in submitting the report to the Board of Education on July 28, they transmitted the plan proposed by the Lion's Head Lake School Committee for such further consideration as respondent wished to give it. Otherwise, the committee proposed only minor changes in the Administration Plan.

On August 13, 1964, after having received the Citizens' Committee Report, a proposal presented by counsel for petitioners herein, and a report from the administration disapproving the proposal of the Lion's Head Lake School Committee, respondent adopted the Administration Plan with amendments recommended by the Citizens' Committee. Subsequently, after authorizing the school administration to make adjustments where feasible or necessary, respondent adopted the plan as adjusted as its organization plan for the 1964-65 school year.

Petitioners' complaint is grounded essentially in three conditions, which are not denied. First, the transfers ordered for 1964-65 constitute for some of the pupils affected an unreasonable number of transfers in their elementary school careers. Some of the pupils were originally enrolled in Pines Lake School, then transferred to another school, and in 1964-65 transferred to still another school. Respondent does not deny this, but defends the transfers on educational grounds that they regard as more compelling; namely, the values derived from limiting class size and providing full-time rather than part-time schooling where transfers will produce these results. Second, children of the same family are required to attend different elementary schools. Respondent's witnesses testified that this condition is avoided wherever possible, and

pointed to the fact that after the plan became operative, it was possible to transfer one of petitioners' children back to her original school so that the children of that family would attend the same school.

The third objection, which petitioners urged most forcefully, was that the children from Lion's Head Lake who are transferred actually live nearer to the Pines Lake School than do the children of the Pines Lake area, who are not transferred. Petitioners find in this aspect of the plan the workings of political influence, favoritism, and personal bias. No witness could support the charge of improper motive by any statement of fact or incident. Nor could petitioners support by fact their charge that residents of the Pines Lake section were given opportunities not available to petitioners to express a preference as to which school their children should attend. The Commissioner dismisses the charges of impropriety as mere inference unsupported in fact.

As to petitioners' charge that the adoption of the Administration Plan was arbitrary, capricious, and unreasonable, and an abuse of respondent's discretionary authority, the Commissioner finds no support for the charge either in fact or in law.

The responsibility of a local board of education to provide suitable school facilities is stated in *R. S. 18:11-1*, which 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."

The testimony establishes that respondent, through its administrative officers, set about the task of planning the 1964-65 organizational pattern as early as January 1964. The assistant superintendent of schools worked with a committee comprising all the elementary school principals on the development of the plan. At the outset it was anticipated that a new school being built by the district, as well as the new laboratory school of Paterson State College would be available for use in September 1964. Midway in their study, it was learned that the laboratory school would not be ready in September, and replanning became necessary. The objectives of the Board which guided the development of the plan (P-R-4) are educationally sound:

"To provide a minimum of part-time classes on a system-wide basis.

"To maintain a reasonable distribution of school population between the various schools.

"To set district lines with the goal of making schools neighborhood schools wherever possible.

"To locate pupils in schools nearest their homes whenever possible.

"To allow for growth on a grade-level basis to minimize organization of new classes during the operation of the school year."

Following the presentation of the proposed Administration Plan in June 1964, respondent gave consideration to objections and criticism raised by residents and created a Citizens' Committee to review the Plan and make recommendations. Admittedly the time allotted to the Committee was short, but final decision had to be made in time to complete the arrangements for the opening of school. Moreover, although the Citizens' Committee report urged that similar activities in the future be allowed more time, the Committee as such gave no indication that it would have arrived at different results over a longer period of time, save in the further consideration of the Lion's Head Lake Committee's proposal, which it referred to the Board. Respondent considered not only this alternate proposal, but another one submitted by a Lion's Head Lake resident. The entire procedure by respondent demonstrates not only its concern that the plan as adopted be carefully considered, but also that the public be heard and consideration given to its criticisms and proposals. That respondent, in the exercise of its discretion, selected for ultimate adoption a plan submitted by its own administrators, rather than one proposed by a group of citizens, does not constitute abuse of such discretion.

Nor does the selection of the Lion's Head Lake area pupils to be transferred, rather than the pupils from the Pines Lake area, constitute unfair discrimination. The objectives as stated, *supra*, "to set district lines with the goal of making schools neighborhood schools wherever possible," and "to locate pupils in schools nearest their homes whenever possible" could not be achieved as respects the pupils of both the Lion's Head Lake and Pines Lake sections without the sacrifice of all or part of the other three stated objectives. No unlawful discrimination occurs when different categories are established on a rational basis to achieve a desired legislative design or some suitable public purpose.

"* * * But where the propriety of the division into classes or groups is fairly debatable, the local legislative judgment controls. The State and its municipalities holding properly delegated powers may legislate according to 'reasonable classification of the objects of the legislation or of the persons whom it affects.' *New York Rapid Transit Corporation v. City of New York*, 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024 (1938)." *Guill et al. v. Mayor and Council of City of Bayonne*, 21 N. J. 574, 582 (1956)

And at page 583 of the same opinion:

"* * * It suffices if the classification have a rational and just relation either to the fulfillment of the essential legislative design or to some substantial consideration of policy or convenience bearing upon the common welfare."

See also the opinion of the State Board of Education affirming the decision of the Commissioner in *Spruill et al. v. Board of Education of Englewood*, 1963 S. L. D. 141; *Schrenk et al. v. Board of Education of Ridgewood*, 1960-61 S. L. D. 185; *Morean et al. v. Board of Education of Montclair*, 1963 S. L. D. 154, affirmed State Board of Education 160, 42 N. J. 237 (1964).

In the instant matter, the assistant superintendent of schools testified that the children of the Lion's Head Lake section provided in a more

concentrated area the same number of pupils that would be available in the Pines Lake section, and that their transfer to other schools could be accomplished with less reorganization of transportation routes, with fewer new routes, and with no differences in educational benefits. (Tr. 218) The Commissioner holds that the classification thus established are reasonable ones designed to satisfy the policy of respondent to provide full-time schooling for all, and that as such they do not constitute unlawful discrimination against petitioners.

The Commissioner finds and determines that the Administration Plan for assignment of pupils to elementary schools is not arbitrary, capricious, unreasonable or discriminatory, and was adopted as a proper exercise of the discretionary authority of respondent.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

August 27, 1965.

XXXIV

BOARD MAY IN GOOD FAITH ABOLISH POSITION AND REASSIGN INCUMBENT IN ACCORDANCE WITH LAW

WILLIAM A. McDONALD,

Petitioner,

v.

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

For the Petitioner, Francis X. Hayes, Esq.

For the Respondent, John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case appeals from three resolutions of respondent abolishing his position as Director of Health and Physical Education, terminating his services as Director, and assigning him as vice-principal of one of respondent's high schools. He asserts that the duties of his position as Director have been usurped and that the abolition of his position and termination of his services were not in good faith and contrary to law. Respondent answers that its actions were taken with good cause and in good faith.

A hearing was held by the Assistant Commissioner in charge of Controversies and Disputes on January 15, 1965, at the County Administration Building, Jersey City.

Petitioner was appointed a teacher in the Jersey City School system on September 1, 1929. In 1947 he was appointed vice-principal of one of the City's high schools, where he served until January 16, 1961, when he was appointed Director of Health and Physical Education for the school system. The duties of the position of Director were established by rules of the Board

of Education, and consisted of responsibility for the supervision and overall direction of the health, physical education and athletics program of the schools. He was responsible to the superintendent of schools. Working under his direction were an Assistant Director, and two supervisors, one of whom was directly assigned to supervise the athletics program, and the other to supervise the health and physical education program for girls.

When petitioner's position as Director was abolished, the duties of his position were assigned to the superintendent of schools. Petitioner contends, however, that all the duties of his position still exist and are being performed by the Assistant Director and the supervisors who served under him. He points out, and it is admitted by respondent, that the resolution abolishing his position states no reason therefor, and he alleges that the abolition of his position and the termination of his services were not done in good faith and are contrary to law.

The witnesses called by petitioner were those whom respondent would have called, counsel avers, and the testimony of these witnesses on direct and cross-examination establishes that (1) the Assistant Director and supervisors continue to perform the same duties that they performed under petitioner as Director, and no more; and (2) the duties of the Director have been assumed by the superintendent of schools and are largely delegated by him to an assistant superintendent, to whom the Assistant Director and supervisors report. There is no evidence to support petitioner's contention that his duties have been "usurped." The Commissioner finds that the duties as assigned to the superintendent are being performed by him or delegated by him to be performed by a proper person under the superintendent's direction.

The Commissioner further finds that petitioner's charge that the resolutions of abolition, termination, and transfer were not in good faith is unsupported by any evidence. The superintendent testified that respondent was faced with a 5% reduction in its budget for the 1964-65 school year. In the consideration by respondent of ways to reduce expenses, the superintendent suggested, but did not recommend, that one position in the department of health and physical education could be eliminated. (Tr. 53) It was a proper discretionary act of respondent to decide to abolish a position in order to live within the budget approved by the Board of School Estimate. See *Barnes, et al. v. Board of Education of the City of Jersey City*, 1961-62 S. L. D. 122, affirmed in part, reversed in part State Board of Education, 1963 S. L. D. 240, affirmed 85 N. J. Super. 42 (App. Div. 1964), cert. denied 43 N. J. 450 (1964).

Nor does the Commissioner find the assignment of petitioner to a high school vice-principalship contrary to law. Petitioner had occupied such a position prior to his becoming Director of Health and Physical Education. By the operation of law (R. S. 18:13-19) he was entitled to be returned to such position upon the abolition of his position as Director. It is conceded by respondent that by virtue of the same statute, he is placed on a preferred eligible list to become Director of Health and Physical Education should such a position be re-established.

In all essential respects, the Commissioner finds the present case similar to *Lauten v. Board of Education of Jersey City*, 1963 S. L. D. 119, and

governed by the principles enunciated therein. Lauten's position as Director of Industrial Education was abolished by the Board of Education, and the duties of the position were assigned to the superintendent. Lauten's claim was that his duties were in fact being performed by two supervisors who were appointed subsequent to the abolition of his position. Proof was lacking in that case, as here, that the duties being performed were those of petitioner, or that responsibility for performance of petitioner's duties had passed to anyone other than the superintendent, to whom the duties of the abolished position were assigned. The Commissioner found Lauten's claim without merit, as he does petitioner's herein.

The Commissioner finds that the abolition of petitioner's position as Director of Health and Physical Education, the termination of his services in such position, and his assignment to a vice-principalship were acts within the discretionary power of respondent, and not violative of petitioner's rights under the law.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

August 30, 1965.

XXXV

DISCIPLINE POLICY OF SCHOOL WILL BE SUSTAINED
IF REASONABLY APPLIED

GUSTAVE M. WERMUTH AND SYLVIA WERMUTH, AS NATURAL PARENTS AND
GUARDIANS FOR MARSHA WERMUTH, A MINOR UNDER THE AGE OF 16,

Petitioners,

v.

JULIUS C. BERNSTEIN, PRINCIPAL OF LIVINGSTON HIGH SCHOOL, AND
BOARD OF EDUCATION OF THE TOWNSHIP OF LIVINGSTON, ESSEX COUNTY,

Respondents.

For the Petitioners, Lee A. Holley, Esq. and Milton Diamond, Esq.

For the Respondent Bernstein, Jerome C. Eisenberg, Esq.

For the Respondent Board, Peter N. Perretti, Jr., Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners are parents of a pupil in the Livingston High School. They charge that their daughter Marsha, hereinafter referred to as petitioner, was improperly disciplined by the school authorities and unfairly penalized in her school work. They ask the Commissioner of Education to make amends for the injustices alleged to have been suffered by their daughter and to take remedial action to correct the system of discipline employed by the Livingston school authorities. Respondents deny any improper action with respect to punishment of petitioner and maintain that the policies which govern pupil discipline in the schools are soundly conceived and properly administered.

Testimony was heard and documentary evidence received by the Assistant Commissioner in charge of Controversies and Disputes at hearings on September 24, December 3, 4, and 5, 1963, October 13, 1964, and March 9, 1965, in Livingston.

It appears that petitioner had been involved in a number of infractions of school rules during her first year in high school and also at the beginning of the 1962-63 school year when she was in the 10th grade. For these offenses, including truancy both from school and from particular classes, she was at first detained after school and later suspended, once for one day and later for five days.

On or about Tuesday, October 23, 1962, five girls, including petitioner, spent their lunch period in a girls' lavatory room. The lavatory was later discovered to have been marked on its walls and equipment with writings made with a "Magic Marker." The room was ordered locked while the school authorities attempted to learn who had committed the vandalism. On the following Friday and Monday four of the five girls, including petitioner, were interrogated by the principal, a vice-principal, or both, in one of the school offices. They were also taken to the lavatory where they identified the markings each had made.

On Tuesday morning, October 30, all five girls reported to the office of the vice-principal. During the course of the morning they were taken to the girls' lavatory and directed to remove the markings and restore the room to a proper appearance. This they did under the supervision of two janitors. They were then returned to the office of the vice-principal. At some time during the waiting period, petitioner wrote her name in two places on the wall of the office. Also while waiting in the office, both before and after their cleaning chore, requests were made by different ones of the girls for permission to get books from lockers or to get a drink of water, all of which were refused. Shortly before one o'clock they were notified by the vice-principal that three of the girls were suspended from school for two days, the fourth girl for four days, and petitioner for seven.

Petitioner's mother was notified of her suspension by the following letter from the principal:

"Because of Marsha's most recent disciplinary involvement, this time in an extreme case of vandalism, I am suspending her from school until November 12. At that time we can consider the possibility of her readmission.

"To compound her difficulties, Marsha, while in custody in Mr. Hurley's office this morning, wrote her name on the wall in two places, an act of extreme defiance.

"Because of the pattern of behavior which I observe in Marsha, I am bringing her case to the attention of the Superintendent for consideration for study by the school psychologist and the further possibility of permanent separation." (P-3)

After receipt of this notice petitioner's mother expressed her concern to her brother, one of the attorneys in this case. He made inquiries of counsel for the Board of Education, the president of the Board, and the school

superintendent, which culminated in a meeting of petitioner's two attorneys with the Board of Education and the administrative staff on November 5, 1962. At the conclusion of the discussion, the Board supported the action of the administrators and declined to take further action. The subject litigation was then commenced. Subsequently, there were other meetings and discussions, one of which was at the home of the president of the Board, in an attempt to resolve the controversy, but without success. Neither of the parents was present at any of these conferences but they were represented by either or both counsel.

At the conclusion of the period of suspension petitioner returned to school. She had a conference with her guidance counselor, who urged her to consult with each of her teachers to find out what she had missed in class work and how she could repair any loss of competence as a result of her enforced absence. At the end of the first marking period, which occurred shortly thereafter, petitioner's report card showed failing marks in all subjects. It also showed that she had been absent seventeen days during the period for which she was marked. During the second marking period she dropped French II and in the third period stenography was eliminated. At the end of the year she received passing marks in English II, Biology and Typing I, and failing grades in Algebra I and Physical Education.

Petitioner's parents contend that the actions of the school authorities "were arbitrary, capricious, ill-founded and ill-advised, and were not perpetrated in the manner and keeping with the standards of the public school systems of the State of New Jersey and were such as to permanently injure the reputation and character" of petitioner. They charge that she was (1) subjected to a vigorous and biased interrogation by school personnel; (2) accused falsely of writing obscene remarks on the lavatory walls; (3) made to appear as a socially undesirable child to her peers; (4) forced to perform servile acts which included not only removal of writings made by her but the cleaning of fixtures and equipment not marred by her; (5) refused permission to get books, food or water, or visit the lavatory while detained in the school office; (6) and that she, with others, has been the victim of a system of penal discipline adopted by the school administration which produces undesirable results.

Respondents, in their Answer, contend that their actions with reference to this pupil have been reasonable in all respects. They also raise the question of the standing of the parents to bring this appeal because of their refusal "to discuss or communicate with the respondents (otherwise than through counsel) concerning the said Marsha Wermuth, her general welfare, education, conduct and progress in school."

Under New Jersey law, local district boards of education are given broad discretionary powers in the day-to-day operation of the schools. *R. S. 18:7-56* provides in part as follows:

"The board may make, amend and repeal rules, regulations and by-laws, not inconsistent with this Title or with the rules and regulations of the State Board of Education, for its own government, the transaction of business, the government and management of the public schools and the public school property in the district, and for the employment and discharge of principals and teachers."

Pupils in the public schools are required to submit to authority. *R. S. 18:14-50* states:

"Pupils in the public schools shall comply with the regulations established in pursuance of law for the government of such schools, pursue the prescribed course of study, and submit to the authority of the teacher. Continued and willful disobedience, open defiance of the authority of the teacher, or the habitual use of profanity or obscene language shall be good cause for suspension or expulsion of any pupil from school." Defacing school property is specifically dealt with by *R. S. 18:14-51*:

"Any pupil who shaall cut, deface, or otherwise injure any schoolhouse, furniture, fences, outbuildings, or other property of the school district shall be liable to supension and punishment * * *."

The authority of the teacher is also spelled out in *R. S. 18:13-116*, as follows:

"A teacher shall hold every pupil accountable in school for disorderly conduct on the way to or from school, or on the playgrounds of the school, or during recess, and may suspend any pupil from school for good cause, which suspension shall be reported forthwith by the teacher to the board of education. In any school in which more than one teacher is employed the principal alone may suspend a pupil."

Petitioner admits that she was one of the pupils who defaced the school building. It is clear also that she had been guilty of various acts of rebellion and defiance against school authority prior to this incident. Her contention is that the punishment meted out to her was unreasonable and that it penalized her unduly and unfairly in achieving a satisfactory scholastic standing. Through her own experience she attacks the entire philosophy of discipline and the policies by which it is implemented in respondents' schools. She contends that the disciplinary policies and practices adopted by respondents have an effect contrary to the desired result of acceptance of school regulations and authority, and conformity thereto. According to petitioner, respondents' policies tend to foster rebellious and defiant attitudes which incite pupil disobedience and misbehavior. In her own words, "the more I get suspended, the more I'm not going to do what they want me to." Petitioner also claims the policies are administered discriminatorily and that "the group I hang around with always are the ones that are blamed for things even if they didn't do them."

The Commissioner will consider petitioner's complaints in the order enumerated above.

(1) The Commissioner finds no merit in petitioner's claim that she was unfairly or improperly interrogated by the school administrators. Petitioner was guilty of a deliberate and inexcusable act of vandalism of school property. It was the duty of the school authorities to discover the pupils responsible for such an act. This they did and there is no showing that it was done improperly. Handwriting characteristics led them to suspect certain girls who were called to the office and questioned. Petitioner estimates that her interrogation lasted only about ten minutes (Tr. 533) and she admits that she denied involvement (Tr. 533) until she was taken to the lavatory

and confronted with the writings, at which point she admitted that certain ones were hers. Her objection appears to be to the manner in which the questions about her participation were asked, which she describes as being "as though I killed somebody." (Tr. 534) The Commissioner finds nothing in this expression of not unusual childish defensiveness on which to ground a complaint of improper interrogation.

(2 and 3) No evidence was educed that petitioner was accused of writing obscenities. Some of the writings may have been vulgar or coarse and may even have been characterized by some observers as obscene, but there is no accusation that such expressions were perpetrated by this pupil. The writings which were introduced in evidence consisted mostly of the coupling of the first name of a boy and a girl. The president of the Board and the school staff made it plain that their concern was not with what was written but the act of vandalism itself in the form of defacing, markings and writings. Petitioner's complaint is that she has been made to appear as the kind of person who would write obscene comments when in fact she did not. The Commissioner cannot find, however, that the school authorities were responsible in any way for the inferences which may have been drawn by petitioner's peers from her voluntary association with others whose written expressions were in bad taste.

In this case petitioner attempts to make the point that the group in the high school to which she belongs is looked upon with disfavor by the school staff. She identifies her group as "the ones that tease our hair, like to wear short skirts, wear eye make-up, and don't like to wear lip-stick." (Tr. 507) The implication is also made that these pupils are from a lesser socio-economic group in the community. She asserts that "the group I hang around with always are the ones that are blamed for things even if they didn't do them." (Tr. 494) It is her belief that the school personnel discriminate against her and her friends in favor of those who are more conforming in dress and behavior and who come from so-called upper-class homes. The assertion is made on her behalf that the school policies are designed to discourage members of her group from remaining in school and to make dropping-out of school attractive because the school authorities "don't want to be bothered with them" and would prefer to work only with the elite.

The testimony does not support these allegations. There is, in fact, evidence to the contrary. Both petitioner and her mother testified that the guidance counselor had shown interest and had tried in a variety of ways to help. The school social worker had also become involved in petitioner's school adjustment problem and had arranged for the services of a family counseling agency. The president of the Board of Education, with the knowledge and consent of the Board, arranged a meeting in her home to which she invited petitioner's mother and counsel in the hope that co-operative efforts might be developed aimed at improving petitioner's adjustment to school. Counsel appeared at this meeting but neither parent attended.

There is no evidence that these or any other parents have appeared before the Board of Education to protest discriminatory practices, nor did any other parent come forward during the course of these proceedings to support these allegations. The Commissioner finds that the charge of favoritism toward some pupils and discrimination toward others on the part of the school staff is unsupported by the facts.

(4) Requiring petitioner and her companions to remove the markings made by them and to restore the lavatory to a state of cleanliness, was an appropriate and reasonable punishment, in the Commissioner's opinion. Petitioner's position appears to be that she was willing to remove the particular writings she had made but should not have been required to go beyond that to the elimination of marks not of her making or the cleaning of fixtures and equipment not specifically marred by her. To set all five miscreants to the task of restoring the room in its entirety to an acceptable condition was in no way unreasonable or unjust. Such a punishment, because it most appropriately fits the offense, is commonly employed not only in schools but by parents themselves in teaching their children in the home.

(5) On the Tuesday morning following their discovery as those responsible for the defacing of the lavatory, the five girls were kept waiting in the school office to see the principal. Some time in the late morning they were taken to the lavatory and directed to restore it to proper condition. They returned thereafter to the office and again waited until they were seen by the principal and told that they were suspended from school. During these two periods of waiting two of the girls asked permission of the secretary to leave to get books, to get a drink of water, or made similar requests. Permission was denied with the admonition to "sit there and wait for Mr. Hurley." (Tr. 239)

In the Commissioner's judgment this facet of the matter hardly merits serious consideration. The girls themselves admit that there was no emergency, no compelling reason, for any one of them to leave the office. The fact is that they were bored or worried or anxious and wanted to relieve the tension of waiting until their fate was decided. Petitioner wrote her name on the office wall during this period of waiting because she "was mad." (Tr. 480, 481) The principal may have had other pressing matters which demanded his attention before he could deal with these girls and their problem or he may have kept them waiting deliberately in order that they might meditate on their misbehavior. Whatever the reason, the Commissioner finds no basis for questioning either their being forced to wait or the refusal of permission to leave.

(6) The main thrust of petitioner's complaint is against what is characterized as a system of "penal discipline" which counsel has called a "mandatory zero suspension system." It is alleged that respondents imposed the "penalty of suspension for numerous and varied breaches of the most minute detail of school discipline;" that teachers are required to give "mandatory markings of zero" while the pupil is suspended and an arbitrary reduction in the grade for the marking period for a certain number of such zeroes; that the pupil may not "take any action to eradicate the said zeroes or * * * take examinations missed;" that the "penalty imposed zeroes" become a part of the pupil's school record affecting his standing for college, for employment, in the community and among other pupils. Such a system has the effect, petitioner asserts, of "driving and maintaining a wedge between the penalized student and * * * the teaching staff" and results in "encouragement of the disadvantaged or disciplinarily disturbed child to separate himself from the education system, to fall behind irretrievably in his academic work, and to embark further upon a more accentuated course

of unruliness, antisocial behavior, and failure to take a proper place and interest in society.”

The policy with respect to suspension in effect in the high school at the time of this matter as published in respondents’ *Administrative Manual 1962-63* reads as follows:

“The faculty should realize some basic facts about our suspension policy. To begin with there are, essentially, two kinds of suspension.

“(1) for offenses committed against a particular class or group of classes

“(2) for violation of school rules

“When a student is truant or cuts a class, when he is disobedient or disorderly in a particular class and is withdrawn, or when his behavior affects a particular classroom situation, a suspension should be interpreted in terms of his work in the classroom. We have usually interpreted such a suspension as having the weight of reduction of one grade for the marking period. Generally speaking, there seems to be no confusion or difficulty with such cases.

“Offenses against the school, such as smoking, fighting, defiance, vandalism, and such, carry a variable punishment, usually for three days, with heavier penalty in case of repeated offense. In these cases the loss of class time may not be made up, but a student should be allowed the opportunity to come after school to make up for loss in competence. The penalty, in terms of the marking period grade, will, of course, vary in terms of the weight of the work missed, but, again generally speaking, it should amount to about one-tenth the value of daily classroom work. If the student who is suspended should miss a major test or the due date of a major project, Mr. Hurley will make arrangements for make-up on the student’s own time, but the penalty cannot and should not be a total failure in a major unit of work. If you are in doubt about the weight to be placed upon absences because of suspension for a school offense, I would suggest you see Mr. Hurley who will help you to clarify the issues.” (P-1, page 37)

Respondents deny that there is any unusual number of suspensions in the high school or that such a penalty is imposed for minor infractions. They admit that suspended pupils suffer a loss of class time while away but deny the balance of petitioner’s charges.

According to the principal, the policy *supra* was developed by the faculty when it became apparent that wide variation existed in the way individual teachers dealt with pupils who had been suspended. In some instances no penalty was imposed, with the result that pupils regarded suspension as a vacation from school; in others pupils were not only penalized for class time missed but were not permitted to take examinations, complete major projects, or make up and maintain skills and competence necessary to final satisfactory achievement. The subject policy was devised therefore to correct this divergence.

Under this policy, the principal testified, a pupil who is suspended suffers the loss of class time for those days he is absent, which class time cannot be made up. He is permitted, however, and is urged to consult his teachers to learn what he has missed, and how he can regain whatever loss he has sustained through absences in his understanding, skill development, or competence in the subject matter. He may attend such make-up sessions at the close of each school day. He has also the right to make up examinations missed and to complete major projects.

With respect to school records, only the final mark for the term is recorded. There can be no doubt that an amount of absences because of suspension can have an adverse effect on a pupil's final grades, but the Commissioner can find no arbitrary penalty herein which would automatically result in failure despite a pupil's best efforts to rehabilitate himself, as petitioner implies. The testimony shows that petitioner was suspended for at least fifteen days in the first marking period; that she was urged by the guidance counselor on her return to consult her teachers and arrange to make up her work and maintain her competence; that she went to only one teacher for that purpose; that she failed all classes at the end of the first marking period; and that she achieved final satisfactory grades in three of her classes. In fact, during the protracted course of these proceedings, petitioner's record appears to have shown much improvement, and it has come to the Commissioner's notice that she has now successfully completed high school and has been accepted for post-secondary school training in a school of her choice. It appears that the matter is now to some extent moot but because the issue has been raised and litigated to this extent, the Commissioner will make the following observations with regard to suspension and marking policies for the guidance of school authorities.

In the Commissioner's opinion, employment of suspension from school as a routine and regularly used device to inflict punishment for school infractions and maintain disciplinary standards is a misuse of the authority granted by the Legislature under *R. S. 18:13-116* and *18:14-50, supra*. Children of school age have a constitutional right to attend the public schools of the district. *New Jersey State Constitution, Article VIII, Section IV, 1* The power to suspend that right conferred by statute upon the school principal was granted in order that conditions or circumstances calling for immediate and drastic action or relief could be dealt with effectively. Such action is always temporary, affording a period of time and a climate for consideration of the problem and for bringing to bear upon it the most promising means by which it can be resolved. The serious nature of suspension is evident from the Legislature's requirement that it be reported *forthwith* to the board of education. *R. S. 18:13-116, supra*. Suspension, when used for such reasons and purposes, is an essential and valuable instrument in the school administration's disciplinary program. Resort to suspension as an automatic or routine device to control a variety of violations of school regulations suborns its purpose, lessens its effectiveness, and tends to encourage undesirable attitudes and actions with respect to authority and responsible self-conduct. The Commissioner cannot condone the use of suspension in this manner.

The use of marks and grades as deterrents or as punishment is likewise usually ineffective in producing the desired results and is educationally not defensible. Whatever system of marks and grades a school may devise will

have serious inherent limitations at best, and it must not be further handicapped by attempting to serve disciplinary purposes also. Attention is called to the statement of the Office of Secondary Education of the New Jersey State Department of Education in its publication "Secondary School Bulletin," Volume 20, No. 5, dated March 1964 and entitled: "Suspension and Drop-Outs."

This enunciation of a philosophy with respect to suspension and marks should not be interpreted as an erosion of either the authority of the school staff or of the desirability of maintaining good order and high standards of behavior in public schools. An effective school is an orderly one, and to be so it must operate under reasonable rules and regulations for pupil conduct. Unacceptable behavior must be restrained and discouraged and when necessary appropriate deterrents and punishments must be employed for purposes of correction and to insure conformity with desirable standards of conduct. Such results are attained, to the Commissioner's knowledge, by the great majority of school staffs through use of a variety of techniques adapted to the particular pupil and problem without having to resort to frequent suspensions and grade penalties.

The Commissioner notes that the school's discipline policies resulted from a cooperative study by faculty and administration and that changes are made from time to time as need indicates. To the extent that the present policies may have some semi-automatic and grade penalty characteristics, the Commissioner expresses the view that such policies should be subject to review for the reasons stated.

The Commissioner will also instruct the Office of Secondary Education and the Essex County Superintendent of Schools to give particular attention to this part of the school's program upon the occasion of their next visit to the high school for formal approval purposes, and to advise and counsel the administration with respect thereto.

The Commissioner finds that the complaint of one girl, unsupported by other pupils and their parents, cannot in the circumstances of this case, sustain the burden of a general and serious charge of the nature asserted herein. If contrary to the Commissioner's findings, there is substance to these complaints which has not been shown by the evidence presented in this case, it behooves the parents of the community to come forward and make their concerns known to the school administration and the Board of Education, who are entitled to be so informed in order that appropriate action may be taken. Absent such proof, the Commissioner finds no cause for action in this case.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

August 31, 1965.

XXXVI

INTENT TO PUNISH MUST BE ESTABLISHED WHEN
CORPORAL PUNISHMENT IS CHARGED

IN THE MATTER OF THE TENURE HEARING OF PAULINE NICKERSON,
PEAPACK-GLADSTONE, SOMERSET COUNTY

For the Complainant, *Pro Se*

For the Respondent Nickerson, Wesley L. Lance, Esq.

For the Respondent Board, Bradford Seaman, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This matter comes before the Commissioner of Education as a result of a written charge made by the father of a pupil in the Peapack-Gladstone School, alleging that his daughter Gail was slapped in the face by her teacher, Pauline Nickerson, hereinafter referred to as "the teacher." The charge, dated April 8, 1965, was considered by the Peapack-Gladstone Board of Education at a special meeting on April 30, 1965, and certified to the Commissioner by letter dated May 3, 1965. A hearing was then held before the Assistant Commissioner of Education in charge of Controversies and Disputes at the Somerset County Court House on July 7, 1965. Testimony was heard from the parents, the pupil in question and her older sister, two other pupils, the teacher and one of her colleagues, and the present principal and his predecessor.

On Monday, March 29, 1965, at approximately 3 p.m. the second grade class returned to its classroom from a period of physical education. Following regular custom, papers which had been handed in earlier in the day and which the teacher had corrected while the class was out of the room, were returned to the pupils for making corrections where indicated, for completion if not finished, for further instruction, etc. While the group was busy with these tasks, Gail took her paper to the teacher to be checked. According to the child, the teacher reproached her for her errors and she returned to her seat. When she realized she had forgotten her eraser she returned to the table where the teacher was and the teacher slapped her face. Gail then returned to her desk, continued her corrections, which she took to the teacher several times to be checked and when finished, left for home in the company of her older sister who was waiting at the door of the classroom. On the way home the two children were met by their mother who asked about the marks on the younger girl's cheek. The children then informed their mother that the teacher had slapped Gail. The father telephoned the principal that evening and the next morning appeared with Gail and her older sister for a conference with the teacher and the principal. At that meeting Gail displayed some equivocation whether, in fact, the teacher had slapped her or had taken hold of her face. The father accused the teacher of "buttering up" the child in order to confuse her and cause her to change her story.

After the teacher and the children returned to class, the principal summoned three other pupils from the second grade individually. Each of them

gave him and the father an account similar to that of the girl and her sister: that the teacher had upbraided and slapped Gail the previous afternoon. Later on, in the afternoon of the same day, the principal recalled each of these three pupils separately and without any one else present. At that time they said that they had been mistaken and that Gail had not been slapped by the teacher. When questioned why they had changed their account since morning, they said that the teacher had explained to them that she had not slapped Gail but had moved her out of the way and they accepted her explanation.

The teacher denies ever slapping Gail "or any other child." (Tr. 126) She testified that at the time of this incident she was moving books from a corner of the table to a more central position when "unbeknown to me, Gail Hollman came and stood directly in back of me. * * * And when I took this pile of books to swing around and put them down, there was Gail bending over in back of me approximately at the place where I would have put the books. In order not to hit her in any way with those books, * * * I took and held * * * her face with my left hand so she wouldn't go forward into the books or backwards against a chair and a table which was immediately in back of us." In demonstrating this act, the teacher placed her left hand under the chin of the subject with her fingers extending along the right cheek and her thumb on the left cheek.

The teacher produced testimony to show that the father has had an antagonistic and uncooperative attitude toward her, extending back some four years when the older daughter was in her class. She claims that he has blamed her "inadequate teaching" for the older child's difficulties in school and has found fault with her for various matters over which she had no control. She testified that he was difficult to deal with at parent-teacher conferences and that he had made threats to have her dismissed.

Corporal punishment of pupils has been prohibited in New Jersey public schools by statute since 1867. *R. S. 18:19-1* provides in part as follows:

"No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution * * *."

Corporal punishment has been defined by the Commissioner in *Craze v. Allendale Board of Education*, 1938 *S. L. D.* 585, as "any punishment causing or intended to cause bodily pain or suffering." The legal philosophy underlying the proscription of such disciplinary measures is that

"an individual has a right to freedom from bodily harm or any impairment whatever of the physical integrity of his person by the infliction of physical pain by another. There is also a right to freedom from offensive bodily touching by another altho no actual physical harm be done." (*Teacher Liability for Pupil Injuries*, National Education Association of the United States, p. 8)

There is conflict in the testimony with respect to the actual act of physical contact of the teacher and Gail. The teacher asserts she took hold of the child's face to prevent possible injury. The pupils say that Gail was slapped. This was also the testimony of the 12-year-old sister who was waiting for

Gail at the classroom door where she witnessed the incident. As is his wont, the Commissioner has examined the testimony of these children with unusual care because as he has said before

“* * * It is the opinion of the Commissioner that testimony of children, especially of those ten years of age, against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it. The necessities of the situation sometimes make it necessary to use the testimony of school children. If such testimony were not admissible, the children would be at the teacher’s mercy because there is no way to prove certain charges except by the testimony of children.”
Palmer v. Board of Education of Audubon, 1939-49 S. L. D. 183, 188

See also *In the Matter of the Tenure Hearing of David Fulcomer*, 1961-62 S. L. D. 160.

The Commissioner notes that there is also disagreement among the children as to where in the room the incident occurred. Both the teacher and the older sister place it at a “low desk” and table at the front of the room. Gail and another member of her class were sure it occurred at the teacher’s desk.

In any event it is clear that there was physical contact between the teacher’s hand and the face of the child of sufficient force to leave a mark noticeable shortly thereafter to the parent. This touching appeared to the children present to be a physical punishment, occurring as it apparently did at the same time as the teacher was upbraiding the child for her academic errors. No particular trauma appears to have resulted. The child did not cry, she was not apparently hurt, nor does it seem that there was any injury to her feelings. Her rapport with the teacher was not impaired as a result of the incident, as she continued her work and made several more trips to the teacher’s desk for approval of her efforts.

Under these circumstances, the Commissioner cannot find that corporal punishment, in the sense proscribed by the statute, occurred on this occasion. This does not imply that he condones slapping or buffeting of pupils by their teachers in any way. Parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty.

No such drastic action is called for here, nor does the parent request it. His expressed concern is that it be made clear “that a teacher has no right putting her hand on the child’s face, striking it, pushing it or anything,” (Tr. 165) and “we don’t want it to happen again.” (Tr. 166) In the Commissioner’s judgment, petitioner’s purpose has been served as a result of these proceedings, and the defense of this action has already imposed a severe enough penalty upon the teacher for this unfortunate incident.

The matter is dismissed.

ACTING COMMISSIONER OF EDUCATION.

September 2, 1965.

XXXVII

CHANGE OF DESIGNATION OF RECEIVING HIGH SCHOOL
APPROVED WHEN NOT CONTESTED

THE BOARD OF EDUCATION OF THE BOROUGH OF SPRING LAKE,
MONMOUTH COUNTY,

Petitioner,

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

Intervenor,

v.

THE BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
MONMOUTH COUNTY,

Respondent.

ORDER OF THE COMMISSIONER OF EDUCATION

The Board of Education of the Borough of Spring Lake having applied, pursuant to R. S. 18:14-7, to the Commissioner of Education for a change of designation of the receiving district for that portion of its high school pupils heretofore designated to attend Asbury Park High School to attend Manasquan High School thus making Manasquan High School the receiving high school for all secondary pupils of the Borough of Spring Lake; and it appearing that the Board of Education of the Borough of Manasquan has consented to become the designated receiving district for all of the high school pupils of Spring Lake; and it appearing that the Board of Education of the City of Asbury Park has withdrawn its objection to the release of the portion of Spring Lake high school pupils heretofore designated to Asbury Park High School and has notified the Commissioner of Education that it will not contest this application; and for other good cause shown, now therefore

IT IS ORDERED, on this 24th day of September, 1965, that the application of the Board of Education of the Borough of Spring Lake be approved and the Manasquan High School be and hereby is designated to receive all of the high school pupils of the school district of Spring Lake; and

BE IT FURTHER understood that the approval of this application and the issuance of this Order is without prejudice to the rights of the school district of Asbury Park to continue to receive high school pupils from such other school districts as are presently designated to it.

COMMISSIONER OF EDUCATION.

XXXVIII

TENURE MAY NOT BE GRANTED TO PRINCIPAL AS
A PERSONAL BENEFIT

ANGELO SPADORO,

Petitioner,

v.

ROBERT A. COYLE, SUPERINTENDENT OF SCHOOLS, AND BOARD OF EDUCATION
OF THE CITY OF JERSEY CITY, HUDSON COUNTY,

Respondents.

For the Petitioner, Schiff, Cummis & Kent
(Michael B. Tischman, Esq., of Counsel)

For the Respondents, John J. Witkowski, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner in this case was made principal of a high school in Jersey City by a resolution which purported to give him tenure in that position as of the effective date of his appointment. Twelve days later, when a new board of education organized, his appointment was rescinded and he was assigned as a classroom teacher. He asserts that his tenure rights have been violated, and seeks an order reinstating him as principal. Respondents answer that the outright grant of tenure by the predecessor Board of Education was illegal and that it was within its rights to rescind petitioner's appointment as principal.

A hearing was conducted by the Assistant Commissioner in charge of Controversies and Disputes at the County Administration Building, Jersey City, on February 2 and March 26, 1965. Briefs and memoranda were filed by counsel.

It is stipulated that on September 1, 1955, petitioner was appointed a teacher in respondents' schools. On December 7, 1961, he was appointed Assistant to the Superintendent of Schools in charge of Curriculum Development and Instruction. On January 11, 1962, this appointment was rescinded and petitioner was made Assistant to the Superintendent in charge of Curriculum and Instruction in the Secondary Schools. On November 15, 1962, he was appointed Assistant Superintendent of Schools in charge of Curriculum and Instruction in the Secondary Schools.

On June 10, 1964, the Board of Education appointed petitioner principal of Lincoln High School effective June 18, 1964, in a resolution granting him outright tenure as a principal on the effective date of his appointment. On the same date, Dr. Maxim Losi, who had been principal at Lincoln High School for several years, was relieved of his duties and assigned to the office of the Superintendent of Schools. Petitioner assumed his duties on June 18, and served as principal until July 1, when the Board of Education which organized on that date adopted a resolution rescinding petitioner's appointment as principal and returning him to classroom duty as a teacher of

Spanish. On the same day the former vice-principal of Lincoln High School was appointed principal. The petition herein was received on September 4, 1964.

It is petitioner's contention that the grant of outright tenure by the appointing Board of Education was a valid action which cloaks him with the protection of tenure in his position, and that he cannot be removed from that position save by the Commissioner after a hearing on charges filed pursuant to *R. S. 18:13-17* and heard pursuant to the Tenure Employees Hearing Act (*R. S. 18:3-23 et seq.*). It was testified by the former president of the Board of Education that in view of the imminent retirement of Dr. Losi on June 30, 1964, it was essential that a principal be appointed before the school year's end, in order that an efficient transition could be made between the closing school year and the new academic year beginning in September. It was further testified that other possible candidates for the position were considered and that the majority of the Board, without seeking the Superintendent's recommendation, deemed petitioner the best qualified for the position. The former Board president also testified that it was known that the voting majority on the Board would change on July 1, and that the then majority wanted to protect petitioner in the principalship from the very rescission of the appointment which actually occurred. The granting of outright tenure was done upon advice of counsel at that time, pursuant to that portion of *R. S. 18:13-16* which reads:

“* * * Other provisions of this section notwithstanding, any employee under tenure or eligible to obtain tenure pursuant thereto, who is transferred or promoted with his consent to another position covered by this section on or after July 1, 1962, shall not obtain tenure in the new position until (a) after the expiration of a period of employment of 2 consecutive calendar years in the new position unless a shorter period is fixed by the board, or (b) after employment for 2 academic years in the new position together with employment in the new position at the beginning of the next succeeding academic year, or (c) after employment in the new position within a period of any 3 consecutive academic years, for the equivalent of more than 2 academic years; provided that the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such employee, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district, such employee shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.”

It is petitioner's contention that it was within the discretionary power of the Board to fix a shorter period than two consecutive calendar years for the acquisition of tenure in the principalship—in this instance simultaneously with the beginning of employment in the new position.

Respondents argue, on the other hand, that the grant of outright tenure was both illegal and in bad faith. It is urged that the provision in *R. S. 18:13-16*, *supra*, allowing a board of education to fix a shorter period than two consecutive calendar years for the acquisition of tenure was never

intended to authorize the conferring of a personal benefit on an individual employee. Rather, respondents argue that if tenure is to be granted in "a shorter period," it must affect all employees in the same category; for example, all principals. Testimony was offered to show that at the same time petitioner was appointed and given outright tenure, two elementary school principals were appointed but without provision for their acquiring tenure in less than the statutory period of time. (Tr. 32) Further, respondents argue, the resolutions of June 10 evidence bad faith in that the incumbent principal was transferred, without his consent and against his will (R-1), to the office of the Superintendent without any assignment of duties and without any request from the Superintendent for such an assignment to his office (Tr. 23, 126), and petitioner was given tenure for the purpose of putting him out of the reach of the next Board (Tr. 18, 59), thereby depriving the succeeding board or boards of the probationary period during which petitioner's services as principal could be evaluated.

It is the Commissioner's opinion, and he so holds, that respondent Board's action in rescinding petitioner's appointment, with its grant of outright tenure, was a lawful and valid exercise of its discretionary authority and must be sustained. This holding is grounded on his finding that (1) there was no vacancy in the principalship at Lincoln High School to which petitioner could lawfully be appointed effective on June 18, 1964; (2) *R. S. 18:13-16* cannot be construed to authorize a board of education to grant tenure to an individual as a personal benefit; (3) *R. S. 18:13-16* must, in any event, be so construed that "a shorter period" provides a probationary period of service in the new position, however short such a period may be; and (4) that the action of the Board of Education on June 10, 1964, was conceived and accomplished in bad faith and must therefore be set aside. These findings are supported as follows:

(1) There was no vacancy in the principalship at Lincoln High School to which petitioner could lawfully be appointed effective on June 18, 1964. The transfer of Principal Losi to the Superintendent's office without assignment of duties creates an anomaly. A principal is the principal of a school; without a school a principal's identity as such vanishes. In the language of school organization, the principal is the "principal teacher." For example, *R. S. 18:13-116* establishes the authority of the teacher over pupils. In its original form, as adopted in *Chapter 176* of the *Laws* of 1867, *Article V*, § 45, authority was given to the teacher to suspend pupils for misconduct; but in *Chapter 96*, *Laws* of 1900, *Article VIII*, § 112, the law was amended by adding a proviso which still remains essentially in the same form: "that in any school in which more than one teacher shall be employed *the principal alone* shall have the power to suspend a pupil." (Emphasis added) The amended law thus recognized the necessity for a "principal teacher" in the multi-teacher school, a necessity affirmed by the Commissioner and State Board of Education in *Kelly v. Board of Education of Lawnside*, 1938 *S. L. D.* 320, affirmed State Board of Education 322, in which the Commissioner held that the Board could not abolish the principalship, saying:

"The position of principal of a school building is one recognized by what may be termed 'the common law of public schools.' One person in each school is recognized as being in authority in the administration of the educational program. * * *

And elsewhere:

“* * * Under the guise of economy, high salaried teachers protected in their employment by the Teachers’ Tenure of Office Act cannot be removed and their positions filled by those receiving lower salaries *when the positions, in fact, continue to exist* * * *.” (Emphasis added)

In the instant case, Dr. Losi held tenure in a high school principalship. While there is no doubt that by appropriate Board action he could have been transferred to any other secondary school principalship in the district, the Commissioner can find no basis in law for a transfer without his consent to a position or location in which he could not be the principal of any secondary school. The attempt of respondent Board to do so is unlawful, and it follows therefore that there existed no lawful vacancy in the principalship of Lincoln High School on June 18, 1964, to which petitioner could be assigned.

(2) Even assuming that petitioner could lawfully be assigned to the principalship, the granting of tenure to an individual as a personal benefit before the expiration of the statutory probationary period is unlawful. The statute providing tenure to teachers and principals, originally adopted in 1909, has the public interest as its central purpose. In the words of Justice Schettino in *Zimmerman v. Board of Education of Newark*, 30 N.J. 65 (1962), at page 71:

“* * * The objectives are to protect competent and qualified teachers in the security of their positions during good behavior, and to protect them, after they have undergone an adequate probationary period, against removal for unfounded, flimsy, or political reasons.”

While the original grant of tenure status was limited to teachers, principals, and supervising principals, it has been extended by amendment to include superintendents and assistant superintendents, vice-principals and assistant principals, and “such other employees of the public schools as are in positions which require them to hold an appropriate certificate * * *.” R.S. 18:13-16 Other legislation has given tenure to board secretaries and assistant secretaries, school business administrators and business managers (R.S. 18:5-51); to school nurses (R.S. 18:14-64.1a); and to secretarial and clerical employees (R.S. 18:6-27 and 18:7-56). It is to be noted that in each statute, tenure is a status granted to a class or category of employees upon the fulfillment of a precise set of conditions. Cf. *Ahrensfield v. State Board of Education*, 126 N.J.L. 543 (E. & A. 1941); 78 C.J.S. § 180, p. 1014. No individual teacher who has met the statutory requirements may be denied tenure. 78 C.J.S. § 180, p. 1024

The tenure status of the groups or categories named above is in sharp contrast to the tenure of janitors and janitorial employees. (R.S. 18:5-67) It has been established that a janitor’s tenure is a matter of personal privilege (cf. *Hardy v. Orange*, 61 N.J.L. 620 (E. & A. 1898)), and that indeterminate tenure accrues only when a janitor is appointed without definite term. See *Calverley v. Board of Education of Landis Township*, 1938 S.L.D. 706, affirmed State Board of Education 709; *Ratajczak v. Board of Education of Perth Amboy*, 1938 S.L.D. 709, affirmed State Board of Education 711, affirmed 114 N.J.L. 577 (Sup. Ct. 1935), 116 N.J.L. 162 (E. & A. 1936).

Thus a board of education may, in the terms under which the appointment is made, grant tenure to some janitors and not to others, or to one janitor but to no others, or to all janitors or none of them.

The Commissioner has previously expressed his conviction that the Legislature, in permitting the conferring of tenure before the completion of less than the specified probationary period, had no intention to authorize the granting of such tenure to a single member of the category for whom tenure was authorized. In *Rinaldi v. Board of Education of North Bergen*, 1959-60 S. L. D. 109, petitioner contested her dismissal as a clerk. She contended, *inter alia*, that she had acquired tenure by a resolution of a prior board of education purporting to give her tenure in her position after less than two years of employment, where the relevant statute (*R. S. 18:6-27*) provides tenure for clerks after completion of three consecutive calendar years of service "unless a shorter period be fixed by the employing board, body, or person." While the Commissioner decided the matter on other grounds, he expressed this opinion concerning the granting of tenure under circumstances similar to those in the instant case:

"A vice of the resolution of October 10, 1957, is that it confers tenure upon an individual. The public policy of the State is not served when a board of education may arbitrarily and capriciously select an individual to be given tenure. It is the opinion of the Commissioner that it was the intention of the Legislature to delegate to boards of education the power to shorten the period for acquisition of tenure for school employees according to classifications properly established." (*Rinaldi, supra*, at p. 111)

At the same time that tenure was purportedly granted to petitioner, two other principals were appointed who were not given outright tenure. It was testified that the Board of Education had no policy of giving such tenure to the classification of principal. (Tr. 31, 46)

The Commissioner holds that the granting of outright tenure to petitioner contravenes the intent of the Legislature as expressed in *R. S. 18:13-16* by conferring upon petitioner a personal benefit not available to others in his employment category. Respondent Board, therefore, was not bound by any condition of tenure of petitioner as a principal in determining to assign him as a classroom teacher.

(3) On still a third ground the Commissioner sustains the action of respondent Board. Petitioner's purported tenure was granted to become effective as of June 18, 1964, the date on which he assumed the duties of the principalship. In other words, he was not required to serve any probationary period whatsoever before acquiring tenure. Even assuming that the Board of Education had the right to confer tenure upon him as a personal benefit, the Commissioner holds that the provisions of *R. S. 18:13-16* were violated when the "shorter period" fixed by the Board became, in fact, *no* period at all. Prior to the amendment of *R. S. 18:13-16* by *Chapter 231* of the *Laws* of 1962, a certificated employee who was protected by tenure in one position in a school district automatically acquired tenure in any other tenure-protected position to which he was transferred or promoted. See *Noonan and Arnot v. Board of Education of Paterson*, 1938 S. L. D. 331,

affirmed State Board of Education 336; *MacNeal v. Board of Education of Ocean City*, 1938 S. L. D. 374, affirmed State Board of Education 377, affirmed Supreme Court January 18, 1928. The evil resulting from this situation was that a board of education had no opportunity to observe the effectiveness of a tenured employee in his new position, and might well be loath to promote a tenured employee from within the ranks, lest it be later discovered that he was ill-fitted for his new or different responsibilities. The 1962 amendment corrects this evil, by requiring that an employee who is transferred or promoted, with his consent, to another position for which a particular certificate is required, serve a two-year probationary period before acquiring tenure in the new position, "unless a shorter period is fixed by the board." The Commissioner finds in this amendment the clear intent that *some* period of time, however short, must be required in order that the board may evaluate the employee in his new post; he finds nothing to indicate that the Legislature intended to defeat the purpose of the amendment by permitting the probationary period to be eliminated altogether.

Petitioner makes much of the fact that his employment before the adoption of the challenged resolution was that of assistant superintendent and not that of a teacher, and that the pronouncements of the courts, especially of the Supreme Court in *Zimmerman v. Board of Education of Newark*, *supra*, with respect to a probationary period of employment for teachers, do not apply with equal force to one of his experience and background in education. The Commissioner does not regard the difference as valid. While in no way impugning petitioner's ability as an assistant superintendent in charge of curriculum and instruction, or as a teacher, the Commissioner observes that no part of petitioner's professional experience has been that of a principal. His success in either of his former capacities is no guarantee of his success in the difficult and complex duties as an administrator of a large high school. It was to provide opportunity to demonstrate ability in a new and different position, the Commissioner believes, that R. S. 18:13-16 was amended in 1962. The resolution granting petitioner outright tenure clearly negates such an opportunity.

(4) Finally, the resolution purporting to confer outright tenure upon petitioner is an act of bad faith. It has been shown that petitioner had no previous experience as a high school principal upon which the Board of Education could determine his fitness for that position. It was testified that the then majority of the Board wished to protect petitioner in a position which the expected new majority could not readily abolish. His position as an assistant superintendent was vulnerable; budget reductions made it possible to abolish that position. (R. S. 18:13-19) The high school principalship was less vulnerable, since every high school must have a principal. The Commissioner concludes that the sole reason for the grant of outright tenure was to put petitioner beyond the reach of succeeding Boards of Education, which under the normal operation of the Tenure Law would have opportunity to observe petitioner in the position of high school principal and determine his fitness for tenure. Such a purpose, the Commissioner holds, was designed to and does subvert the clear intent of the Tenure Law, and must be deemed to be in bad faith.

In reaching the conclusions set forth herein, the Commissioner has been aware of the Court's expressed opinion that the tenure statutes should be

liberally construed. In *Barnes et al. v. Board of Education of Jersey City*, 85 N. J. Super. 42, 45 (App. Div. 1964), the Court said:

“* * * Moreover, since tenure statutes are intended to secure efficient public service by protecting public employees in their employment, ‘the widest range should be given to the applicability of the law.’ *Sullivan v. McOsker*, 84 N. J. L. 380, 385 (E. & A. 1913).”

Not only was the context of this statement concerned with the breadth of definition of employees covered under the protective cloak of tenure, and so not clearly applicable to the instant matter, but the Commissioner finds nothing in the decisions of the courts that would relax the requirement set forth by Justice Heyer in *Ahrensfield v. State Board of Education*, *supra*, at page 544:

“* * * It is axiomatic that the right of tenure does not come into being until the precise condition laid down in the statute has been met. The contrary would transgress the legislative will.”

It is the Commissioner’s opinion that in granting tenure to an individual as a personal benefit and in requiring no probationary period of service, the resolution of June 10, 1964, does in fact transgress the legislative will.

The Commissioner finds and determines that, for the reasons stated herein, respondent Board of Education acted within its proper authority in rescinding the previous Board’s resolution appointing petitioner as high school principal and conferring tenure upon him as of the effective date of the appointment, and in assigning petitioner to a classroom teaching position to which he held seniority rights pursuant to the provisions of R. S. 18:13-19.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

September 29, 1965.

XXXIX

WHEN CONTESTED ACTION IS REMEDIED, CASE BECOMES MOOT

THEODORE PULLEN AND EDNA PULLEN, HIS WIFE,
Petitioners,

v.

THE BOARD OF EDUCATION OF HAINESPORT TOWNSHIP,
BURLINGTON COUNTY,
Respondent.

For the Petitioners, Hartman & Schlesinger (Francis J. Hartman, Esq.,
of Counsel)

For the Respondent, Parker, McCay & Criscuolo (Albert McCay, Esq.,
of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this matter are the parents of a child, Debra Pullen, who cannot be properly accommodated through the school facilities usually provided for children in the public schools. Their petition seeks an order requiring respondent to provide a suitable educational program for Debra.

By agreement at a conference of counsel held by the Assistant Commissioner of Education in charge of Controversies and Disputes on April 22, 1965, respondent undertook psychiatric and pediatric evaluation of the child. At the subsequent hearing of this matter by the Assistant Commissioner at the office of the Burlington County Superintendent of Schools in Mount Holly on September 9, 1965, the results of these evaluations were entered in evidence (R-1, R-2, R-3). Petitioners put in evidence additional psychiatric and psychological evaluations which they had obtained (P-1, P-2).

On the basis of the studies made at its direction, respondent has arranged for the admission of Debra to the James Fenimore Cooper School in Burlington, and agrees to maintain her in that school and provide for her transportation to and from school during the current year. Counsel therefore stipulates that the matter has become moot and requires no further determination by the Commissioner. (Tr. 6)

The petition is therefore dismissed as moot.

COMMISSIONER OF EDUCATION.

October 18, 1965.

XL

BOARD RULES GOVERN EMPLOYMENT OF TEACHER
WITHOUT CONTRACT

MILTON CHAREN,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,

Respondent.

For the Petitioner, Clapp & Eisenberg (Robert P. Gorman, Esq., of Counsel)

For the Respondent, Joseph G. Barbieri, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

This appeal is brought by a former teacher in the Elizabeth Public Schools who contends that his dismissal was without cause and unlawfully accomplished. He seeks an order directing respondent to pay his salary from the time of his alleged improper dismissal until the end of the school year. Respondent denies any improper action with respect to petitioner or any further obligation to him.

Testimony was heard and exhibits received at a hearing before the Assistant Commissioner of Education in charge of Controversies and Disputes, on November 24, 1964, at the office of the Union County Superintendent of Schools in Elizabeth. Briefs of counsel were submitted subsequently.

Most of the facts in this case are undisputed. Petitioner was employed by respondent at its meeting on February 14, 1963, as a teacher at a salary

of \$5,950. He was assigned to the Thomas Edison Vocational and Technical High School to teach classes in radio and television. Petitioner had no professional preparation for teaching or any prior experience as a teacher. He had been employed for the past eleven years as a technician, salesman, and sales manager of a store in the electronics field.

Approximately six weeks after petitioner began teaching, he received a letter dated March 29, 1963 (P-6) from the superintendent of schools which offered him employment for the 1963-64 school year, the pertinent excerpts of which read:

"The Board of Education on April 11, 1963 will officially approve your appointment as teacher for the school year ending June 30, 1964 in the public schools, Elizabeth, New Jersey, at the salary of \$6,313., in accordance with the provisions of the salary guide—subject to correction of errors.

"The members of the Committee of the Whole of the Board of Education have authorized me to send this notification to you at this time, to be officially confirmed at their meeting on April 11, 1963.

* * * * *

"Please sign and return one copy of this notice on or before April 8, 1963, if you are planning to return next September."

Petitioner accepted the appointment by signing and returning a copy of the letter as required. At its next regular meeting on April 11, 1963, the Board of Education adopted the following resolution (P-3) by a vote of 6 to 0:

"* * * That instructional employees be appointed for 1963-64 as listed in the 'Instructional Employees List' filed in the office of the Secretary-Business Manager of the Board of Education, in accordance with the provisions of the salary guide for 1963-64, subject to the correction of errors."

It is not disputed that petitioner was included in this action.

Petitioner completed the 1962-63 school year and returned to teach in September 1963. On September 27, following an incident of pupil misbehavior in petitioner's classroom, he was advised by the principal of the school to seek other employment no later than October 31. Subsequently, the principal recommended to the superintendent that petitioner be dismissed. On October 31 petitioner received a letter (P-7) from the superintendent which said in part:

"This is to inform you that your services as a teacher in the Elizabeth Public Schools are terminated as of 3:00 p.m. today, October 31, 1963. This is in keeping with the conference that Mr. Starks and Mr. Poniatowski had with you that this would be a possible date of conclusion of your services. * * *"

The appeal herein was filed on May 18, 1964.

Petitioner contends that the letter dated March 29, 1963 (P-6, *supra*) constituted a valid and binding contract for employment for the full 1963-64

school year. He says that in it the authorized agent of the Board made an offer which he accepted and it was therefore binding on both parties. He argues that *R. S. 18:13-7*, which sets forth requirements for teachers' contracts in the absence of local board rules, has no application here because respondent has enacted such rules and this matter, therefore, falls within the scope of *R. S. 18:13-5*. Petitioner further contends that because he did not leave voluntarily, he was, in fact, dismissed and such a dismissal places a burden of showing good cause upon respondent which it has failed to carry. Whatever deficiencies there may have been in his performance as a teacher he ascribes to respondent's failure to provide him with adequate facilities, equipment, supplies, and teaching materials. In any event, he argues that his employment could not have been terminated without official action of the Board of Education and therefore the effective date of dismissal and cessation of compensation could not have occurred prior to the meeting of the Board on November 14, 1963.

Respondent counters by saying that there was no offer and acceptance of a formal contract but only an illusory contract or at best a promise of payment for services adequately rendered to be terminated upon the will of either party. It contends that the communications from the superintendent (P-5 and P-6) were merely notices indicating that petitioner was to be employed in a probationary status and that he would be compensated while performance was adequate. Respondent admits that petitioner was discharged but asserts that good cause existed and was clearly shown. It denies that it is under any obligation, financial or otherwise, to petitioner.

The statutes, or portions thereof, pertinent to these contentions are:

R. S. 18:13-5

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

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

R. S. 18:13-7

"No contract between a board of education which has not made rules and regulations under section 18:13-5 of this Title and a teacher shall be valid unless the same be in writing, in triplicate, signed by the president and district clerk or secretary of the board of education and by the teacher.

"The contract shall specify the date when the teacher shall begin teaching, the kind and grade of certificate held by the teacher, the date when the certificate will expire, the salary, and such other matters as may be necessary to a full and complete understanding. * * *

"The commissioner shall prepare and distribute blanks for contracts between boards of education and teachers.

“One copy of each contract shall be filed with the board of education, one copy with the teacher, and one with the county or city superintendent.”

R. S. 18:6-19

“The board shall make, amend, and repeal rules, regulations and by-laws not inconsistent with this Title or with the rules and regulations of the state board of education, for its own government, for the transaction of business and for the government and management of the public schools and the public school property in the district, and also for the employment and discharge of principals and teachers.”

Three issues are raised by this matter, which the Commissioner decides as follows:

(1) Whether the letter from the superintendent was or was not a valid contract, it is clear that an employment agreement was reduced to writing, was accepted by petitioner and was ratified by respondent. It is also clear from Exhibit P-2 that the Board of Education had adopted rules and regulations governing the employment of personnel which would meet the requirements of *R. S. 18:13-5 supra*. The following excerpts from P-2 entitled “Rules of Government of the Board of Education of Elizabeth, New Jersey,” are pertinent:

“Rule 14

Employees

Sec. 1. All employees of the Board, except when otherwise provided by the Board or law shall be employed during the pleasure of the Board. * * *

“Rule 22

Employment and Salaries of Teachers
and Principals

* * * Sec. 2. Appointments to employment in the public schools, transfers, promotions, or salaries of teachers, shall be upon the recommendation of the Superintendent of Schools to the Committee on Educational Management or the Committee of the Whole, and shall require the recommendation of such Committee or Committees to the Board of Education. The Board shall make appointments, promotions, transfers, or changes in personnel as may be deemed best for the interests of the schools. * * *

“Rule 23

Terms of New Appointments

Sec. 1. Directors, Assistant Directors, Coordinators, Supervisors, Principals, Vice-Principals, Special Teachers, and Teachers appointed, shall be engaged temporarily only and during the pleasure of the Board until such time as they receive permanent appointment or acquire tenure of office as provided for by the State School Law. Before entering upon their duties they shall notify the Superintendent of acceptance of such temporary appointment, which may be terminated at the pleasure of the

Board except as prescribed by the State Law fixing tenure after three years' consecutive service. Every appointment shall be subject to and upon the conditions provided for by this rule and shall become effective upon acceptance received by the Superintendent."

The Commissioner finds that the procedure followed in the employment of petitioner was in conformance with the above rules of respondent. The rules further provide that continued service, short of tenure, is "at the pleasure of the Board" and there is no provision for notice of any kind in the event of termination. The Commissioner must find, therefore, that respondent's action in terminating petitioner's services without notice and before the term of the employment had run its course was an exercise of discretion which it could make.

(2) Petitioner's contention that he could be dismissed only on a showing of good cause runs counter to respondent's rule of termination "at the pleasure of the Board." Assuming *arguendo* that petitioner is correct, the Commissioner still finds ample evidence in the record in support of the dismissal. The kinds of problems in control of pupils, classroom management, and teaching techniques which the testimony reveals were apparent during petitioner's incumbency are typical of an untrained, inept teacher. Indeed the very questions petitioner raised to his superiors, his inability to make effective use of the help and suggestions of his supervisors, and the defenses he offered for his deficiencies indicate his lack of comprehension of the art and science of teaching. Thus, he seeks to excuse his unsatisfactory performance on a lack of supplies, equipment, and teaching materials. This is a cliché of the inadequate teacher. While the Commissioner does not depreciate the value and necessity of having appropriate and adequate facilities and materials in order to facilitate the teaching-learning process, he cannot find in this case that there was such lack as to be responsible for petitioner's ineffectual performance. That petitioner was unable to cope with the problems which beset him as a beginning teacher and to overcome them should not be held as a discredit to him, in the Commissioner's opinion, in view of his total lack of preparation for a professional assignment calling for a high degree of training and skill. Nor can respondent be found at fault for terminating petitioner's services when, after a reasonable time of trial, he was unable to perform satisfactorily.

(3) The testimony discloses that petitioner was notified by the superintendent on October 31 that his service as a teacher was concluded at the close of that school day. At the next meeting of the Board of Education, on November 14, the superintendent's action was ratified by a vote of 8 to 0. Petitioner cites *R. S. 18:6-20*, which provides that

"No * * * teacher shall be * * * dismissed * * * except by a majority vote of the whole number of members of the board."

in support of his claim to compensation for the period from October 31 when he was notified by the superintendent to November 14 when the Board took official action on the dismissal.

There can be no question that the power to employ and dismiss teachers lies solely with the board of education. In this case it is evident from the testimony that the Board was kept informed of petitioner's status and of

the superintendent's notification of October 31 and concurred in it. At the first opportunity, the next meeting of the Board, it was ratified as of the date it occurred. Further, it must be recognized that R. S. 18:6-42 gives authority to the superintendent to suspend a teacher. Such suspension is to be reported to the board forthwith and "[t]he board, by a majority vote of all of its members, shall take such action for the restoration or removal of such * * * teacher as it shall deem proper * * *." Had petitioner been restored to duty he would have had a claim to missed compensation but in this case his suspension was made permanent. No service was rendered by him in this two-week period and the Board acted promptly to resolve any question of his status. Under these circumstances the Commissioner finds no entitlement to salary for the interval between October 31 and November 14.

The Commissioner finds and determines (1) that under the agreement between petitioner and respondent and in the rules of the Elizabeth Board of Education, petitioner's services for the 1963-64 school year were subject to termination at the discretion of the Board; (2) that, whether required or not, sufficient cause for the termination of petitioner's employment has been shown; and (3) that petitioner is not entitled to salary for the period between the involuntary cessation of his services and the formal action of the respondent Board of Education at its next meeting.

The petition is dismissed.

COMMISSIONER OF EDUCATION.

October 27, 1965.

XLI

BOARD MAY ESTABLISH REASONABLE CONDITIONS FOR READMISSION OF EXCLUDED PUPIL

IN THE MATTER OF "G"

For the Petitioner, Anthony Luongo, Esq.

For the Respondents, Frederick C. Waldron, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioner is a junior high school pupil who contends, through his father, that he was suspended from school summarily without cause by the Glen Ridge school authorities. He prays for reinstatement in the public schools without loss of academic standing and removal from the school records of all reference to the matters on which the suspension was based. Respondents deny that there was anything improper in their actions and say that petitioner has been at all times eligible for reinstatement upon compliance with the conditions laid down at the time of the suspension.

Petitioner was suspended from school on March 27, 1963. The appeal to the Commissioner was filed on August 15, 1963, and respondents submitted their Answer on August 23. At a conference of counsel held September 4, 1963, service of interrogatories was agreed upon and a hearing was set down for October 3 and 4. By letter of counsel dated September 5, peti-

tioner requested reinstatement in school *pendente lite*. This request was denied by Order of the Commissioner on September 13, 1963.

Following the service of interrogatories and their return by respondents, petitioner requested indefinite postponement of the hearing set for October 3, pending more complete discovery. Petitioner objected specifically to respondents' refusal to furnish the names of all of the school pupils who had any knowledge of the matter and claimed the right to take depositions and examine the school records of any child named in this dispute. Both counsel submitted memorandums of law addressed to this issue. Following this exchange a second conference of counsel was held on February 14, 1964, at which time the matter of further discovery was discussed. Possible bases for settlement of the controversy were also expressed and counsel agreed to explore these possibilities with their principals.

Attempts to reach a basis for settlement proved fruitless and on July 9, 1964, the Commissioner issued a formal Order granting petitioner's counsel the right (1) to copies of certain letters in possession of respondent; (2) to examine petitioner's school records; (3) to disclosure of the names of witnesses to be called by respondent; and (4) to take depositions of the witnesses named under conditions arranged by the Commissioner. The Order denied petitioner's request for disclosure of the names of pupils who were not to be called as witnesses and the right to take depositions and examine the records of such pupils. Petitioner then appealed to Superior Court, Appellate Division, on August 10, 1964, from this denial by the Commissioner. The Court denied petitioner's request on that same date and issued a formal Order to that effect on October 7, 1964. The Commissioner also denied a second request by petitioner for reinstatement *pendente lite* by letter dated October 23, 1964.

Depositions of the two pupils named by respondent as potential witnesses were taken by counsel for petitioner on November 23, 1964. Several other pupils were named in the answers they gave to counsel's questions. Petitioner then renewed his application to compel depositions of additional pupils, which request the Commissioner denied by an Order dated February 4, 1965. Leave to appeal from the Commissioner's Order was again sought by petitioner to Superior Court, Appellate Division, on March 8, 1965, and again denied. Petitioner then requested that the matter be set down for hearing during the school summer vacation period in order that witnesses necessary to his presentation, not available during the school term, could be present. Hearings were accordingly scheduled for June 21 and 22, 1965, and were held on those dates before the Assistant Commissioner in charge of Controversies and Disputes, at the office of the Essex County Superintendent of Schools, East Orange. Failure to finish the examination of witnesses on those days required continuance to July 19, 20 and 28 and the matter was finally concluded with oral argument on August 2, 1965.

Prior to moving to Glen Ridge, petitioner was enrolled in the East Orange public schools. In December 1960 he transferred to Glen Ridge and was enrolled in the sixth grade in Central School. He was advanced to the seventh grade at the end of the year and beginning September 1961, attended the Glen Ridge High School, a six-year school housing grades 7 to 12. He continued at the Glen Ridge High School during that year and the next, when

he was in eighth grade, until March 27, 1963, when he was suspended from school. He was at that time 14 years of age, having been born January 3, 1949. Since March 27, 1963, he has not attended any school but has been tutored at home at his parents' expense.

The culminating incidents which provoked petitioner's suspension occurred in late February and early March, 1963. As a result of reports and accusations from several parents and pupils, the superintendent of schools summoned petitioner to his office on March 7, 1963, and questioned him in the presence of the school psychologist. During this interrogation petitioner broke down and cried and admitted having performed an unnatural sex act with another boy after school on February 25, 1963, in a park section of the community known as the "Glen." At a conference that afternoon with the mother, the superintendent advised psychiatric evaluation and treatment for petitioner. On March 27, 1963, following a conference with both parents on the previous day, the principal of the high school suspended petitioner and notified his parents by letter. (P-1)

"I regret that I must suspend your son, _____, from school until all the provisions of the March 26 conference in Mr. Martin's office are met."

The conditions laid down for readmission were that petitioner have psychiatric evaluation and treatment by a qualified physician chosen by the parents and that "the psychiatrist would have to submit a written report to us on _____ and indicate continuing psychiatric interviews and that our psychologist would have to be able to get those reports and work with _____ and their psychiatrist." (Tr. 818, 819) The superintendent testified that prior to the principal's action he discussed the possibility of suspension with the Board of Education at a "workshop meeting" on March 23. Subsequently, at the next regular meeting of the Board he reported the actual suspension and the Board took formal action to sustain it. Petitioner remained out of school for the balance of the 1962-63 school year and was tutored at home by teachers employed by his parents. During this time attempts were made to resolve the problem by two separate attorneys, and at least one conference of the parties was held. Apparently, from time to time, the matter appeared capable of settlement, but this desirable result was never finally achieved. The petition herein was then filed on August 15, 1963, by a third attorney who also made efforts to arrive at settlement during the course of the litigation, without avail.

Petitioner contends that he was accused by the superintendent of having had homosexual relations with another boy and that the charge is untrue, unfounded, vicious, malicious, false and unsupported. He claims that he was subjected to such unfair and unreasonable questioning by the superintendent that he broke under the strain and consented to the accusation solely in order to be left unharassed and permitted to return to his classroom. He asserts further that he was questioned without being given the opportunity of having his parents or counsel present and that he was not advised of his rights in this respect. Petitioner argues that there was no basis for the charge or the questioning and no proofs have been produced in support thereof. Nor has respondent made any provision for continued schooling. The result, petitioner avers, has been irreparable injury to his physical and

mental health, to his standing and position as a student, and to his good name and reputation in the community. He asks that he be reinstated immediately in the proper grade in the Glen Ridge High School, that the school records be expunged of all references to this matter, and that the superintendent of schools be censured for this abuse of discretion and authority.

Respondents deny that any charges were made or that there was any improper conduct with respect to petitioner. They allege that there were a number of incidents and occurrences during petitioner's three years in the Glen Ridge schools which, culminating in the events of February and March 1963, made it necessary to exclude petitioner both for his own good and for the welfare of the student body. They disclaim any harsh, unfair, or abusive treatment and assert that their only consideration and motivation was concern for petitioner and a desire to effect a satisfactory school adjustment for him.

Much testimony was offered to refute any charge or assumption that petitioner is a homosexual or has such tendencies. The Commissioner recognizes no such issue in this case and finds no need or reason to make any finding with respect to this question. The issue here presented is whether the action to suspend petitioner was warranted and properly taken within the scope of respondents' discretionary authority or whether it was so unreasonable, arbitrary, or unfounded as to require the Commissioner's intervention.

Turning to the particular allegations of this petition recited *supra*, the Commissioner finds no evidence that the superintendent or any other member of the school staff ever accused petitioner of being homosexual or of performing an overt homosexual act. This charge was expressly denied by all school employees who testified, each of whom stated that he had not, could not and would not characterize petitioner by any such label.

Nor does the Commissioner find that the interrogation of petitioner by the superintendent was in any way improper. The evidence does not support petitioner's contention that he was grilled for an hour and a half, during which time he was asked a single question repeatedly. Far more credible is the testimony of others that petitioner was absent from his classroom for not more than 40 minutes; that the interview was in no way a "third degree" but was conducted in a calm and understanding manner and in a spirit of helpfulness; and that petitioner's major concern was directed toward keeping his parents from being informed. Confronted with a problem such as that herein, the superintendent had no choice other than to investigate it completely and to take whatever measures were appropriate to his findings.

Petitioner's contention that he was questioned without being given the opportunity to have his parents or counsel present and of not being advised of his rights to do so is without merit. Pupils in the public schools are required to submit to the authority of the teacher, *R. S. 18:14-50*, and the teacher stands, in a limited sense at least, *in loco parentis*. *Gebhart v. Hopewell Township Board of Education*, 1938 S.L.D. 570; *Gaincott v. Davis*, 281 Mich. 515; *Eastman v. Williams*, 207 A. 2d 146 (Sup. Ct., Vt. 1965) To hold that a teacher or school administrator, before questioning a pupil in his charge with respect to matters affecting the good order of

the school, must make an offer to have the parents or counsel present, would place insuperable obstacles in the way of proper administration of pupil control and discipline. The Commissioner finds no fault in the interrogation of petitioner, either in the manner in which it was conducted or in the fact that the parents were not present. It should be noted that there was no delay in notifying the parents and, in fact, a conference with the mother was held the same day.

Petitioner further contends that no proofs have been advanced to support the charges and that the suspension was without cause. As stated *ante*, the Commissioner recognizes no charge herein with respect to petitioner and agrees that no proofs have been produced to establish an alleged charge. He cannot agree, however, that there was no basis for suspension of petitioner. The record clearly establishes the fact that problems of pupil behavior centered upon petitioner. Whether these difficulties were caused deliberately by him or were no fault of his, begs the question. It is clear that the same kinds of problems existed in the school petitioner attended before moving to Glen Ridge and that psychiatric evaluation was recommended there before he left. During his stay in respondents' schools the matter became more acute despite the efforts of the school staff. There is ample evidence that there was unrest and disorder in the student body with respect to petitioner; that his relationship with his classmates was not normal, wholesome, or desirable; that numerous conferences were held among members of the school staff and with the parents, focused upon helping petitioner to make a satisfactory school adjustment; that he was under continual study and counseling by the school psychologist and had been recommended several times for psychiatric evaluation; and that, finally, accusations of grossly unacceptable behavior by petitioner were made by pupils and later by parents and admitted, at least as to one instance, by petitioner. Under these circumstances, the Commissioner agrees that exclusion pending appropriate professional consultation and recommendation was a proper course for the school administration to take, not only for petitioner's own welfare but for the welfare of the school. It cannot be doubted that petitioner's continued presence in school, under the conditions which had arisen, whether his fault or not, and absent appropriate medical counsel, was prejudicial to the good order of the school. The Commissioner concludes that respondents' action to exclude petitioner until competent professional advice was available was proper and reasonable under the circumstances herein.

Unhappily, petitioner's parents vacillated with respect to seeking appropriate medical counsel, agreeing at one time to do so only to reject the proposal later. No application was made for home instruction by the parents under R. S. 18:14-71.40 nor was any offer of such made by respondents. In this both parties erred. Under the circumstances of exclusion for medical evaluation, and later pending the outcome of this litigation, petitioner was eligible for and should have been receiving home instruction in lieu of the program in the classroom, provided by the local school district. According to the testimony the school has been supplying books and materials for instruction but the teaching has been done by persons employed by the parents. The record is clear that the parents did not apply for home instruction, but it is not certain whether they were unaware of petitioner's

eligibility for such a program or whether they elected to pursue their own remedy at their expense.

Since it is concluded that respondents' actions herein were not improper or unreasonable, there remains the question of petitioner's status.

Respondents suspended petitioner pending referral to a psychiatrist and receipt of a report and recommendation. It appears that such has now been accomplished. Petitioner has been seen by two psychiatrists, both of whom testified. The first saw him on one occasion only and referred him to the second, to whom he has made three visits. Both practitioners testified that they found no problem or condition that would interfere with petitioner's continuance in school and recommend his reinstatement. While he will not dispute the report and recommendation of these two qualified physicians, the Commissioner notes that both based their findings on a history and statement of the problem furnished solely by petitioner and his parents. No information was obtained nor conference held with any member of the school staff, the family doctor, or any one outside the family. Under these circumstances the Commissioner believes that the adequacy of the psychiatrists' evaluation is open to challenge. Nevertheless, he will hold that the conditions set down for petitioner's reinstatement have been met in that psychiatric evaluation and recommendation have been obtained. On the basis of that recommendation petitioner is entitled to be reinstated in respondents' school system and the Commissioner so directs. The Commissioner also recommends that steps be taken to provide adequate consultation between petitioner's psychiatrist and the appropriate members of the school staff in order to facilitate and insure petitioner's satisfactory adjustment to school.

The question of grade placement is, of course, a matter that lies within the professional judgment of the school authorities, who will employ whatever procedures are appropriate to determine petitioner's scholastic status and proper placement for his optimum progress. With respect to petitioner's request that the school records be expunged of all reference to this matter, the Commissioner notes that certain information such as petitioner's attendance record cannot be removed. He is certain that the school authorities will record in permanent form only such data as are essential and will keep such other information related to the events herein as may be necessary to retain temporarily, under restricted and confidential conditions.

In summary the Commissioner finds and determines (1) that there existed more than sufficient basis for the exclusion of petitioner pending competent medical counsel; (2) that the treatment accorded petitioner by the superintendent and members of the school staff was in no way improper; (3) that on the recommendation of his psychiatrist, petitioner is entitled to immediate reinstatement in school; and (4) that psychiatric consultation involving the appropriate members of the school staff be arranged and continued pending petitioner's satisfactory adjustment to school.

COMMISSIONER OF EDUCATION.

November 9, 1965.

XI.II

BOARD MAY ADOPT REASONABLE PLAN TO CREATE
PUPIL ATTENDANCE AREAS

RUDOLPH SCOLPINO, LUCINDA SCOLPINO AND MARK SCOLPINO, MINORS,
BY THEIR FATHER AND NEXT FRIEND, ROBERT SCOLPINO; BRENDA
CAPASSO, FRED MATCHULAT, PETER ZELENY, JAMES COCHRANE, DON
STRICKLIN, BERTRAM SUBIN AND WILLIAM G. DISANZA,
Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondent.

For the Petitioners, Milton T. Lasher, Esq.

For the Respondent, Parisi, Evers & Greenfield
(Irving C. Evers, Esq., of Counsel)

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners in this case are pupils of the Teaneck Public Schools and citizens and taxpayers in the Township of Teaneck. They seek to have set aside a resolution of respondent establishing one of the schools of the district as a sixth-grade school for all the pupils of that grade in the district and dispersing pupils in grades one through five who previously would have attended that school to the several other elementary schools in Teaneck. They seek also to have the Commissioner set aside and declare void all contracts and commitments made pursuant to the challenged resolution.

A hearing in this matter was held by the Assistant Commissioner of Education in Charge of Controversies and Disputes on May 11, 1965, at the County Administration Building, Hackensack. In addition to the testimony and exhibits offered at the hearing, the depositions of the superintendent of schools, the secretary of the Board of Education, a present and a former member of the Board of Education, and five secretarial and clerical employees of the school district were received in evidence. Briefs were submitted by counsel.

The testimony establishes that for several years, at least as far back as 1961, when the present superintendent of schools took office, the administrative staff and Board of Education have studied the most efficient and effective organization of the schools of the district. Included in this study was the recognition that the Negro enrollment of the schools tended to be concentrated in the Washington Irving and Bryant Schools. In November 1963, the Board made a progress report in which it described three possible plans of school organization, one of which proposed to convert Bryant School into a school for all sixth-grade pupils in Teaneck, and to distribute the Bryant School pupils in grades one to five among the other seven elementary schools of the district on the basis of available space. This report and proposal were published in December 1963, in a publication of respondent entitled

“People-Planning-Programs” (P-R-3). While the report acknowledged that such a plan would present “a complex transportation problem,” no cost figures for transportation were developed at that time, and no provision for such transportation costs was made in the budget prepared for the 1964-65 school year. A further report by the superintendent to the Board with reference to this plan, made in December, contained estimates of the number of pupils involved, but made no estimate of transportation costs. At public meetings, including the required hearing on the proposed budget, no information or projection of additional transportation costs were offered. When the twice-defeated budget was referred to the Commissioner of Education for his determination as provided by *R. S. 18:7-83*, it was testified, no need for additional transportation funds was indicated to the Commissioner. The Commissioner further notes that in his hearing on the budget, it was testified that no money was provided in the budget for the transportation of any students other than what had been in the previous year’s budget. The Commissioner further observes that the “free balance,” or unappropriated surplus of \$204,097.41 anticipated for the end of the 1963-64 school year was of the same order of magnitude that had existed annually for the previous ten years.

School organization plans continued to be discussed in the months between the annual school district election in February 1964, and the following May. On or about May 9 the president of the Board of Education requested the superintendent of schools to prepare a resolution calling for the establishment of the Bryant School sixth-grade school plan, and to prepare also the data and procedures supporting and implementing the plan. The draft of the resolution and accompanying information were presented to the Board at an executive session on May 12, the day prior to the regular meeting of the Board. No advance notice of the consideration of the draft was given to the members of the Board generally. The draft was discussed at considerable length, and certain suggestions for revisions were made to be incorporated by the superintendent in a final draft to be presented for action at the regular meeting on the following night. It was testified that the mayor and several members of the township council waited upon the Board near the end of the executive session on May 12, recommending that the Board should take no action at that time. It was also testified by two members of the Board that prior to May 12 they had no knowledge of the majority’s intention to adopt the Bryant School sixth-grade plan.

The final draft of the resolution, together with recommendations for implementing the plan, was presented at the regular meeting of respondent Board of Education on May 13 and was adopted. Supporting data provided with the resolution indicated that the additional transportation costs to implement the plan were estimated at \$44,469.00. A contract for transportation was ultimately signed in the amount of \$47,946.00.

The testimony of the first-named petitioner in this matter, a parent of two children who were transferred from Bryant School to Hawthorne School, was to the effect that the transfer deprived his children of the right to come home for lunch and that their classmates were not their playmates, with a resulting problem of educational adjustment.

Petitioners in this matter attack both the central sixth-grade plan and the manner of its adoption. They charge that the pupils transferred in

accordance with the plan are deprived of a constitutional and statutory right to attend a school convenient of access and are unlawfully discriminated against and denied the equal protection of law enjoyed by pupils attending schools in their own neighborhood. Petitioners further charge that the execution of the pupil assignment policy approved to implement respondent's plan will necessitate the expenditure of large sums of money not provided in the 1964-65 school budget. Finally, petitioners charge, the resolution of May 13 is an arbitrary action, an abuse of discretion, and a breach of faith by respondent in that (1) it represents a secret action prepared in advance by the majority members of the Board and not made known to the minority members until May 12 and to the public until May 13; (2) the majority members of the Board had, prior to the resolution of May 13, represented to the public that no plan was contemplated which would incur transportation costs beyond those required under the previously existing transportation policy; (3) the plan as adopted is a scheme to circumvent the will of the majority of the electorate and to divert tax moneys from educational to non-educational purposes; and (4) the expenditures to be incurred under the challenged plan are not authorized by statute and have not been approved by the voters of the district.

The substance of the case before the Commissioner was presented to the courts in *Schultz et al. v. Board of Education of Teaneck*, 86 N. J. Super. 29 (App. Div. 1964), affirmed 45 N. J. 2 (1965), in which plaintiffs sought injunctive relief against the central sixth-grade plan herein considered. The Superior Court, Law Division, dismissed the complaint, on defendants' motion to strike, on the grounds that plaintiffs had failed to exhaust their administrative remedies. In affirming the order of dismissal, the Appellate Division considered and disposed of the constitutional issues raised herein, holding that these issues had been resolved by the Supreme Court in *Morean v. Board of Education of Montclair*, 42 N. J. 237 (1964). The Court said, at 86 N. J. Super. 40:

"We perceive no merit in the argument that the present case presents an unresolved constitutional question involving the equal protection clause. The development of the law in the area of school segregation, whether intentional or *de facto*, has moved logically forward from *Brown v. Board of Education*, 349 U. S. 294, 75 S. Ct. 753, 99 L. Ed. 1083 (1955). We need go no further than *Morean v. Board of Education of Montclair*, from which we have quoted above, 42 N. J., at pages 242-244, and the cases therein cited, for an answer to plaintiffs' contention. * * * the plan adopted by the board can well be firmly based solely upon its obligation under the school laws and upon Art. I, par. 5, of the 1947 *Constitution of New Jersey* ('No person shall * * * be segregated in the * * * public schools, because of religious principles, race, color, ancestry or national origin'), wholly apart from any requirement under the Fourteenth Amendment to the United States Constitution.

* * * * *

"In short, we find that the constitutional question as to whether a local board of education may adopt a reasonable plan to resolve a *de facto* segregation situation, has already been decided contrary to plaintiffs' position."

The Court went on to say, at page 42:

“As indicated, the constitutional principles here involved have already been decided, and all that the Commissioner need do is to apply them. The question he will resolve is whether the Teaneck plan is a reasonable one in light of our statutes and the Federal and State Constitutions—exactly the approach he used in the *Morean* case.”

As to plaintiffs’ other complaints, which are those raised by petitioners herein, the Court spoke as follows:

At page 45:

“Plaintiffs also argue that their complaint involves an interpretation of the School Budget Law, *N. J. S. A. 18:7–77.1 et seq.*, and the School Transportation Act, *N. J. S. A. 18:14–8 et seq.* These laws certainly call for the exercise and application of the Commissioner’s expertise, for they involve interpretation of our school laws under *R. S. 18:3–14.*”

At page 46:

“* * * In our view, the Commissioner is most qualified to determine whether a budget meets the requirements of those regulations [of the State Board of Education], rather than the court.

“* * * Here, again, the Commissioner is better qualified by reason of his expertise to pass upon the transportation questions raised by this case, and to do so before the matter is further considered by the courts.”

And at page 47:

“If there is anything to plaintiff’s claim of ‘secret action’ by members of the board or their alleged ‘breach of trust,’ the Commissioner can well dispose of these factual questions when he deals with the other matters here raised.”

The first issue thus raised for the Commissioner’s determination is whether the central sixth-grade plan, as approved in respondent’s resolution of May 13, 1964, is “a reasonable one in light of our statutes and the Federal and State Constitutions.” The statutes establish the responsibility of the school district to provide suitable school facilities. *R. S. 18:11–1* states:

“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.”

The Resolution challenged herein embodies the following characteristics (P-R-1):

“RESOLVED, That beginning September 1, 1964, the Teaneck Board of Education initiate a program entitled ‘Improvement of Educational Opportunity’ to include the following—

1. Initiate a Central School for all sixth grade pupils in the Bryant School.
2. Increase the Washington Irving School district to include those children living within the area bounded by the west side of Teaneck Road, including both sides of State Street and Terrace Circle on the north, and west to the Railroad tracks, thence southerly to West Englewood Avenue.
3. Assign all pupils in the Bryant School district in grades one through five to the several elementary schools of the Township in accordance with the 'Assignment Policy'.
4. Maintain a continuous evaluation of the new program and give a comprehensive review two years hence with a view to taking any further action which may appear necessary at that time."

The plan is implemented by an assignment policy which provides (1) that children assigned to a school will remain in that school through fifth grade; (2) that assignments will be made within limits of reasonable class size; (3) that children of the same family will be assigned to the same school; and (4) that assignment will be made on an objective basis (alphabetically). The plan further provides for the extension of the food service plan to provide dry lunches and milk in all schools, and for transportation of children living more than 1.2 miles from school.

While it is acknowledged that the adoption of the plan gained both its initiation and its impetus from the desire of respondent to reduce the racial imbalance existing and increasing at both the Bryant and Washington Irving Schools, respondent also assesses other advantages which in its estimation will accrue from educational opportunities available in a central sixth grade which would not exist in eight separated sixth grades, as well as more efficient use of classroom space and the reduction in class size on a systemwide basis.

The Commissioner finds that respondent's plan was adopted after careful consideration over a long period of time, that it embodies educational objectives which in the exercise of its discretion respondent finds to be valid and more readily or more economically attainable than under the previous organizational plan, and that it

"* * * appears clearly to have been in sympathetic furtherance of the letter and spirit of the [fourteenth] amendment and in fair fulfillment of the high educational functions entrusted to it by law." *Morean, supra*, at page 244

In short, the Commissioner finds the plan "a reasonable one in light of our statutes and the Federal and State Constitutions."

There remain petitioners' charges that the manner of adoption of respondent's plan was arbitrary, an abuse of discretion, and a breach of faith. The Commissioner finds no basis in fact or in law to sustain these charges. The challenged plan, along with others had been studied over a long period of time. On November 13, 1963, the Board of Education made public a report of its study, in which it described this plan and two others as "possibilities." (P-R-3) It was discussed at public meetings prior to the annual school

election in February 1964, and it continued to be discussed at Board meetings after new members had been elected to the Board. Finally, in early May, it was put in draft form by the superintendent at the request of the Board president, and the draft was considered at length at an executive session of the Board on May 12. There a majority of the members approved it for presentation at the regular meeting on the following night. Except that not all members were informed that the draft would be prepared and considered on May 12, there was nothing in the procedure which was not fully known to all members, nor is there anything to indicate that full discussion and consideration by either Board members or the public generally was in any way denied or even suppressed. The absence of this item from the agenda circulated among Board members prior to the meeting cannot be regarded as a bar to its consideration, if the Board so desires. Nor can the unofficial approval of the draft of the plan be considered an unlawful procedure.

“* * * We know of no prohibition against members of a public body holding a closed conference where no official action is taken. *Cf. Wolf v. Zoning Board of Adjustment*, 79 N. J. Super. 546 (App. Div. 1963). What is prohibited by our laws is the taking of official action at other than a public meeting. *N. J. S. A. 10:4-1 et seq.* The complaint does not charge a violation of that law.” *Schultz v. Board of Education of Teaneck*, 86 N. J. Super. 29, 46 (App. Div. 1964)

Nor can respondent's determination to use available surplus funds for transportation and other costs arising from the implementation of its plan be found to be either an abuse of discretion or a breach of faith. It is not denied that none of these costs were included in the budget prepared for the school year 1964-65. It would have been impossible to include such costs, since there was no plan in existence, and at least three plans, each involving different cost elements, were being considered as “possibilities.” (P-R-3) It was testified, however, that uncommitted balances existed in the budget adequate to sustain the additional costs when the plan was finally adopted. (Deposition of Harold Burdge, at page 38) The budget prepared and submitted to the voters at the school district election in February 1964 was the Board's estimate of the amounts needed to be raised by taxation for the operation of the public schools in Teaneck in the 1964-65 school year. The people voted on an amount to be raised by taxation, but not on specific line items of the budget. There is nothing in the testimony to warrant a conclusion that the rejection of the budget at both the first and second elections was designed to reject a plan not even in existence. Nor is the Board restricted, a budget once having been approved (as it was, in this case, by the Commissioner), to the expenditure of funds in accordance with the line items in the budget. Once the appropriation has been made, the disbursement and distribution of the money lie within the discretionary authority of the Board. *Townsend v. State Board of Education*, 88 N. J. L. 97, 101 (Sup. Ct. 1915) In *Townsend*, the Court went on to say:

“We are not unmindful of the damage that may be done by a dishonest school board in estimating moneys for one item, and when the appropriation is received, diverting them to other purposes.”

But the Commissioner finds here no evidence of such a breach of faith as the Court found reason to fear. To say that there has been a breach of faith is to say that respondent has acted dishonestly.

“* * * And to say governing officials must act in good faith is merely equivalent to saying that they must act honestly.” *Peter’s Garage, Inc. v. City of Burlington*, 121 N. J. L. 523, 527 (Sup. Ct. 1939)

The record herein is devoid of any evidence of concealment or deception concerning its plans by the Board in the preparation and discussion of the budget. On the contrary, the Board continued to discuss the challenged plan and other plans after the organization meeting of the new Board in February. It is clear to the Commissioner that in deciding to make a plan effective for the school year 1964-65, respondent acted with due deliberation, and no sooner than would be reasonable to allow sufficient time for working out the details of reassignment, advertising for transportation bids, and preparing the school buildings for their changed function under the plan.

The Courts, the State Board of Education, and the Commissioner have established in a series of decisions the clear duty of boards of education to adopt reasonable plans to eliminate inequalities of educational opportunity arising out of *de facto* segregation of races. See *Fisher v. Board of Education of Orange*, 1963 S. L. D. 123, *Spruill v. Board of Education of Englewood*, 1963 S. L. D. 141, affirmed State Board of Education 147; *Booker v. Board of Education of Plainfield*, 1963 S. L. D. 136, affirmed State Board of Education, February 5, 1964, reversed and remanded 45 N. J. 161 (1965); *Morean v. Board of Education of Montclair*, 1963 S. L. D. 154, affirmed State Board of Education 160, affirmed 42 N. J. 237 (1964); *Alston v. Board of Education of Union*, decided by the Commissioner, April 6, 1964, affirmed State Board of Education, July 8, 1964. In *Booker v. Board of Education of Plainfield*, *supra*, the Supreme Court said at page 170:

“In a society such as ours, it is not enough that the 3 R’s are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discriminations bear fruition strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. * * *”

In the instant matter, respondent has recognized its responsibility by selecting a plan which the Commissioner finds to be a reasonable one, adopted at a regular Board meeting after careful consideration and full discussion, and supported by funds available to be spent for this purpose.

The petition is accordingly dismissed.

COMMISSIONER OF EDUCATION.

November 24, 1965.

XLIII

BOARD MAY NOT MAKE AGREEMENT WITH
TEACHER ORGANIZATION WHICH RESTRICTS
ITS STATUTORY POWERS AND DUTIES

PERTH AMBOY TEACHERS' ASSOCIATION, ALICE O'BRIEN, INDIVIDUALLY AND
AS PRESIDENT OF THE PERTH AMBOY TEACHERS' ASSOCIATION; EDITH
KRAHE, INDIVIDUALLY AND AS VICE-PRESIDENT OF THE PERTH AMBOY
TEACHERS' ASSOCIATION; CAROL DAISEY, INDIVIDUALLY AND AS
TREASURER OF THE PERTH AMBOY TEACHERS' ASSOCIATION;
FLORENCE L. SEGUINE, INDIVIDUALLY AND AS SECRE-
TARY OF THE PERTH AMBOY TEACHERS' ASSOCIA-
TION; BETTYE MALOY, HELEN WARGA, EDNA
R. TRUEMAN, KENNETH CAMPBELL, JR.,
SARA SOKOLOW, JOSEPH A. GERA-
CHTY, VERONICA V. SMITH, PA-
TRICIA ANN REILLY, HELEN
CUPRZINSKI, AND MARIE
R. McCORMICK,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY
IN THE COUNTY OF MIDDLESEX,

Respondent.

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

For the Respondent, Alfred D. Antonio, Esq.

DECISION OF THE COMMISSIONER OF EDUCATION

Petitioners are members of the Perth Amboy Teachers' Association (hereinafter referred to as the Association), an organization comprised of professional staff employees in the Perth Amboy Public Schools. They contend that their employer, respondent Board of Education, has entered into an agreement with a rival organization, the Perth Amboy Teachers' Union, Local 857 AFL-CIO (hereinafter referred to as the Union), which is beyond the scope of its authority and *ultra vires* and which should therefore be set aside.

A hearing of this appeal was held on November 26, 1965, at the State Department of Education, Trenton, before the Assistant Commissioner in charge of Controversies and Disputes. The president of the Association, petitioners herein, called as the only witness, gave testimony with respect to the membership and function of her group, its current relations with respondent, and the fact of a recent strike by members of the Perth Amboy Teachers' Union. Three exhibits were received: (1) a letter addressed to the witness from the chairman of the New Jersey State Board of Mediation enclosing a notice of election; (2) a copy of an Interlocutory Injunction issued by Judge David D. Furman on November 12, 1965, restraining the Union from strike actions or activities; and (3) a copy of an agreement

between respondent and the Union dated November 12, 1965. The remainder of the hearing was given over to argument of counsel. A brief of petitioner was received. Counsel for respondent waived filing of a brief.

Also made part of the record was a telegram received from counsel for the Union. After receipt of this Petition of Appeal, the Commissioner directed that the Union be invited to participate in the matter. On November 19, 1965, the Assistant Commissioner of Education extended such an invitation by telephone conversation with the president of the Union. Letter confirmation addressed to the Union president was sent the same day as follows:

"This will confirm my telephone conversation with you on the above date.

"The Commissioner of Education has received a Petition of Appeal filed by certain named teachers in the Perth Amboy School District against the Board of Education of Perth Amboy, copy of which I enclose for your information. Although the group which you represent is not named as a party, it appears to the Commissioner that your organization may have an interest in this litigation and may wish to participate in it. Hearing of the appeal has been set down for Friday, November 26 at 10 a.m. at the State Department of Education, 225 West State Street, Trenton. I shall appreciate knowing from you as soon as possible whether your organization wishes to enter an appearance and be heard on this appeal. If your answer is in the affirmative, may I also request that you advise me of the name and address of the attorney or other person who will represent you."

On November 26, prior to the opening of the hearing, the following telegram, addressed to the Assistant Commissioner, was received and subsequently read into the record:

"As counsel for and on behalf of Perth Amboy Teachers' Union, Local 857 AFL-CIO, this is in answer to your letter of November 19 addressed to Mr. Robert Bates, President of Local 857. The subject matter of the Petition of Appeal does not raise any issue cognizable by the Commissioner of Education of falling within the legal ambits of the jurisdiction of the Commission. All rights of individual teachers have been zealously safeguarded in the agreement between the Board of Education of Perth Amboy and Local 857. The leadership of this Local, with the interests of the students paramount, achieved the end of a long curtailment of work; any interference with the arrangements under which teaching was resumed will, undoubtedly, result in a more aggravated struggle which may be beyond the power of the leadership of the Union to control. Furthermore, arrangements have been made with another and co-equal department of the State, to wit, the New Jersey State Board of Mediation to handle the mechanics of the settlement adjustment. Your Department has no right or jurisdiction to interfere with, censor, or in any way supervise the activities of the Department of Labor. The arrangements under which the dispute in Perth Amboy was settled is identical with similar arrangements presently obtained in many school districts of this State and which have not been interfered with by your office. Since we do not believe that your office has any jurisdiction to entertain the Petition of Appeal or to make any determinations with respect thereto

or to interfere with the peaceable arrangements made between the Perth Amboy Board of Education and Local 857, we must respectfully decline to participate in any form in this proceeding.

SAMUEL L. ROTHBARD.”

Although the Commissioner considers the Union to have been a proper party to these proceedings and would have preferred to have had the benefit of its position and argument, he does not consider it to be a party whose participation is essential. Nor does he find any validity in the Union’s claim that the matter herein is not within the jurisdiction of the Commissioner of Education. This appeal is grounded on actions of a local school district board of education with respect to its employees. There can be no question that such an action falls within the ambit of the Department of Education. Counsel for both parties herein acknowledge the jurisdiction of the Commissioner to hear this appeal.

The comprehensive nature not only of the Commissioner’s jurisdiction but his responsibility also to review the actions of local boards of education, has been stressed by the Supreme Court of New Jersey in several opinions. *Laba v. Newark Board of Education*, 23 N.J. 364 (1957); *In re Masiello*, 25 N.J. 590 (1958); and *Booker v. Plainfield Board of Education*, 45 N.J. 161 (1965) in which the Court said in referring to R. S. 18:3-14:

“That statute provides that the Commissioner shall decide all controversies and disputes under the school laws or under the rules and regulations of the State Board or of the Commissioner. Its comprehensive terms were liberally implemented by the opinions of this Court in *Laba v. Newark Board of Education*, 23 N.J. 364, 381-384 (1957) and *In re Masiello*, 25 N.J. 590, 605-607 (1958), where we stressed the Commissioner’s overriding responsibility ‘to make certain that the terms and policies of the School Laws are being faithfully effectuated.’”

See also *Kopera v. West Orange Board of Education*, 60 N.J. Super. 288 (App. Div. 1960), involving a wage dispute between a teacher and a board of education in which the Court, referring to the *Masiello* case *supra*, said:

“* * * 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.’”

Boards of education are given broad discretionary powers for the day-to-day operation of the public schools. They may make rules and regulations for the employment, compensation and dismissal of personnel (R. S. 18:6-27), for the proper conduct, equipment and maintenance of the public schools (R. S. 18:6-17), and for their own government and the transaction of business (R. S. 18:6-19). They may grant leaves of absence with or without pay or extended sick leave to employees as they see fit (R. S. 18:13-23.12); may fix the initial compensation of teachers and grant or withhold salary increments (R. S. 18:13-13.4, 18:13-13.7); and may retire a teacher at any time after age 62 is reached (R. S. 18:13-112.45). The controversies which arise from the exercise of these and other powers of boards of education have been adjudicated in the first instance by the Commissioner of Education under the authority of R. S. 18:3-14 for more than 60 years. The instant

matter is a dispute between a local board of education and its employees and as such cannot be other than a controversy under the school laws and therefore subject to the mandate of *R. S. 18:3-14*. It is the responsibility and duty of the Commissioner of Education, therefore, to hear and decide this appeal.

The Perth Amboy School District is governed by the provisions of Chapter 6 of Title 18. Within the school system there are two competing organizations of teachers. According to the testimony, the Perth Amboy Teachers' Association, petitioners herein, is open to all members of the professional staff including teachers, nurses, supervisory and administrative personnel. The Perth Amboy Teachers' Union apparently is limited to classroom teachers. It appears that members of the Union called a strike against the Board of Education beginning Monday, November 1, 1965. An *ex parte* restraining order was issued later that same day by the Chancery Division, Middlesex County. On November 8 and 9 the Commissioner received reports from two members of his staff who visited the Perth Amboy schools at his direction. These reports disclosed that the striking teachers had ceased to picket the schools in compliance with the order of the Court, but had not returned to work. On November 8 the Board of Education ordered the high school closed. On November 12, the Court issued an interlocutory injunction extending the strike restraint indefinitely. (Ex. P-2) Later that same day the Board of Education entered into an agreement with the Union. (Ex. P-3) Testimony discloses that petitioners were not consulted and did not participate in the formulation of the agreement. There is nothing in the record to show how and by whom it was prepared or adopted. It is signed by the president of the Board of Education and by the president of the Union and reads as follows:

"Article 1, Paragraph 19 of the Constitution of the State of New Jersey provides, 'public employees have the right to organize and present grievances and proposals through representatives of their own choosing.'

"Nothing herein shall be construed as abrogating the rights of any individual or organization respecting this constitutional provision. It is understood that the inherent management of the Perth Amboy Public School system is vested in the Perth Amboy Board of Education.

"Pursuant to the foregoing, the New Jersey State Board of Mediation and the Honorable Mayor James J. Flynn, Jr., recommend a resumption of normal school operations in Perth Amboy on the following basis.

"1. A. The New Jersey State Board of Mediation will conduct an election among eligible classroom teachers for the purpose of determining the wishes of these teachers respecting representation in the Perth Amboy School System.

B. Said election to be conducted on December 3, 1965.

C. The State Board of Mediation will certify the results of said election to all interested parties.

"2. A. The organization receiving the most votes in the election will be authorized to negotiate with the Perth Amboy Board of Education on all matters of salary, working conditions and the welfare of its members.

B. Nothing in this section shall in any way abrogate the right of any individual or organization to negotiate as provided in the preamble above.

“3. The Perth Amboy Board of Education and Local 857 agree to meet and discuss in a spirit of good faith all items of salary, working conditions and the welfare of its members.

Nothing in this section shall in any way abrogate the right of any individual or organization as provided in the preamble above.

“4. A. The Perth Amboy Board of Education and the organization receiving the most votes in Section 1 above will discuss and develop machinery for processing teacher’s grievances.

Nothing in this section shall in any way abrogate the right of any individual or organization as provided in the preamble above.

B. It is mutually agreed that said machinery shall contain a provision that unresolved grievances may be referred by either side to a referee. Said referee to be appointed from a panel submitted by the New Jersey State Board of Mediation. The referee shall make recommendations respecting the resolution of the grievance.

C. The expenses for this procedure are to be shared equally between the Board of Education and the appellant.

“5. It is hereby mutually agreed that there shall be no reprisals against students or teachers who participated in the current disputes.

“6. It is hereby agreed that the Board of Education shall grant to Local 857 the right to check-off.

“7. All items pertaining to salary, working conditions, and welfare of its members that are mutually agreed upon by the Board of Education and the teacher representatives shall be adopted by resolution of the Board of Education.

“8. All schools will be operative on Monday, November 15, 1965, and the leadership of the Union will urge and recommend all teachers report for work in the usual fashion.

“9. Attorneys for both sides shall petition the court for permission to discontinue the pending suit relative to the present controversy.

Dated:

11/12/65”

Subsequently, petitioner received a letter dated November 22, 1965, signed by the chairman of the State Board of Mediation enclosing the following notice of election. It can be fairly assumed that each classroom teacher whose name appeared on the list furnished to the Mediation Board by respondent received a similar communication.

“NOTICE OF ELECTION
TO

ELIGIBLE CLASSROOM TEACHERS IN THE PERTH AMBOY SCHOOL SYSTEM

An election will be held to ascertain whether the teachers of the Perth Amboy School System wish to be represented by the Perth Amboy Teachers Union, Local 857 as their representative.

ELIGIBILITY TO VOTE

CLASSROOM TEACHERS, EXCLUDING PRINCIPALS,
SUPERVISORS, CLERICAL EMPLOYEES, DOCTORS,
NURSES, PSYCHIATRISTS, ATTENDANCE OFFICERS
AND CUSTODIANS.

TIME AND PLACE OF ELECTION

DATE: DECEMBER 3, 1965
TIME: BETWEEN HOURS OF 3:30 P. M. and 6 P. M.
PLACE: ROOM 118, PERTH AMBOY HIGH SCHOOL

SECRET BALLOT

The election will be by SECRET BALLOT. Voters will be allowed to vote without interference, restraint or coercion. Electioneering will not be permitted at or near the polling place. A violation of these rules should be reported immediately to the Chairman or his agent in charge of the election.

STATE OF NEW JERSEY
NEW JERSEY STATE BOARD OF MEDIATION
SAMPLE BALLOT

-
1. Mark an X in one square only.
 2. Fold your ballot to conceal the X and personally put it in the ballot box.
 3. If you spoil your ballot, return it to the Board's Agent and obtain a new one.
-

MARK AN "X" IN THE SQUARE OF YOUR CHOICE

DO YOU WISH TO BE REPRESENTED BEFORE THE PERTH
AMBOY BOARD OF EDUCATION IN MATTERS PERTAINING
TO THE WELFARE OF TEACHERS BY:

PERTH AMBOY TEACHERS UNION, LOCAL 857 ☐
OTHER ORGANIZATION (SPECIFY) ☐
NONE ☐

Petitioners contend that respondent is without authority to enter into or authorize such an agreement with one group of employees. They argue further that respondent has no authority to permit the New Jersey State Board of Mediation to conduct the subject election, to participate in the settlement of disputes or the establishment of grievance procedures between respondent and its employees. They contend that the broad powers assigned to the State Board of Education and the Commissioner of Education by the Legislature to control and supervise public education preclude the intervention of the State Board of Mediation in public school matters. They claim in any event that the State Board of Mediation is restricted by the law which created it, to intervention only when agreed to by all interested parties and that therefore, absent the consent of the Association, the Mediation Board is powerless to intervene. Finally, they say that the agreement gives preferential treatment to members of the Union and is therefore unfair and discriminatory with respect to other professional staff employees.

Respondent says it has not violated any law by entering into this agreement with the Union. It states that it was not forced into the agreement but agreed to it as a practical expedient which would permit the Union to save face and end the strike with its harmful effect on the pupils. It takes the position that the "so-called election" is not one in fact but is merely a show of strength; that the Board has not called an election nor will it conduct it or take part in it; and that the election will change or accomplish nothing of any significance. It maintains that no matter what the outcome of the election may be, the Board will continue, as it has in the past, to confer and negotiate with representatives of both groups and with employees who are members of neither organization. It contends that it has done no more than permit the use of a part of the school facilities between certain hours on a specific date by the representative of a State agency, the State Board of Mediation, and made available a complete list of employees of the school district.

Respondent further says that any grievance machinery that it develops will of necessity apply equally to all groups. It admits, however, that it is bound by this agreement to submit unresolved grievances to a referee appointed by the State Board of Mediation. Because the referee's authority is limited to recommendations, with all final decisions resting with the Board of Education and ultimately the Commissioner of Education and State Board, it finds nothing improper in this arrangement.

Finally, respondent asks the Commissioner to consider its position and the practicalities of the situation. It says that it is caught in the middle of a war between two local groups of employees, which in turn is part of a larger issue between the two state organizations of teachers. It notes the "thinly veiled threat" expressed in the Union's telegram *supra*, and agrees with counsel for petitioner that the Commissioner should not be put in fear of threats nor should his decision be colored by them. Respondent maintains, however, that there is a practical necessity to operate its schools harmoniously in order that its pupils may not suffer and that the agreement will accomplish that purpose without giving anything to the Union or taking anything away from the Association.

The issue raised by this appeal is whether the Perth Amboy Board of Education may enter into the specific Agreement set forth above.

Section 1 of the Agreement provides for an election "among eligible classroom teachers for the purpose of determining the wishes of these teachers respecting representation in the Perth Amboy School System." The election is to be conducted by the New Jersey State Board of Mediation and that Board is to certify the results of the election to all interested parties.

Under the New Jersey Constitution persons in public employment have the right to organize and to have representatives of their own choosing. *N. J. Constitution* (1947) *Art. I, par. 19* There is no doubt that the constitutional right of employees to organize and to have their own representation is one which must be given full recognition by governmental authorities. *N. J. Turnpike Auth. v. Amer., etc., Employees*, 83 *N. J. Super.* 389 (*Ch. Div.* 1964) An election among employees to determine their wishes with respect to representation would appear to be an incident to the exercise of their legal right to organize and to choose representatives. Consequently it is not impermissible for a local Board of Education to recognize and permit the conduct of elections for representation among its employees.

In the instant case, the Agreement calls for the utilization of the State Board of Mediation in conducting and supervising the election. The Office of the Attorney General has heretofore ruled that the State Board of Mediation has no authority to participate in labor disputes involving public employees. In Formal Opinion 1952, No. 11 of the Attorney General, it was stated that "labor disputes involving public employees are not legally the subject of negotiation between employer and employee, and they are, therefore, not within the powers of mediation vested in the Board of Mediation." Since the instant election procedure is an ingredient of a labor dispute involving public employees, the Commissioner is constrained to hold that those provisions of Section 1 of the Agreement, which contemplate the participation of the State Board of Mediation in the election procedure, may not be enforced.

The Agreement provides, in Section 2, that the organization receiving the majority of the votes at the election will be authorized to negotiate with the Board of Education on all matters of salary, working conditions and the welfare of its members. It further specifies that this shall in no way "abrogate the right of any individual or organization to negotiate" as provided in the introductory preamble of the Agreement. This preamble refers to the constitutional provision which accords to public employees the right to organize and to present grievances and proposals through their chosen representatives. It further emphasizes that the Agreement shall not be construed as abrogating the rights of any individual or organization with respect to the constitutional provision and that "it is understood that the inherent management" of the local school system is vested in the local Board of Education.

The critical issue in construing this provision of the Agreement is whether or not it grants to the successful organization the right of exclusive representation and collective bargaining. The Commissioner holds that the Agreement does not so provide and cannot be thus construed. This issue has been raised and settled by our courts. In *N. J. Turnpike Auth. v. Amer., etc., Employees*, *supra*, it was contended by the Union local that it had the right to bargain collectively with the New Jersey Turnpike Authority. The court held to the contrary, *viz.:*

“Public employees have many desires similar to those of persons in private employment, to wit, fair rates of pay, impartial opportunities for advancement, safe working conditions, review of grievances, and reasonable hours of work. Nothing in the Constitution or statutes of this State renders unlawful the organization of public employees for their mutual interest. Further, they may have representatives of their own choosing present their ‘grievances and proposals’ to the proper authorities; however, the public interest is always paramount.

“The right to organize does not carry with it the right to collective bargaining. The term ‘collective bargaining’ is conspicuously absent from the rights conferred upon public employees by virtue of the N. J. Const., *Art. 1, par 19*. The Attorney General of New Jersey has aptly set forth the reasons therefor, in a memorandum opinion dated October 20, 1954, in response to an inquiry from the South Jersey Port Commission:

“‘The concept of collective bargaining, as generally understood and applied in the field of private industry, implies bargaining sanctions and weapons not admissible to public employees, such as the right to strike, and other incidents of the private employment relationship not appropriate in the public employment field. It also implies two bargaining entities of co-equal status, each with unlimited power to enter into binding commitments. This does not apply in the case of the state in relation to its employees.’” 83 *N. J. Super.* at 397

Thus it is settled that no particular employee-representative or organization can claim or assert the right to speak for all employees merely because it represents a majority or a particular percentage of the employee force. Moreover, no employees may bargain collectively with their governmental employers. The local Board of Education is therefore without authority to engage in “negotiations,” in the sense of collective bargaining, with any employee organization which is successful at a representation election. The local Board of Education may, and indeed must, deal with such employee-representatives, as well as all employees or employee-representatives who desire to make known their views involving matters of common concern. As stated by the court in *N. J. Turnpike Auth. v. Amer., etc., Employees, supra*, at 397, “[the Board] is under an affirmative duty to meet with its employees of their chosen representatives and consider in good faith the ‘grievances and proposals.’”

It would not be proper for the Board of Education herein to meet with the successful employee organization—or for that matter any employee-representative—unless the Board were specifically informed with respect to the individual employees actually represented by the organization or the spokesman. The Constitution, it is to be emphasized, grants to public employees the right to choose their representatives and to present their views through those selected. As stated in *N. J. Turnpike Auth. v. Amer., etc., Employees, supra*:

“It should be emphasized that any one or more representatives may speak only for those employees who chose them. The Turnpike has no right to recognize a representative of only a segment of its employees as agent for all of the employees of the Turnpike. Therefore, if five separate

groups of Turnpike employees each have a different representative, all five representatives are entitled to recognition.” 83 N. J. Super. at 397-398

It is therefore not sufficient for an employee organization merely to “represent” a particular number of employees in order to deal with the Board of Education. It must, in some suitable manner, designate those individual employees for whom it purports to speak. It is noted that the election which is proposed to be conducted pursuant to the Agreement calls for secret balloting. Such a secret ballot election, while indicative of the numerical strength behind a given representative, does not serve to inform the Board as to which employees a particular representative in fact represents. Effective and proper representation should be accomplished by presenting the Board with a membership list or some other designation sufficient to inform the Board as to the identity of the persons whose grievances it must consider. For these reasons the Commissioner determines that Section 2, as well as Section 3 of the Agreement, may not be enforced except in the foregoing manner.

Section 4 of the Agreement provides that the Board of Education and the organization receiving the most votes as a result of the election “will discuss and develop machinery for processing teacher’s grievances.” It is further provided that this shall not abrogate the right of any individual or organization as provided in the preamble to the Agreement.

A local board of education has the power to create grievance procedures and an orderly framework within which the complaints of its employees may be presented and resolved. Such procedures are necessary and desirable in order to facilitate and assure the smooth and efficient operation of the local school system. In the formulation of grievance procedures, it is appropriate that the local Board of Education take into account and give due consideration to the views of its employees with respect to such procedures. In the final analysis, however, any decision reached by the Board with respect to grievance procedures must be the result of its independent judgment, taking into full consideration, *inter alia*, the proposals of its employees. Cf. *N. J. Turnpike Auth. v. Amer., etc., Employees*, 83 N. J. Super. at 397. Consequently, the Commissioner determines that Section 4A of the Agreement cannot be implemented except in a manner which will require the Board of Education to consider the views and proposals of the employees or organizations which are presented to it and only on the basis of what the Board considers, as an exercise of its discretion and independent judgment, to be suitable for the school district.

Section 4B of the Agreement recites that, “It is mutually agreed that said machinery shall contain a provision that unresolved grievances may be referred by either side to a referee. Said referee to be appointed from a panel submitted by the New Jersey State Board of Mediation. The referee shall make recommendations respecting the resolution of the grievance.”

The Commissioner will not comment on whether or not it is proper for a grievance procedure adopted by a local board of education to utilize third parties to assist in the resolution of employee-employer differences. It may, under appropriate circumstances, be desirable for a board of education to utilize such persons as consultants, mediators or referees. It is to be emphasized, however, that in this area, as well as others committed to the

discretion of the local board, final decisions must reflect the independent judgment of the local board. *N. J. Turnpike Auth. v. Amer., etc., Employees, supra*

This particular provision of the Agreement specifies that the referee is to be appointed from a panel furnished by the New Jersey State Board of Mediation. Certainly, the provision for a referee, in this context, is in connection with labor disputes involving public employees. As previously noted, the State Board of Mediation does not have jurisdiction to participate in the resolution of labor disputes involving public employees. The Commissioner holds, therefore, that, insofar as Section 4B of the Agreement provides for the participation of the State Board of Mediation in the process of selecting a referee, it cannot be followed.

Section 6 provides that the Board of Education shall grant to Local 857 "the right of check-off." The right of check-off ordinarily means that the Board of Education, with the consent of individual employees, would deduct dues from school employees' wages and remit such amounts to the organization representing the employee.

The right of check-off has been granted to private employees in the *Taft-Hartley Act*, 28 U.S.C.A. 159. There is no specific statute granting or denying to public employees the right of check-off. In the absence of such statute, the Commissioner must seek to determine the intention of the Legislature.

The Legislature has seen fit to enact certain statutory provisions for authorizing deductions from school employees' salaries. The statutes require withholding from compensation for income tax, social security and pension purposes; other statutes permit deductions from salary for hospital service and group insurance plans and the purchase of United States Government bonds and stamps (*R.S. 18:5-50.6*); for summer payment plans (*R.S. 18:5-50.19*); for additional death benefit coverage (*R.S. 18:13-112.80*); for the purchase of supplemental annuities from the Supplemental Annuity Collective Trust (*R.S. 52:18A-112*); and for contributions to United Fund charities (*R.S. 52:14-15.9c*). The existence of these statutes authorizing specific and limited deductions from compensation indicates, under the principle of *expressio unius est exclusio alterius*, that the Legislature intended to limit the power to make salary deductions to those enumerated by law. In fact, under *R.S. 18:5-50.6* and *R.S. 18:5-50.19* the Legislature specifically provided that a school board is "empowered and directed" to deduct specific fees. This indicates that without legislative authorization, boards of education are not empowered to make deductions from school employees' salaries. Several bills which have been introduced in the Legislature from time to time seeking to authorize deductions for check-off, have not been enacted into law. In addition, this Department, which is charged with the enforcement of the school laws, has consistently interpreted Title 18 to mean that deductions may not be taken from school employees' salaries unless specifically authorized by statute. The Commissioner holds, therefore, in the absence of enabling legislation, that the Board of Education is not authorized to grant the right to check-off and that Section 6 of the Agreement cannot be enforced.

Section 7 of the Agreement provides that, "All items pertaining to salary, working conditions, and welfare of its members that are mutually agreed upon

by the Board of Education and the teacher representatives shall be adopted by resolution of the Board of Education.”

We again emphasize that the Board has an affirmative duty to meet with the representatives of all of its employees, and that it has an obligation to take into account and give full consideration to their “grievances and proposals.” The concerns of employees may pertain to such items as salary, work conditions and the general welfare of employees. It is reiterated, however, that any final decision with respect to these, as well as other items affecting employees and the school district in general, must reflect the independent judgment of the Board. To the extent that this judgment coincides with the proposals, wishes or views of employees, there would be nothing to prevent the Board from implementing its decision. Section 7 of the Agreement does not appear to be inconsistent with these principles and may be applied in accordance therewith.

Section 5 of the Agreement provides that there shall be no “reprisals” against students or teachers who participated in the “current dispute.” The Commissioner must stress that in the evolution of this dispute, teachers employed by the local board of education participated in unlawful picketing and an unlawful strike. It has been repeatedly held by our courts that strikes by public employees are prohibited. *Delaware River and Bay Auth. v. International Org., etc.*, 45 N. J. 138, 142 (1965) ; *N. J. Turnpike Auth. v. Amer., etc. Employees*, *supra*, 83 N. J. Super. at 395; *Donevero v. Jersey City Incinerator Auth’y*, 75 N. J. Super. 217, 222 (Law Div. 1962) rev’d. on other grounds; *McAleer v. Jersey City Incinerator Auth’y*, 79 N. J. Super. 142, 146 (App. Div. 1963) Strikes against government cannot be tolerated. *Norwalk Teacher’s Association v. Board of Education*, 138 Conn. 269, 83 A. 2d. 482 (Sup. Ct. Err. 1951) Picketing by public employees in furtherance of an illegal purpose is prohibited. *Delaware River and Bay Auth. v. International Org., etc.*, *supra*, 45 N. J. at 150 The Commissioner deplores in strongest possible terms the unlawful activities on the part of teachers in picketing and striking in complete defiance of the law.

It is within the discretion of the local Board of Education to ascertain what, if any, measure should be taken against individuals to assure the continuation of a sound educational system within its district. A board of education may not by agreement create self-imposed reins on its statutory powers or abdicate its primary responsibility to maintain effective discipline within the school system. With respect to the current controversy, which has witnessed a serious interruption of schooling, the Board must not be unmindful of State regulations regarding the minimum number of days required in the school year and it must, of course, enforce compulsory attendance laws. Its paramount obligation is the enforcement of the public school laws and it may not shirk this responsibility. The Commissioner does not imply that Section 5 of the Agreement is inconsistent with the foregoing principles but he does hold that the Board of Education may not act, with respect to teachers and students individually involved in the current controversy, in a matter inimical to its paramount duty under the public school laws.

The Commissioner remands this matter to the Perth Amboy Board of Education to proceed in accordance with this opinion.

COMMISSIONER OF EDUCATION.

December 4, 1965.

DECISIONS RENDERED BY THE STATE BOARD OF EDUCATION,
SUPERIOR COURT (APPELLATE DIVISION), AND SUPREME
COURT ON CASES PREVIOUSLY REPORTED

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION
HELD IN THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY.

Decided by Commissioner of Education—May 26, 1964.

Appeal before State Board of Education dismissed for lack of prosecution,
June 2, 1965.

MAURICE J. O'SULLIVAN,

Petitioner,

v.

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

Respondent.

Decided by Commissioner of Education—February 7, 1962.

Appeal before State Board of Education withdrawn, February 8, 1965.

IN THE MATTER OF THE TENURE
HEARING OF ANTHONY A. PERROTTI,
AUDUBON PARK, CAMDEN COUNTY.

Decided by the Commissioner of Education, December 9, 1964.

DECISION OF THE STATE BOARD OF EDUCATION

For Appellant, Meyer L. Sakin, Esq.

For Respondent, Richard S. Hyland, Esq.

For Intervenors, John P. Reilly, Esq.

This is an appeal by Anthony A. Perrotti from a decision of the Commissioner of Education dated December 9, 1964, wherein the Commissioner, pursuant to R. S. 18:13-17, authorized dismissal of appellant from the position of Principal in the employ of the Board of Education of the Borough of Audubon Park (hereinafter called the local "Board").

On June 22, 1964, the Board passed a resolution stating that certain charges had been made in writing charging Perrotti with "incapacity, conduct unbecoming a teacher, and conduct detrimental to the welfare of the School System and pupils of Audubon Park" and that, in the opinion of the Board, if said charges are true they would be sufficient to warrant the dismissal of Perrotti. Said charges were accompanied by 9 separate specifications of the alleged actions upon which the charge was based. Pursuant to R. S. 18:13-17 the charge and specifications came on for hearing before the Deputy Commissioner of Education which culminated in the decision of the Commissioner referred to above. The Commissioner found that of the 9 specifications only specification #4 was supported by the evidence. Thereupon he

noted that the other 8 were dismissed either by agreement or because they lacked substance. Finding, however, that the evidence supported the allegation in specification #4 (called charge #4) and that the said "charge" justified dismissal, the Commissioner authorized the Board to dismiss Perrotti as Principal.

By way of background, it is noted that the resolution of the Board of June 22, 1964 was passed by a vote 7 - 2. At the annual school election of February 1965, 3 of the 7 members who voted for the surrender of the charges of June 22, 1964 were defeated in an election with the resulting change in the personnel of the Board. As this matter came on for argument before the State Board of Education, we were informed by the present counsel to the Board that 5 of the present members feel that the Commissioner's decision is incorrect and 4 feel that it is justified. Present counsel for the Board filed a brief with us urging that the Commissioner's Decision should be set aside. While the matter was pending before the State Board a motion was made by certain interested citizens of Audubon Park for permission to intervene so that arguments may be presented in favor of sustaining the Commissioner's decision. Said motion was granted. The Intervenors, through their counsel, filed a brief and argued orally before the State Board in support of the Commissioner's decision.

Since the Commissioner's decision rested solely on specification #4, the briefs and argument herein have been directed to that issue. Specification #4 read as follows:

"That Mr. Perrotti during the past three school years has, in connection with Female Teachers and Female Pupils, had the Teachers and the Female Pupils, mostly girls in the seventh and eighth grades, come to his office and put on their gym suits and then interviewed them alone in each case fingering the suit under the guise of seeing if it fit properly."

The Commissioner heard testimony of a number of girl students who testified that it was customary, after they were issued a "gym uniform" to put it on in one of the girls' lavatories and go to the Principal's office for his inspection. Testimony was to the effect that no one else was present in the Principal's office and most claimed that the office door was closed. With respect to the nature of the inspection, the girl witnesses stated that they were asked to perform some exercise while the Principal observed them. In some cases he would also test the firmness of the elastic of the pants at either the waist or the thighs or both with his fingers. After this examination the pupil returned to her classroom after donning regular school clothes in the lavatory. Perrotti admitted making the inspections, but denied any evil intent or improper motive or action, asserting that his object in making the inspections was to assure himself that there would be no ill-fitting costumes and that it was his responsibility to avoid embarrassing situations and to make certain that the girls achieve a pleasing appearance. The Commissioner found that the evidence clearly supported the specification as it pertained to the female pupils. However, he also found that "the Principal was not motivated by evil purpose or by intent to violate the person of the girls or to do them harm." Nevertheless, the Commissioner held that the Principal's conduct warranted dismissal.

Appellant and the present local Board argue here that the essential allegations of specification #4 were not proved, stressing that the essence of the specification, as worded, constitutes a charge of sexual impropriety and deviousness by reason of the words contained in said specification "fingering the suit under the guise of seeing if it fit properly." However, this was merely a specification of the actual charge of "conduct unbecoming a teacher and conduct detrimental to the welfare of the school system generally, and the pupils specifically." Since, in our view, the conduct proved would fairly support such a charge, we consider that failure to prove all the details of specification #4 does not warrant reversal of the finding of guilt under the charge made. Incidentally, it is also noted that as to specification #4 there was no support for the assertion therein that appellant, in connection with female teachers, had those come to his office for inspection. The failure to prove this detail does not override the finding that the admitted conduct with respect to female pupils is sufficient to constitute "conduct unbecoming a teacher and conduct detrimental to the school system generally, and the pupils specifically".

Thus, we accept the findings of the Commissioner below because there is substantial evidence to support them. But we accept both findings, namely, that appellant was guilty of the conduct alleged with respect to the inspection of the fitting of gym costumes worn by the female pupils, and also the finding of the Commissioner that appellant "was not motivated by evil purpose or by intent to violate the person of the girls or to do them harm." On this factual basis we come to the question as to whether outright dismissal of appellant is a proper penalty. Accepting the finding of no immoral or evil intent, we must look upon appellant's conduct as an exercise of poor judgment, unwise, and conduct which is not to be condoned. During all of his career, up to the institution of the instant charges, he had never had any charges preferred against him, nor had he ever been suspended for any cause. Unwise and unsound as we deem his conduct in this instance to have been, and fully mindful of the justified concern of many citizens of Audubon Park about such conduct, we nevertheless feel that since no immoral or evil intent motivated the actions, an outright dismissal is too severe a penalty. Yet we do not think that such conduct should be free of all penalty.

Upon consideration of all of the circumstances and motivated by equitable principles (which our Supreme Court has indicated is a proper consideration in teacher tenure cases, *cf. Evaul v. Board of Education of the City of Camden* (1961), 35 N. J. 240, 250), it is the order of this Board that appellant be reinstated to his position as Principal in the Audubon Park School effective at the opening of the September 1965 term on condition, however, that he is not entitled to collect salary from the date of his suspension, July 27, 1964, until his reinstatement.

September 8, 1965.

GEORGIA L. JOHNSON,

Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST WINDSOR,
MERCER COUNTY,

Respondent.

Decided by the Commissioner of Education, November 23, 1964.

DECISION OF THE STATE BOARD OF EDUCATION

For the Appellant, Richard J. Casey, Esq.

For the Respondent, Baggitt, Dietrich, Mancino & Stonaker
(William C. Baggitt, III, Esq., of Counsel)

This is an appeal by Georgia L. Johnson from a decision of the Commissioner of Education dated November 23, 1964. Hearing on the matter was held on May 21, 1965 at #1 Exchange Place, Jersey City, New Jersey.

After consideration of the record below, and the arguments of the parties, the State Board of Education affirms the decision of the Commissioner of Education and adopts the opinion of the Commissioner dated November 23, 1964.

November 3, 1965.

ZELDA GOLDBERG,

Appellant,

v.

BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL
HIGH SCHOOL DISTRICT,

Respondent.

Decided by the Commissioner of Education, May 20, 1964.

DECISION OF THE STATE BOARD OF EDUCATION

Appellant here is a teacher under tenure who appeals from a decision of the Commissioner of Education upholding respondent Board's denial of a salary increment to appellant for the 1963-1964 school year. During the school year 1962-1963 appellant's salary was \$6,800, which represented the ninth step on the local salary guide effective for that year. A new salary guide was developed during the 1962-1963 school year and on February 19, 1963 each teacher received a "proposed salary" under the new guide for 1963-1964. Under this schedule appellant's salary would have been \$7,100, representing the tenth step on the new scale. This guide was adopted by the Board on February 26, 1963. On March 5, 1963 the Superintendent of Schools advised appellant that he would recommend to the Board that her increment be withheld for the 1963-1964 school year for reasons which had been given to her at a conference on the previous January 28th. At a Board meeting held on the evening of March 5th, teachers' salaries were fixed

for the following year, appellant being established at \$6,850, and she was notified to this effect by the Superintendent.

Appellant first contends that the withholding of her salary increment violates *R. S. 18:13-13.7*, arguing that the proposed increments provided in the new salary schedule adopted by the Board come within the provisions of that section and, in particular, that such an increment may be withheld only for inefficiency or other good cause, and that it shall be the duty of the Board of Education within 10 days to give written notice of such action, together with the reasons therefor to the teacher concerned. Since such reasons were not given to appellant she claims that her rights under this foregoing section were violated.

The Commissioner, in his Decision, held that *R. S. 18:13-13.7* has no application to a situation such as this when the salary paid to a teacher is in excess of that required to be paid her as a minimum under the provisions of the Section. The Commissioner thus stated the issue, as he saw it, as follows:

“If the salary voted to be paid to a teacher is in excess of the minimum salary to which a teacher is entitled under the provisions of *R. S. 18:13-13.2*, do the provisions of *R. S. 18:13-13.7* apply?”

The Commissioner pointed out that the salary guide adopted for 1963-1964 provided that appellant at step 9 be paid a salary several hundred dollars higher than the minimum established by law for teachers at the step. Citing *Greenway v. Board of Education of Camden* (S. Ct. 1942), 129 N. J. L. 46, *aff'd.* (E. & A. 1943), 129 N. J. L. 461, *Offenhouse, et al. v. Board of Education of Paterson* (S. Ct. 1944), 131 N. J. L. 391, the Commissioner held that a local salary schedule has no contractual effect and is a “mere declaration of legislative policy that is at all times subject to abrogation by a local Board in the public interest.”

We agree with the Commissioner that where, as here, the proposed salary guide would provide a salary for appellant in excess of the minimum required under the Minimum Salary Law (*R. S. 18:13-13.1, et seq.*), the provisions of *R. S. 18:13-13.7*, with respect to finding of good cause and notification of reasons, have no application.

However, we feel that the Commissioner’s scope of review as exercised in this matter was too narrow. He cited the provisions of the salary guide which provided that:

“any increment may be withheld in whole or in part by the Board of Education for unsatisfactory service or *any other reason* upon recommendation of the Superintendent.” (Emphasis ours)

He further said:

“The evidence before the Commissioner is clear that the Superintendent had reasons which were known to the Board, upon which he based his recommendation. The nature and validity of such reasons are not in issue before the Commissioner.”

We disagree. We consider that the provision of the salary guide that increments may be withheld for “any other reason” is so lacking in establishment

of standards that it is invalid. "Any other reason" may be a good reason, a bad reason, or no reason at all, and would leave the door wide open to arbitrary, biased or prejudicial action. We do not believe that that is the intent of our school law, nor the policy of "fair play" which permeates it. Respondent Board cites *Kopera v. West Orange Board of Education* (App. Div. 1960), 60 N. J. Super. 288, particularly, 298, for the proposition that the local Board would still have the right, even in the absence of a written rule, to refuse an increment. The language of *Kopera*, however, at page 298, is to the effect that a local Board would have such a right, "even in the absence of a written rule, to refuse a raise or an increment to a poor teacher." On this record we have no way of knowing whether there was sufficient grounds for believing that appellant here was indeed a "poor teacher." In fact, there is some testimony to the effect that she is an excellent teacher.

It is our opinion that the scope of the Commissioner's review was controlled by the decision in *Kopera v. West Orange Board of Education*, *supra*. There, too, the local Board withheld an increment from a teacher whose salary was more than the minimum fixed by R. S. 18:13-13.2 for teachers with the training and experience of the teacher there involved. In that case the Commissioner, relying upon the fact that the local Superintendent had found the services of the teacher there involved as "unsatisfactory," affirmed the denial of the increment without stating what he found to be the underlying facts or whether he found the evaluation of the teacher's services unreasonable. The Appellate Division held that 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, and
- (3) that the burden of proving unreasonableness was upon the teacher involved.

In *Kopera* the Court remanded the case to the Commissioner with direction to him to make the findings and conclusions mentioned. We find the Commissioner's decision here lacking in the same respects. For that reason, this Board orders that the matter be remanded to the Commissioner to make the findings and conclusions dictated by *Kopera*.

September 8, 1965.

MICHAEL A. FIORE,

Plaintiff-Appellant,

v.

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

Defendant-Respondent.

Decided by the Commissioner of Education, February 28, 1962.

Decided by State Board of Education, December 4, 1963.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 19, 1964—Decided January 14, 1965.

Before Judges GOLDMANN, SULLIVAN AND LABRECQUE.

Mr. Lee A. Holley argued the cause for the appellant (*Mr. Max Boxer*, attorney; *Messrs. Holley and Kroner*, of counsel).

Mr. John J. Witkowski argued the cause for respondent.

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

In this case, plaintiff appeals from a decision of the State Board of Education (State Board) affirming the dismissal by the Commissioner of Education (Commissioner) of plaintiff's petition for reinstatement to his position as Custodial Director and Business Manager of the Jersey City Board of Education (Board).

Plaintiff was one of a number of employees of the defendant Board whose services were terminated at the Board's reorganization meeting on the first day of July, 1958. His subsequent appeal to the Commissioner was consolidated for hearing and determination with a number of appeals filed by other employees of the Board whose positions had likewise been terminated. These consolidated hearings resulted in a decision, dated February 28, 1961, which, as to the appellant, affirmed the Board's action. An appeal was thereupon taken to the State Board which, after receiving additional exhibits and hearing oral argument, rejected plaintiff's contentions and affirmed the termination of his services.

The portion of the State Board's decision referable to the plaintiff found, essentially, that he had been previously employed by the defendant Board as a teacher but in 1953 had vested his rights in the Pension Fund. On July 15, 1957 he was appointed Business Manager. On October 10, 1957 the Board passed a resolution, retroactive to July 15, 1957, establishing the position of Custodial Director and Business Manager and amending the July 15 resolution so as to appoint Fiore to that position. The change in title did not involve any change in duties, but was apparently made to enable plaintiff to obtain reinstatement to the Pension Fund as a custodial worker. On July 1, 1958 the Board, by resolution, (1) abolished the position of Custodial Director and (2) terminated petitioner's services as Business Manager.

The State Board concluded that plaintiff had not acquired tenure as Business Manager under *R. S. 18:5-51* since he had not served the requisite three years in that position. It further held that he did not have tenure as a custodial worker under *R. S. 18:5-66.1* and 67 since his position as Custodial Director did not involve any change of duties, his position as Business Manager having included supervision over the custodial staff. It determined that the termination of his employment was made in good faith for purposes of economy and did not constitute an abuse of discretion or unlawful arbitrary action.

Plaintiff contends that the termination of his employment is invalid because (1) it was determined upon at a private meeting of a majority of the Board held before the scheduled organization meeting; (2) the defendant Board's action constituted an abuse of discretion; (3) his discharge was accomplished in violation of his tenure rights; and (4) the State Board imposed an illegal standard by which to measure plaintiff's proofs.

We are satisfied that these grounds are without merit.

The Legislature has committed the operation of local schools to district boards of education. It has provided a system of administrative appeals from such boards to the Commissioner, *R. S. 18:3-14*, and thereafter to the State Board, *R. S. 18:3-15*. The powers of boards of education in the management and control of school districts are broad. *Downs v. Board of Education, Hoboken*, 12 *N. J. Misc.* 345, 171 *A.* 528 (*Sup. Ct.* 1934), affirmed *sub nomine Flechtner v. Board of Education of Hoboken*, 113 *N. J. L.* 401 (*E. & A.* 1934). Subject to statutes relating to tenure, they are vested with wide discretion in determining the number of employees necessary to carry out the program, the services to be rendered by each and the compensation to be paid for such services. Where a board, in the exercise of its discretion, acts within the authority conferred upon it by law, the courts will not interfere absent a showing of clear abuse. 78 *C. J. S., Schools and School Districts*, § 128, p. 920; *Boult v. Board of Education of Passaic*, 135 *N. J. L.* 331 (*Sup. Ct.* 1947), affirmed 136 *N. J. L.* 521 (*E. & A.* 1948). Where, however, the board's action is patently arbitrary, without rational basis, or induced by improper motives, the rule is otherwise. *Kopera v. West Orange Bd. of Education*, 60 *N. J. Super.* 288, 294 (*App. Div.* 1960); *East Paterson v. Civil Service Dept. of N. J.*, 47 *N. J. Super.* 55, 65 (*App. Div.* 1957); *cf. Moore v. Haddonfield*, 62 *N. J. L.* 386, 391 (*E. & A.* 1898); *Peter's Garage, Inc. v. Burlington*, 121 *N. J. L.* 523, 527 (*Sup. Ct.* 1939). In short, we may not substitute our discretion for that of the local board, nor may we condemn the exercise of the board's discretion on the ground that some other course would have been wiser or of more benefit to the parties or community involved. *Boult, supra.* (136 *N. J. L.* at p. 523).

Further, on review of the factual findings below, while we may make independent findings of fact where necessary, *R. R. 4:88-13*, 1:5-4(b), 2:5, we may not substitute our judgment for that of the State Board but must confine our inquiry to the ascertainment of whether the evidence before it furnished a reasonable basis for its findings, *i. e.*, was it such evidence as a reasonable mind might accept as adequate to support the conclusions reached. *In re Plainfield-Union Water Co.*, 14 *N. J.* 296, 307 (1954); *In re Greenville Bus Co.*, 17 *N. J.* 131, 137 (1954); *In re Sanders*, 40 *N. J. Super.* 477, 483 (*App.*

Div. 1956); *In re Public Service Electric and Gas Co.*, 35 N. J. 358, 376 (1961); *Quinlan v. Bd. of Ed. of North Bergen Tp.*, 73 N. J. Super. 40, 46 (*App. Div.* 1962).

Having these considerations in mind, we proceed to examination of the points raised.

Plaintiff's initial contention is that the termination of his employment is invalid because it was determined upon at a private meeting of certain members of the Board held prior to the July 1, 1958 organization meeting. The latter, it is contended, did no more than formalize the action previously taken. *Cullum v. Board of Ed., North Bergen Twp.*, 27 N. J. Super. 243 (*App. Div.* 1953), affirmed 15 N. J. 285 (1954). At the organization meeting, three new members of the Board, appointed by Mayor Witkowski, were scheduled to be seated. The State Board found that some days prior to the meeting there had been a gathering at the Hotel Manhattan in New York City at which there were among those present the Mayor, counsel for the defendant Board, and six of the members thereof (designated by plaintiff as the majority bloc). The testimony was in dispute as to what took place at the gathering; defendant contending that it was a social gathering to meet three new board members. The State Board agreed with the finding of the Commissioner that the meeting in question was not the kind of caucus frowned upon in *Cullum, supra*. We agree. Even if the question of the abolition or termination of certain positions was discussed at the meeting, the State Board properly found that there was thereafter ample opportunity for full discussion at the meeting of July 1 or the adjourned sessions of it, held on July 10, July 24 and August 28. The law does not preclude informal meetings at which there is free and full discussion among those attending, so long as such discussions are tentative in nature. *Cullum, supra* (15 N. J. at p. 294); compare *Grogan v. DiSapio*, 15 N. J. Super. 604, 607 (*App. Div.* 1951), affirmed 11 N. J. 308, 326 (1953).

Plaintiff next challenges the resolutions terminating his services on the grounds that they were politically motivated and violated his pension rights. In passing upon this point, the State Board found that the budget submitted by the Board to the Board of School Estimate for the year 1958-1959 was \$232,000 less than the budget for the preceding school year. Of the amount submitted, approximately \$1,000,000 was required to grant mandatory salary increments and employ needed additional teachers. Thus economies would have been required, even had the budget been approved as submitted. However, the Board of School Estimate made a further reduction of more than \$1,000,000 with the result that the need for immediate action to effect savings became pressing. In comparison with national norms for large city school districts, the non-instructional costs for Jersey City schools were found to be high and it was apparent, and the Board determined, that reductions should be had in that area. There followed the termination or transfer of a number of non-instructional employees, including the plaintiff. The State Board found that, in the process, the advice of counsel was sought as to tenure rights and such rights were honored where the Board was told that they existed. Orders were given to abolish entire job categories and where the entire category was not abolished, terminations were to be based on tenure rights. All of these findings were supported by substantial evidence.

The termination of plaintiff's services was effected by two consecutive resolutions; one abolishing the position of Custodial Director; and the other

terminating his services [as Business Manager]. The State Board, as noted, concluded that the plaintiff had no tenure as Business Manager since he had not served the requisite three years in that position, *R. S. 18:5-51*; and no tenure as a custodial worker, *R. S. 18:5-66.1* and *67*, since his services were those performed as Business Manager, a position the duties of which normally included general supervision of the custodial staff.

Since employees of the Jersey City Board of Education were not covered by Civil Service during the period in question, we look to the tenure provisions covering non-instructional employees of the local Board. Under these, tenure accrues to full-time secretaries, assistant secretaries and business managers, *R. S. 18:5-51*; to janitors, *R. S. 18:5-67*; to those holding secretarial or clerical positions, *R. S. 18:6-27* and to certain attendance officers, *R. S. 18:14-43*.

We are in accord that the State Board's determination that plaintiff was without tenure either as Business Manager or as Custodial Director and with the factual findings upon which it was based. The retroactive amendment of the title of the plaintiff's position from Business Manager to Custodial Director and Business Manager added no new duties and carried no additional salary. It was merely a means whereby he sought to qualify for membership in the Teachers' Pension and Annuity Fund. The fact that he was accepted for membership conferred no tenure rights. His rights were measured by the nature of his work, and not necessarily by the title he carried. *Cf. Phelps v. State Board of Education*, 115 *N. J. L.* 310, 315 (*Sup. Ct.* 1935). Since he was without tenure, plaintiff was subject to removal at any time by the vote of the majority of the Board, regardless of his qualifications for the position. The wisdom of his termination was a matter for consideration by those responsible for appointments to the board, not the courts. *Cf. Moore v. Haddonfield*, *supra*, (62 *N. J. L.* 391).

The case of *Quinlan v. Bd. of Ed. of North Bergen Tp.*, *supra*, cited by plaintiff, is not applicable. In that case plaintiff had originally been employed as a Clerk holding tenure. She was later advanced to Clerk-Attendance Officer. Her services were terminated without a hearing on the ground that she was without tenure since the tasks assigned to her at the time of her termination were primarily those of an attendance officer, a position which did not carry tenure. In reversing the action taken, it was held that she had retained her tenure status as a Clerk, notwithstanding her promotion, and was entitled to a hearing before being discharged. Here, on the contrary, plaintiff's original employment was that of Business Manager which did not carry tenure until he had served three years. As such, he was authorized to supervise or direct custodial employees, and did so, both before and after the change in his title.

The additional contention is made that the Board's action was improper because it first abolished the position of Custodial Director and thereafter terminated plaintiff's services as Business Manager. He asserts that as Custodial Director *and* Business Manager his status was not legally affected. While the preferred procedure would have been to abolish the position of Custodial Director and Business Manager and then recreate the position of Business Manager, we are satisfied that the resolutions in question were effective to terminate the plaintiff's status as an employee in both capacities and leave the office of Business Manager open. The intent of the Board was perfectly clear and was well understood by the plaintiff.

Finally, it is urged that the burden of proof exacted of the plaintiff was greater than that required by law. We disagree. Plaintiff was confronted with a presumption in favor of the correctness of the Board's action. The rule applicable required him to carry the burden of proof of such facts as were necessary to entitle him to the relief prayed for. *Quinlan v. Bd. of Ed. of North Bergen Tp.*, *supra*, (73 N. J. Super. at p. 49). This duty of persuasion on the whole case never shifted, *id.*, and was required to be carried by the preponderance of the evidence. Plaintiff asserts that he sustained this burden but that the State Board, by affirming the Commissioner, sanctioned the use by him of phrases such as "it is not *clear*," and thus gave evidence that a more exacting standard was applied to his proofs. When considered in the context of the case, however, we are satisfied that use of this expression was intended to mean no more than that the fact then under discussion had not been established by the preponderance of the evidence. See, however, as to the necessity of a clear showing of bad faith in discretionary matters, *Peter's Garage Inc. v. Burlington*, *supra*, (121 N. J. L. at p. 527); *Ziegler v. Hackensack*, 113 N. J. L. 215, 219 (Sup. Ct. 1934); *Blair v. Brody*, 11 N. J. Misc. 854, 856, 168 A. 669, 670 (Sup. Ct. 1934). In any event, our examination of the record convinces us that the evidence preponderated in favor of the findings below.

Affirmed.

CHARLES B. BOOKER, et al.,
Petitioners-Appellants,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD,
UNION COUNTY,
Respondent-Respondent.

Decided by the Commissioner of Education, June 26, 1963.

Decided by the State Board of Education, February 5, 1964.

DECISION OF SUPREME COURT

Argued March 2, 1965. Decided June 28, 1965.

Mr. Robert L. Carter, of the New York bar, argued the cause for the appellants (*Mr. Herbert H. Tate*, *Mr. William Wright, Jr.*, of the New Jersey bar, and *Mr. Robert L. Carter* and *Miss Barbara A. Morris*, of the New York bar, attorneys; *Miss Joan Franklin* and *Mrs. Maria L. Marcus*, of the New York bar, of counsel).

Mr. Victor R. King argued the cause for the respondent.

Mr. Alan B. Handler, First Assistant Attorney General, argued the cause for the Commissioner of Education and State Board of Education (*Mr. Arthur J. Sills*, Attorney General of New Jersey, attorney; *Mr. Morton Anekstein*, Law Assistant, on the brief).

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

The petitioners appealed under *R. R. 4:88-8* from a decision of the State Board of Education affirming a decision of the Commissioner of Education. We certified on our own motion before argument in the Appellate Division.

After receiving protests against the racial imbalance in the Plainfield public school system, the local Board of Education appointed a lay advisory committee to review the matter and submit its report. The committee recommended that Dr. Max Wolff of New York City be retained and in April 1962 the local Board entered into an agreement which provided that Dr. Wolff, working with a team of specialists in the areas of education, sociology, psychology and zoning, would conduct a study of the racial composition of the schools and would submit findings, conclusions and suggestions by June 15, 1962. In due time, Dr. Wolff submitted his report and recommendations to the lay advisory committee which approved, in principle, the procedure and fact-findings of the specialists team but failed to agree on recommendations and, in turn, submitted majority and minority reports of its own to the local Board.

As indicated in Dr. Wolff's report, the Negro pupil population of the elementary schools¹ in Plainfield was 37 per cent in April 1962. At that time the Negro population of the Washington School was over 95 per cent; in the other elementary schools it ranged between 0 and 65 per cent, with the Emerson, Stillman, Bryant and Lincoln schools having well over 50 per cent. Dr. Wolff submitted two plans designed to reduce racial imbalance. Plan I involved a general rezoning from north-south, instead of the then current practice of east-west; this would integrate the predominantly Negro northern area of the community with the predominantly white southern area. See *Sedler, School Segregation in the North and West: Legal Aspects*, 7 *St. Louis U. L. J.* 228, 253 (1962). Plan II, which was submitted as an alternate and preferred plan, involved the pairing of six schools into three separate sets of schools in line with what has generally become known as the Princeton plan. See *Addabbo v. Donovan*, 22 *App. Div.* 2d 383, 256 *N. Y. S. 2d* 178 (1965).

In July 1962 the local Board declined to adopt either of the plans submitted by Dr. Wolff and issued a statement embodying its reasons. During the same month, it announced an optional pupil registration plan for the school year commencing September 1962. Under this plan, pupils could voluntarily transfer to schools outside their residence areas provided acceptable class sizes were not exceeded and provided further that parents supplied any necessary transportation. Only 69 pupils transferred under this plan. In September 1962 the petitioners, who are children enrolled in the Plainfield school system and are acting through their parents or other legal representatives, filed a petition with the Commissioner of Education, protesting the local Board's refusal to adopt plans and procedures which would eliminate "racial segregation in the public schools" and "the denial of equal educational opportunities" to the petitioners and others similarly situated. An answer to the petition was duly filed and a stipulation of issues and facts was entered into in June 1963.

In the stipulation, the petitioners acknowledged that there was no issue of "intentional or deliberate segregation of elementary school pupils"; they

¹ The high school and junior high schools in Plainfield are racially integrated and are not involved in these proceedings.

asserted, however, that the maintenance of predominantly Negro schools engendered feelings and attitudes which tended to interfere with successful learning and tended to produce in the minds of Negro pupils "a sense of stigma and a feeling of inferiority" which had an undesirable effect upon their attitudes in education; they asserted, further, that the optional pupil registration plan did not meet or relieve the problem of racial imbalance and urged that the Commissioner approve either plan recommended by Dr. Wolff.

The stipulation set forth the local Board's position that the elementary school attendance areas in Plainfield were set up on sound educational principles and that it had no duty to alter the areas "for the sole purpose of maintaining any particular percentage of pupil distribution by color or race." It then went on to state that if the Commissioner should determine that there was racial imbalance which should be eliminated in the Plainfield schools or in any of them, then the Commissioner should approve a plan which the local Board had prepared under the designation "Sixth Grade Plan" and which it offered to put into effect by September 1963. Under this plan all sixth grades would be placed in the Washington School and "all K-5 grades in Washington School" would be transferred to other schools determined by the local Board's administrative staff on the basis of availability and utilization of classrooms; bus transportation would be provided for all pupils who are transferred out of their original school zones irrespective of distance; and no pupils would be transferred to any school where the Negro enrollment was over 50 per cent.

No oral testimony was taken before the Commissioner who dealt with the matter on the basis of the record before him which included the petition, the answer and the stipulated issues and facts. Between the submission of Dr. Wolff's report in June 1962 and the Commissioner's decision in June 1963, the racial imbalance in some of the Plainfield schools had intensified. Thus as of April 1963, the Negro pupil population in the Washington School had risen to 96.2 per cent, in Emerson to 72.1 per cent, in Stillman to 67.6 per cent, in Bryant to 65.5 per cent and in Clinton to 58.9 per cent. The remaining elementary schools, apart from the Lincoln School which is a special school for retarded children, varied between 0.6 per cent and 44.9 per cent. The Negro pupil population in the entire elementary school system had risen to 40.4 per cent (as of April 1964 it had risen to 44.7 per cent and as of October 1964 to 47.3 per cent).

In his decision, the Commissioner first noted that there was no issue of deliberate segregation before him and that the cause of the concentration of the Negro population in particular schools was to be found in patterns of housing resulting from "a constellation of socio-economic factors." He then went on to point out that even though that be so the local Board was not thereby relieved of its responsibility to take whatever reasonable and practicable steps were available to it "to eliminate, or at least mitigate, conditions which have an adverse effect upon its pupils." Quoting from his own opinion in *Fisher v. Board of Education of the City of Orange* (decided May 15, 1963) he said:

"[T]he Commissioner is of the opinion that in the minds of Negro pupils and parents a stigma is attached to attending a school whose enrollment is completely or almost exclusively Negro, and that this sense of stigma and resulting feeling of inferiority have an undesirable effect

upon attitudes related to successful learning. Reasoning from this premise and recognizing the right of every child to equal educational opportunity, the Commissioner is convinced that in developing its pupil assignment policies and in planning for new school buildings, a board of education must take into account the continued existence or potential creation of a school populated entirely, or nearly so, by Negro pupils."

The Commissioner found from Plainfield's enrollment table that the Washington School was the only one where the enrollment was "almost entirely" Negro. He stated that he had given careful consideration to the two plans submitted by Dr. Wolff and the Sixth Grade Plan submitted by the local Board, that under each of the plans there would be no "all or nearly all" Negro school, and that "each plan is reasonable, practicable, and consistent with sound educational practice." He expressed the belief that it was the responsibility and prerogative of the local Board to determine which plan was best suited to the needs of the school system and he directed that the local Board select one of the three plans and put it into effect for the 1963-1964 school year. On the day following the Commissioner's decision the local Board put its own Sixth Grade Plan into operation.

The petitioners then appealed to the State Board of Education which heard argument in November 1963. In the meantime, and after the operation of the Sixth Grade Plan had become effective, there were shifts of Negro pupil population. As of October 1963 the Negro pupil population in Washington School was reduced to 36.6 per cent but Emerson rose from 72.1 per cent to 76.4 per cent, Bryant from 65.5 per cent to 67.1 per cent and Clinton from 58.9 per cent to 66.1 per cent. Stillman dropped somewhat from 67.6 per cent to 65.2 per cent. (As of October 1964, Bryant had risen to 78.6 per cent and Clinton had risen to 71.3 per cent whereas Emerson and Stillman had dropped insignificantly to 75.7 per cent and 65 per cent respectively.) The Jefferson School which in 1962 had a Negro pupil population of 44.9 per cent rose to 52.1 per cent in October 1963 and to 56.6 per cent in October 1964.

In affirming the Commissioner's decision, the State Board of Education stressed the Commissioner's language relating to schools which were almost entirely Negro and to his corrective action with respect to the Washington School. It took the position that the crucial question was not mathematical imbalance but whether the school fell within the Commissioner's test of "completely or almost entirely Negro"; and it concluded that within this test the Emerson, Bryant, Clinton, Stillman and Jefferson schools were free from attack. It expressed the view that racial imbalance was not to be equated with invidious segregation as condemned by the Commissioner and by the State Board itself in *Volpe v. The Board of Education of the City of Englewood* (decided September 25, 1963). It found that there had been no showing "that the 'imbalance' resulting from the adoption of the 'Sixth Grade Plan'" had deprived the Negro pupils of equal educational opportunities and that its adoption by the local Board and its approval by the Commissioner should be sustained. In support of their appeal from the State Board's decision, the petitioners urge before us that under both federal and state law there was a duty to eliminate racial imbalance beyond the step which was taken by the local Board to correct the situation at the Washington School and which was sustained by the Commissioner and the State Board.

When in *Brown v. Board of Education of Topeka*, 374 U.S. 483, 98 L. Ed. 873 (1954), the Supreme Court struck down segregated schools, it recognized that they generate a feeling of racial inferiority and result in a denial of equal educational opportunities to the Negro children who must attend them. Although such feeling and denial may appear in intensified form when segregation represents official policy, they also appear when segregation in fact, though not official policy, results from long standing housing and economic discrimination and the rigid application of neighborhood school districting. *Brown* itself did not, of course, deal with the latter or *de facto* type of segregation and federal judges have differed as to whether that situation gives rise to an affirmative duty under the fourteenth amendment to take suitable action. Compare *Bell v. School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. Ind. 1963), *aff'd*, 324 F. 2d 209 (7th Cir.), *cert. denied* 377 U.S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216 (1964); *Downs v. Board of Education of Kansas City, Kansas*, 336 F. 2d 988, 998 (10 Cir. 1964), *cert. denied* 380 U.S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965), *with Barksdale v. Springfield School Committee*, 237 F. Supp. 543 (D. Mass. 1965); *Blocker v. Board of Education of Manhasset, New York*, 226 F. Supp. 208 (E.D.N.Y. 1964). See Kaplan, "Segregation Litigation and the Schools—Part II: The General Northern Problems," 58 *Nw. U. L. Rev.* 157, 170 (1963); Sedler, *supra*, 7 *St. Louis U. L. J.*, at p. 250.

In *Bell*, the court found that there was no official policy of segregation and that the Gary School Board had consistently required students to attend their neighborhood schools without regard to race; on that finding it concluded that the board was under no obligation under the federal constitution to take any steps towards integration of the school population or towards correction of the racial imbalance which existed in the Gary school system. See Kaplan, "Segregation Litigation and the Schools—Part III: The Gary Litigation," 59 *Nw. U. L. Rev.* 121 (1964). The decision in *Bell* may be contrasted with the recent decision in *Barksdale*. There an action was brought for a declaration that the Springfield School Committee had denied to the plaintiffs their rights under the fourteenth amendment by assigning them to racially segregated schools. The court found that there was no deliberate intent on the part of the school authorities to segregate the races, and that such segregation as did exist resulted from rigid adherence to the neighborhood plan of school attendance. But it also found that, although the Negro elementary school population was 17.4 per cent, there were schools with Negro population appreciably more than 50 per cent (e.g., 59 per cent, 62.9 per cent, 75.3 per cent, 89.9 per cent), that the ability of Negro children to obtain equal educational opportunities in such racially imbalanced schools was impaired, and that the local School Committee was under an affirmative obligation under the fourteenth amendment to eliminate racial concentration "to the fullest extent possible" within the framework of effective educational procedures. With reference to the holding in *Bell*, it had this to say:

"The defendants argue, nevertheless, that there is no constitutional mandate to remedy racial imbalance. *Bell v. School City of Gary Indiana*, 324 F. 2d. 209 (7th Cir. 1963). But that is not the question. The question is whether there is a constitutional duty to provide equal educational opportunities for all children within the system. While *Brown* answered that question affirmatively in the context of coerced segregation, the

constitutional fact—the inadequacy of segregated education—is the same in this case, and I so find. It is neither just nor sensible to proscribe segregation having its basis in affirmative state action while at the same time failing to provide a remedy for segregation which grows out of discrimination in housing, or other economic or social factors. Education is tax supported and compulsory, and public school educators, therefore, must deal with inadequacies within the educational system as they arise, and it matters not that the inadequacies are not of their making. This is not to imply that the neighborhood school policy *per se* is unconstitutional, but that it must be abandoned or modified when it results in segregation in fact.” 237 *F. Supp.* at 546.

See Fiss, “Racial Imbalance in the Public Schools: The Constitutional Concepts,” 78 *Harv. L. Rev.* 564, 583 (1965).

Whether or not the federal constitution compels action to eliminate or reduce *de facto* segregation in the public schools, it does not preclude such action by state school authorities in furtherance of state law and state educational policies. See *Morean v. Bd. of Ed. of Montclair*, 42 *N.J.* 237, 242-244 (1964); *Addabbo v. Donovan*, *supra*, 256 *N.Y.S. 2d* at 182-184; *cf. Schults v. Bd. of Ed. of Teaneck*, 86 *N.J. Super.* 29 (*App. Div.* 1964), *aff’d*, 45 *N.J. 2* (1965). In a society such as ours, it is not enough that the 3 R’s are being taught properly for there are other vital considerations. The children must learn to respect and live with one another in multi-racial and multi-cultural communities and the earlier they do so the better. It is during their formative school years that firm foundations may be laid for good citizenship and broad participation in the mainstream of affairs. Recognizing this, leading educators stress the democratic and educational advantages of heterogeneous student populations and point to the disadvantages of homogeneous student populations, particularly when they are composed of a racial minority whose separation generates feelings of inferiority. It may well be, as has been suggested, that when current attacks against housing and economic discrimination bear fruition, strict neighborhood school districting will present no problem. But in the meantime the states may not justly deprive the oncoming generation of the educational advantages which are its due, and indeed, as a nation, we cannot afford standing by. It is heartening to note that, without awaiting further Supreme Court pronouncements, some states, including our own, have taken significant legislative or administrative steps towards the elimination or reduction of *de facto* segregation. See *Report of the United States Commission on Civil Rights 1963*, pp. 55-62.

The California State Board of Education has adopted regulations designed to avoid attendance areas which “in practical effect” discriminate upon an ethnic basis or tend to establish or maintain segregation on an ethnic basis. These regulations were cited by the California Supreme Court in *Jackson v. Pasadena City School District*, 59 *Cal. 2d* 876, 31 *Cal. Rptr.* 606, 382 *P. 2d* 878 (1963), where a Negro student brought an action seeking a transfer from his predominantly Negro neighborhood school to a predominantly white school. While its actual holding was narrower, the court’s opinion clearly recognized that, under state law and policy, the school authorities have an affirmative duty to take steps towards alleviation of racial imbalance in the

school system without regard to its origin. Speaking for all members of the court, Chief Justice Gibson said:

“So long as large numbers of Negroes live in segregated areas, school authorities will be confronted with difficult problems in providing Negro children with the kind of education they are entitled to have. Residential segregation is in itself an evil which tends to frustrate the youth in the area and to cause antisocial attitudes and behavior. Where such segregation exists it is not enough for a school board to refrain from affirmative discriminatory conduct. The harmful influence on the children will be reflected and intensified in the classroom if school attendance is determined on a geographic basis without corrective measures. The right to an equal opportunity for education and the harmful consequences of segregation require that school boards take steps, insofar as reasonably feasible, to alleviate racial imbalance in schools regardless of its cause.” 382 P. 2d at 881-882.

See Note, “California Suggests De Facto School Segregation Must End,” 16 *Stan. L. Rev.* 434 (1964); Note, “Schools and School Districts: Alleviation of Racial Imbalance,” 51 *Calif. L. Rev.* 810 (1963).

New York’s Board of Regents has issued statements of policy recognizing the insufficiency of public education in schools where segregation in fact exists and its State Commissioner has taken affirmative action towards elimination of racial imbalance wherever reasonably feasible. In a communication addressed to all local school administrators and boards, the Commissioner advised that the State Education Department’s position was that racial imbalance in predominantly Negro schools “interferes with the achievement of equality of educational opportunity” and must be eliminated, and he requested that individual reports be submitted by school districts with respect to their racially imbalanced schools and the corrective steps being taken. (For the purposes of these reports the Commissioner defined a racially imbalanced school as “one having 50 per cent or more Negro pupils enrolled.”) The broad scope of the supervisory powers vested in the Commissioner and the forthright manner of their exercise are well illustrated by the recent litigation in *Vetere v. Allen*, 41 *Misc. 2d* 200, 245 *N. Y. S. 2d* 682 (*Sup. Ct.* 1963), *modified*, 21 *App. Div. 2d* 561, 251 *N. Y. S. 2d* 480 (1964), *aff’d*, 15 *N. Y. 2d* 259, 258 *N. Y. S. 2d* 77 (1965), *petition for cert. filed*, 33 *U. S. L. Week* 3412 (June 22, 1965).

In *Vetere* the school district had three elementary schools. As a result of the concentration of Negroes in a specific area of the community, the Woodfield School had a Negro pupil population of 75 per cent whereas in each of the other two schools it was 14 per cent. The local board refused to take any corrective action and several Negro children appealed through their parents to the Commissioner. The Commissioner heard oral argument, received recommendations from his Advisory Committee on Human Relations and Community Tensions, and directed the local board to adopt a plan prepared by the Committee and approved by the Commissioner. Thereafter the local board submitted a proposed plan but it was rejected by the Commissioner who ordered the effectuation of his own plan which called for the attendance of all fourth and fifth grade pupils at the Woodfield School and all lower grade pupils at the other schools. On appeal, a trial judge annulled

the Commissioner's order but this action was vacated by the Appellate Division which found that there was support in the record for the Advisory Committee's recommendation and the Commissioner's determination, that the Commissioner's decision was neither arbitrary nor capricious, and that the court could not "substitute some other judgment for the judgment of the Commissioner that correction of racial imbalance is an educational aid to a minority group in attaining the skills and level of education which others have had for generations and that compulsory education should be designed for the greatest good of all." 251 *N. Y. S. 2d* at 483-484. On further appeal, the New York Court of Appeals affirmed the Appellate Division, holding that the Commissioner's decision, based on the finding that correction of racial imbalance was essential to sound education, was not arbitrary or illegal. See *Board of Education of City of New York v. Allen*, 6 *N. Y. 2d* 127, 188 *N. Y. S. 2d* 515, 160 *N. E. 2d* 60 (*Ct. App.* 1959); *Van Blerkom v. Donovan*, 15 *N. Y. 2d* 399, 259 *N. Y. S. 2d* 825, 207 *N. E. 2d* 503 (*Ct. App.* 1965).

Our own State's policy against racial discrimination and segregation in the public schools has been long standing and vigorous, and our Commissioner of Education has been vested with broad power to deal with the subject; indeed, his power in this regard may fairly be viewed as no less comprehensive in nature than that possessed by New York's Commissioner and exercised by him in *Vetere*. Cf. *Blumrosen, Securing Equality: The Operation of the Laws of New Jersey Concerning Racial Discrimination*, 71 *et seq.* (1964); *Blumrosen*, "Antidiscrimination Laws in Action in New Jersey: A Law-Sociology Study," 19 *Rutgers L. Rev.* 189, 261 (1965). As early as 1881 there was legislation in New Jersey declaring it unlawful to exclude a child from any public school because of his race (*L.* 1881, c. 149) and this appears in broadened form in our current statutes. *R. S.* 18:14-2. When called upon, our courts have not hesitated to strike down direct and indirect efforts to circumvent the legislative direction. See *Pierce v. Union District School Trustees*, 46 *N. J. L.* 76 (*Sup. Ct.* 1884), *aff'd*, 47 *N. J. L.* 348 (*E. & A.* 1885); *Raison v. Bd. of Education, Berkeley*, 103 *N. J. L.* 547 (*Sup. Ct.* 1927); *Patterson v. Board of Education*, 11 *N. J. Misc.* 179 (*Sup. Ct.* 1923), *aff'd*, 112 *N. J. L.* 99 (*E. & A.* 1934); *Hedgepeth v. Board of Education of Trenton*, 131 *N. J. L.* 153 (*Sup. Ct.* 1944).

New Jersey's strong policy against racial discrimination and segregation in the public schools finds further expression in *Article 1, paragraph 5* of the 1947 *Constitution* which provides that "[n]o person shall be denied the enjoyment of any civil or military right, nor be discriminated against in the exercise of any civil or military right, * * * nor be segregated in the militia or in the public schools, because of religious principles, race, color, ancestry or national origin." In 1949 the Legislature broadened its earlier law against discrimination (*L.* 1945, c. 169) to embody provisions against discrimination in places of public accommodation. *L.* 1949, c. 11. See *Levitt & Sons, Inc. v. Div. Against Discrimination, etc.*, 31 *N. J.* 514, *appeal dismissed*, 363 *U. S.* 418, 4 *L. Ed. 2d* 1515 (1960); *Jones v. Haridor Realty Corp.*, 37 *N. J.* 384 (1962). As thus broadened, the law provides that all persons shall have the opportunity to obtain "all the accommodations, advantages, facilities and privileges of any place of public accommodation," including any public school, "without discrimination because of race." *R. S.* 18:25-4; *R. S.*

18:25-5. In *Walker v. Board of Education of the City of Englewood* (decided May 19, 1955), the Attorney General advanced the contention before the Commissioner of Education that this law, in itself, precluded a board of education "from permitting the existence of segregation—in fact" when it could reasonably be eliminated. See *Greenberg, Race Relations and American Law* 251 (1959). The Commissioner, while expressing his full awareness of *Brown* and its holding that school segregation on the basis of race deprives the minority children of "equal educational opportunities," did not pass on this contention although he did direct the Englewood Board to draw new boundary lines and to eliminate a school which he found to be maintained in "violation of the law against discrimination."

In a series of cases commencing with *Fisher v. Board of Education of the City of Orange*, *supra*, the Commissioner has dealt with attacks on *de facto* school segregation which came before him in proceedings under R. S. 18:3-14. That statute provides that the Commissioner shall decide all controversies and disputes under the school laws or under the rules and regulations of the State Board or of the Commissioner. Its comprehensive terms were liberally implemented by the opinions of this Court in *Laba v. Newark Board of Education*, 23 N. J. 364, 381-384 (1957) and *In re Masiello*, 25 N. J. 590, 605-607 (1958) where we stressed the Commissioner's overriding responsibility "to make certain that the terms and policies of the School Laws are being faithfully effectuated."

In *Fisher* it appeared that the pupil enrollment in Orange was 50 per cent white and 50 per cent Negro and that enrollment in the Oakwood School was 99 per cent Negro. The Commissioner, although he found that the Oakwood segregation resulted from housing problems rather than from official policy, determined (1) that attendance at the Oakwood School engendered feelings and attitudes "which tend to interfere with successful learning," (2) that such extreme imbalance as obtained at Oakwood constituted under New Jersey law "a deprivation of educational opportunity for the pupils compelled to attend the school," and (3) that reasonable means "consistent with sound educational and administrative practice" existed and must be taken to avoid the concentration of Negro pupils at the Oakwood School.

In *Spruill v. Board of Education of the City of Englewood* (decided July 1, 1963), it appeared that the Negro pupil population of Englewood was 39.1 per cent and that the Negro population at the Lincoln School was 98 per cent. The Commissioner found that there had not been any showing of deliberate intent by the school board to segregate but held nevertheless that the Lincoln School must be desegregated under the principles expressed by him in *Fisher*. In the course of his opinion he pointed to the advantages which ordinarily accompany the neighborhood school policy but then went on to state that "the assignment of pupils to nearby schools is a general principle and is not to be applied inflexibly when other considerations outweigh its values." He did not prescribe any plan of his own for reducing the racial imbalance in the Lincoln School but noted instead that several plans had been proposed and that the local board was the one charged with the formulation of the most suitable plan; in this connection, he quoted from and relied upon his own opinion in the *Booker case*, now before us. See *Fuller v. Volk*, 230 F. Supp. 25 (D. N. J. 1964).

In *Alston v. The Board of Education of the Township of Union* (decided April 6, 1964), the local board adopted a voluntary optional pupil transfer policy for the regular pupils of the Jefferson School which had a 95 per cent Negro enrollment in a community having a 10 per cent Negro school population. The petitioners contended that the board's plan was inadequate and they requested that the Commissioner formulate a plan of his own. In dismissing the petition without prejudice to its renewal at a later date, the Commissioner rejected the contention that the local board's plan was ineffective, pointing out that it had not been given a fair trial and that he could not indulge in any presumption that it would fail to achieve its purpose. In discussing the request that he formulate his own plan, he stated that the choice among the various solutions proposed should be made "in the first instance" by the local board and that on appeal he must "keep within proper limits of judicial inquiry." In elaboration of this latter thought, the Commissioner quoted from *Boult v. Board of Education of Passaic* (decided January 8, 1946), *aff'd*, 135 N. J. L. 329 (Sup. Ct. 1947), *aff'd*, 136 N. J. L. 521 (E. & A. 1948), where one of his predecessors had expressed the view that it was "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."

Boult dealt with a local board's power to discontinue a school and had no relation to segregation or race. However, the Commissioner's quotation of its language would indicate that his position as to the scope of his authority and responsibility when passing on local steps towards desegregation is too restrictive and not fully compatible with our decision in *In re Masiello*, *supra*, 25 N. J. 590. In *Masiello* the Commissioner took the view that when reviewing action of the Board of Examiners his function is simply to determine whether its action was "arbitrary or capricious or whether it was the result of bias or prejudice." 25 N. J. at 605. We rejected this view, pointing out that under R. S. 18:3-14 the Commissioner is to decide all controversies and disputes arising under the school laws or under the rules of the State Board or of the Commissioner, and that this involves a responsibility on his part to make independent determinations, giving due weight, of course, to the findings and actions and the measure of discretion vested below. 25 N. J. at 606; *cf. Kopera v. West Orange Bd. of Education*, 60 N. J. Super. 288, 295-297 (App. Div. 1960). None of this brings into question the Commissioner's policy, as expressed in *Alston*, of leaving to the local board the choice in the first instance among the various solutions proposed towards the elimination of *de facto* school segregation. But it does mean that when the sufficiency of the local choice is brought before him he must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own as was done in *Vetere*. *Cf. Laba v. Newark Board of Education*, *supra*, 23 N. J. at pp. 381-384.

In one additional respect the Commissioner, along with the State Board in sustaining his pertinent determinations, has taken a position which we deem too restrictive. While he has broadly recognized and acted on the principle that *de facto* segregation has an undesirable effect upon attitudes

related to successful learning and denies equal educational opportunities to the racial minority, he has narrowly confined relief to situations where the schools in question were entirely or almost entirely Negro. This may be contrasted with *Vetere* where the Commissioner ordered the desegregation of a school with 75 per cent Negro pupil population, with *Barksdale* where the court ordered the desegregation of schools with Negro pupil populations appreciably more than 50 per cent but less in substantially varying amounts than 90 per cent, and with the general tenor of our own opinion in *Morean v. Bd. of Ed. of Montclair, supra*. In *Morean* we first noted that an official policy of segregation would not be consistent either with sound legal principles or sound educational policies and then pointed to the fact that racial imbalance, though fortuitous in origin, presents much the same disadvantages as are presented by segregated schools. 42 *N. J.* at pp. 242-243. While we there made no attempt to define the precise extent of racial imbalance which would require remedial action, we did refer approvingly to *Jackson v. Pasadena City School District, supra*, where the court, after indicating that substantial racial imbalance would call for relief, cautioned that exact apportionment of Negroes among the schools was not required and that consideration must be given to all relevant factors "including the practical necessities of governmental operation." 382 *P. 2d* at p. 882.

In the case at hand, Dr. Wolff acknowledged that there was no fixed racial composition that students of the subject considered ideal for all communities and he suggested that a desirable distribution of white and Negro children would be a range of one-third greater or less than the percentage of Negro pupils to white pupils in the whole elementary school system. In *Bell v. City of Gary, Indiana, supra*, District Judge Beamer said that this might be a good sociological definition but that there was no support for it as a legal definition. 213 *F. Supp.* at p. 829. In *Barksdale* Chief Judge Sweeney made the finding that in the light of the relation of white to non-white in the City of Springfield, "a non-white attendance of appreciably more than fifty per cent in any one school is tantamount to segregation." 237 *F. Supp.* at p. 544. Elsewhere racially imbalanced schools have been described as those predominantly or substantially Negro in view of the ratio throughout the school system;² and, occasionally, fixed percentages in varying amounts have been urged. See Kaplan, *supra*, 58 *Nw. U. L. Rev.* at p. 181; Fiss, *supra*, 78 *Harv. L. Rev.* at p. 579. Before us, the petitioners have not advanced any fixed percentage but have presented the thought that, at some ascertainable point, the Negro population of a school becomes so excessively high, in contrast to the percentage of Negroes in the schools of the same level in the community, that it becomes known as a Negro school with the attendant "sense of stigma and resulting feeling of inferiority" referred to in *Fisher v. Board of Education of the City of Orange, supra*. That point generally may be well above 50 per cent but well below the

² The recent *Report of the Advisory Committee on Racial Imbalance and Education, Massachusetts State Board of Education* April, 1965, refers to racial imbalance as a ratio between Negro and other students in public schools "which is sharply out of balance with the racial composition of the society in which Negro children study, serve and work." The report expresses the committee's thorough conviction that students attending predominantly Negro schools are denied equal educational opportunity and that racial imbalance is educationally harmful to all children, white and non-white. See pp. 1-6.

Commissioner's and State Board's 100 per cent or nearly 100 per cent, as evidenced by the racially imbalanced schools stricken in *Vetere* and *Barksdale*.

As in *Vetere* and *Barksdale*, the goal here is a reasonable plan achieving the greatest dispersal consistent with sound educational values and procedures. This brings into play numerous factors to be conscientiously weighed by the school authorities. Considerations of safety, convenience, time economy and the other acknowledged virtues of the neighborhood policy must be borne in mind. Costs and other practicalities must be considered and satisfied. And trends towards withdrawal from the school community by members of the majority must be viewed and combated, for if they are not, the results may be as frustrating as the inaction complained about by the minority. In his report, Dr. Wolff enumerated the advantages and disadvantages of both of his plans which were aimed at correcting racial imbalance throughout the entire elementary school system while preserving, wherever possible, the neighborhood policy. Both plans contemplated the closing of the Bryant School which was described as "the oldest, least efficient and most expensive school in the city." As outlined by Dr. Wolff, the advantages of each plan were substantial whereas its disadvantages were insubstantial and the Commissioner acknowledged that each of the plans was reasonable, practicable and consistent with sound educational practice. He nonetheless sanctioned their rejection and permitted the local Board to put into effect its own Sixth Grade Plan which he also found to be a proper one. But that plan, while it had the highly desirable effect of integrating the Washington School, was not pointed towards the goal of greatest dispersal in the school system as a whole and did nothing helpful towards meeting the racial imbalance at schools such as Bryant which, as of October 1964, had a Negro population of 78.6 per cent. It appears evident to us that in granting approval of the Sixth Grade Plan without more, the Commissioner was misled by unduly restrictive views, hereinbefore indicated, (1) as to the scope of his own functions in reviewing and supervising local actions, and (2) as to his own responsibilities in the correction of substantial racial imbalance which may be educationally harmful though it has not reached the standard of "all or nearly all Negro."

At oral argument it was indicated that further steps towards correcting the racial imbalance in the elementary schools of Plainfield were now being considered by the local Board. Respondent's counsel stressed that the responsibility for maintaining a sound educational system rests primarily with the school authorities and he urged that the decision of the Commissioner and the State Board, sustaining the local Board's Sixth Grade Plan, not be disturbed. The petitioners have readily joined the respondent's position that the primary responsibility is that of the school authorities and they do not suggest that this Court direct what specific plan should be adopted; their prayer for relief, as voiced during oral argument, is that the matter be remanded to the Commissioner for further consideration and action on his part pursuant to the judicial views expressed in this Court. They are clearly entitled to that relief. The Commissioner will, of course, be at liberty to have the record supplemented by such further evidence and plans as he may call for or as the parties may choose to present. Thereafter he will make whatever determination and take whatever action appears appropriate under the circumstances and the governing principles set forth earlier in this opinion.

Reversed and Remanded.

HALL, J. (Concurring in part and Dissenting in part)

While I agree that this case should be remanded for reconsideration at the administrative level, I would do so on quite a different thesis than I understand the majority to dictate. My difference of view arises from its conception and treatment of the basic issue in the case. Involved in this difference is the even deeper question of the proper role of the judiciary in the resolution of the complex, difficult and important matter of racial imbalance in public schools. It is appropriate that these fundamentals be carefully examined since this is the first case to come to this Court dealing with the *obligation* of school authorities to remedy racial imbalance, *i. e.*, a proceeding to compel initial or additional action, as distinct from a challenge to steps voluntarily taken in that direction (without regard to whether the particular situation was such that some action could have been compelled) on the ground that other alleged rights were violated thereby. The latter category of litigation is exemplified by *Morean v. Board of Education of Montclair*, 42 N. J. 237 (1964) and *Schults v. Board of Education of the Township of Teaneck*, 86 N. J. Super. 29 (App. Div. 1964), affirmed 45 N. J. 2 (1965).

The basic issue posed by the petitioners is essentially an abstract one on a constitutional plane. The thesis boils down to a claim of denial of equal protection under the Fourteenth Amendment of the United States Constitution and a denial of a civil right under Art. I, par. 5, of the New Jersey Constitution when, solely by reason of attendance zones based on residence, the large majority of Negroes attend one set of schools in a municipality, the large majority of whites attend another set, and the percentage of Negro pupils in one or several schools exceeds that of white pupils to some degree. The contention is that such a situation amounts, *ipso facto* and with little regard to the actual degree of the imbalance in a particular school, to a denial of equal educational opportunity, which is equated with equal protection of the laws, and to "segregation in the public schools" within the prohibition of the state constitution, and requires corrective action in that fashion which will accomplish the greatest dispersal of the races.

It should be noted that no claim is made that the racial composition of the Plainfield schools has resulted from any invidious action, or indeed non-action, of the Board of Education in prescribing attendance zones. In other words, the pupil composition of the individual Plainfield schools when this litigation was commenced was not determined on the basis of race. Nor is it contended that the Board has callously ignored the situation. In fact, it is evident that the attitude has rather been one of alertness and activity, whether or not one agrees with what was done, making due allowance for the immense ramifications of the problem in the light of the Board's manifold responsibilities for the proper administration of the entire school system of the city and the highly uncertain state of the law during the period. The point urged is rather that the Board has not gone as far in the measures undertaken as it is legally compelled to. It may be further noted that there is nothing of value in this record to support any charge that the Board or the professional administration has been discriminatory in the spending of available funds, the providing of physical equipment or the assignment of staff with respect to elementary schools where Negro pupils are in the majority, and such a charge is in fact not seriously advanced.

The foundation for "denial of equal educational opportunity" is expressed in petitioners' contentions contained in the stipulation upon which the case was submitted to the Commissioner:

"* * * the color distribution of elementary school pupils which are predominantly Negro, or nearly so, tends to produce a sense of stigma and a feeling of inferiority in the minds of Negro pupils and their parents, results in an undesirable effect upon their attitudes toward education, and interferes with successful learning."

This concept had its legal origin in *Brown v. Board of Education of Topeka*, 347 U. S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873, 880-881 (1954), where, however, the United States Supreme Court was dealing with state enforced separation of school children solely because of their race and rejecting the prior "separate but equal" doctrine.

The Commissioner has concurred in this proposition, with respect to a school "whose enrollment is completely or almost exclusively Negro," as a sound and correct educational tenet and as a declaration of state policy, by his opinion in *Fisher v. Board of Education of City of Orange*, handed down about six weeks before his decision in the instant case. There can be no quarrel with this sound and salutary conclusion, whether it be based on evidence received in other litigation before the Commissioner or on his own expertise. He and the State Board of Education applied the same principle here in sustaining the Sixth Grade Plan as an appropriate means of correcting the extreme imbalance in the Washington School.

The emphasis in this approach is, of course, educational, founded on a psychological base, with any legal connotations deriving therefrom. But in another way, it would seem that the fundamental of the proposition is that variation of an otherwise proper pupil assignment method should be compelled, where race is involved, only when the racial composition of the school results in an educational detriment, in the broadest sense of that term, and in order to serve an educational purpose. It seems to me further implicit in this approach that consideration of corrective measures also involves matters of practicality and the balancing of many things before a particular remedy can or should be ordered. There undoubtedly are situations where the racial composition of a particular school or group of schools is such that reassignment of pupils is educationally called for but where there just is no realistically or practically possible solution available or where the overall disadvantages of a solution completely overbalance desirable benefits.

I am convinced that this approach is the only sound and proper one from every angle, including the legal one, and further that its implementation belongs in the first instance with school authorities at the local and state levels rather than with the courts. I for one, and I would think judges generally, have no special competence and courts have no proper function in matters of educational policy or the manifold details of school administration. These belong with the local school board and the state education department. The judicial role should be confined to its usual one of review of administrative action, deciding only whether that action is legally or factually unreasonable or arbitrary.

As I read the Commissioner's opinion, he did not, however, expressly decide whether denial of equal educational opportunity in the sense outlined above, results where the Negro pupil percentage is less than total or almost so. The State Board in its opinion says the Commissioner held that such lesser percentages in several Plainfield schools did not in fact result in deprivation of equal educational opportunities calling for any remedial action with respect to those schools. Any such thought has to come from the Commissioner's failure to mention the matter and I am not convinced that he passed on it at all. It does seem to me that this question of what percentage level of Negro pupils in a school results in such denial of equal educational opportunity and requires local corrective measures is the initial and real question in this case and that it has to be decided at the state administrative level before the sufficiency of the Sixth Grade Plan may be properly evaluated there or in the courts. It appears not unreasonable for an educational layman to think that something less than 95% of Negro pupils might well produce the same educationally damaging stigma of racial inferiority. On this score, it may be parenthetically observed that petitioners' counsel conceded at oral argument that, if this question were the vital one, some arbitrary mathematical line would have to be drawn, but he could place it no more definitely than at that point where a particular school bears the community connotation of a "Negro" school. He indicated that such a point would not be reached until the enrollment was somewhat more than 50% Negro and that in Plainfield a school with 75% Negro pupils would certainly carry the stigma.

The rationale of the majority, on the other hand, which substantially follows the petitioners' thesis previously summarized, is quite different. While it has to start from the same place—that a predominantly Negro student body in a school interferes with successful learning and attitudes by reason of a sense of stigma and feeling of racial inferiority and so denies equal educational opportunity—, it in effect treats the application of that concept as nearly an automatic legal matter rather than as a factual educational one. The whole tone of the opinion indicates that any feasible plan of pupil reassignment which will produce the greatest racial dispersal is compelled almost upon the mere existence of racial imbalance in a school without much regard for other considerations.

In my view neither present federal nor state law dictates or even supports the majority's conclusion. At the federal level, certainly *Brown v. Board of Education of Topeka*, *supra* (347 U. S. 483, 74 S. Ct. 686), is no authority. As earlier pointed out, the United States Supreme Court was there striking down compulsive separation of school children solely because of their race and upsetting the "separate but equal" doctrine upon which such treatment had previously been constitutionally sanctioned. It has since made clear that the principle there laid down may not be avoided or circumvented by any stratagems. *Goss v. Board of Education*, 373 U. S. 683, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963). This, of course, is not such a case and the court has not dealt with anything like it. There is a vast difference, constitutionally, between saying that a child must go to a certain school and cannot go to another simply because of his color and assigning all pupils to schools, irrespective of race, on a good faith basis of their place of residence. Although it is axiomatic that denial of certiorari by the United States Supreme

Court does not constitute an affirmance or any adjudication on the merits of the case, I do not think it is completely without significance that the court has recently declined to review decisions of two federal Circuit Courts of Appeals upholding school assignment plans based on residence which had resulted in extreme racial imbalance—very considerably greater than that in Plainfield—in the city school systems involved. *Bell v. School City of Gary, Indiana*, 213 F. Supp. 819 (N. D. Ind. 1963), affirmed 324 F. 2d 209 (7 Cir.), cert. denied 377 U. S. 924, 84 S. Ct. 1223, 12 L. Ed. 2d 216 (1964); *Downs v. Board of Education of Kansas City, Kansas*, 336 F. 2d 988 (10 Cir. 1964), cert. denied 380 U. S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965).

Nor can I find the question before us controlled by the provision of the New Jersey Constitution forbidding segregation in the public schools or the anti-discrimination law implementation of the constitutional guarantee of civil rights. Both are aimed at quite different situations. As to the segregation prohibition of the 1947 Constitution, it was, of course, adopted long before *Brown v. Board of Education of Topeka*, supra (347 U. S. 483, 74 S. Ct. 686). Its purpose was clearly stated by the proponent at the Constitutional Convention:

“Argument no doubt will be made that it is not necessary to have a clause with respect to the public schools. I think it is necessary because a peculiar situation exists in our State. I think it is a situation that should be corrected in the Constitution itself. In one whole section of the State, which we generally refer to as North Jersey, there is no discrimination on account of race in the public schools. In another section, South Jersey, there is discrimination, and separate schools according to races. That does not conform to the statutes. As far as the law of the State is concerned, it doesn't conform to the statutes.

“Now, my belief is that if we put it in the Constitution, it will be settled once and for all. There will be no controversy over the subject. It has been the source of quite a good deal of litigation in the courts and the [clause] will avoid the necessity of future legislation.”

1 *Convention Proceedings, Constitutional Convention of 1947*, 596.

Despite the fact that the ancestor of R. S. 18:14-2 referred to in the quoted passage had been on the statute books since 1881, it was well known that the statutory prohibition had not been uniformly and stringently enforced, even in the more northerly sections of the state, and the organic law provision was included to make that matter certain at the highest level.

The anti-discrimination law, N. J. S. A. 18:25-1, et seq., is directed to the outlawing of “practices of discrimination * * * because of race, creed, color, national origin, ancestry, age or because of their liability for service in the Armed Forces of the United States * * *,” N. J. S. A. 18:25-3, i. e., separate or different treatment in any of the categories covered by the statute solely by reason of any of the factors mentioned. By hypothesis, again this is not such a case and I do not think that this statute can reasonably be said to have controlling impact on the matter of school racial imbalance brought about by uniform pupil assignment according to residential location. While the legislature undoubtedly has the power to act in this particular field, it has not done so, although the question has been a matter of unfortunate con-

troversy in many communities in the state for a considerable time. It is not unreasonable to believe, therefore, that that branch of government has to date conceived the matter as one to be treated as an educational problem, committed under general law to the state education department and local school boards.

The majority also suggests that its rationale and conclusion were foretold and are supported by this court's decision in *Morean v. Board of Education of Montclair, supra* (42 N. J. 237). I did not then and do not now so understand that opinion. There the Montclair Board of Education was confronted with one junior high school having a 90% Negro population, another 60%, and the third 18%. The Board voluntarily adopted a plan to close the first and reassign its and other pupils in the system. The plan had an educational object, under the undoubted motivation of relieving racial imbalance which was causing education detriment. The attack was by whites who were reassigned to other than their neighborhood schools in implementation of the plan and claimed violation of rights thereby. The plan was sustained. I understand the very proper holding and implications of the decision to be that a local board of education may voluntarily assign or reassign pupils as it believes desirable on other than a residence location basis for educational reasons even if those reasons have their foundation in the alleviation or future prevention of racial imbalance in one or more schools. Its true tenor, to me, is the educational approach comparable to that which I urge in the case before us. Further, the opinion to me implies that there is no constitutional or statutory right to attend a neighborhood school, notwithstanding its many desirable features especially in the case of young children, and that the neighborhood school policy in a democratic society in this day and age may not be used simply to maintain a pupil population comprising a particular ethnic or socio-economic group. Cf. dissenting opinion in *Vickers v. Township Committee of Gloucester Twp.*, 37 N. J. 232, 252, 264-266 (1962).

Considering the majority rationale from another angle, it seems to me that it may also be said to amount to a judicial finding that educational detriment requiring correction occurs almost automatically whenever the Negro population in a school becomes the majority. I earlier pointed out my thought that this approach is the wrong one for a court to take, *i. e.*, that the matter should be treated as one of educational policy and implementation to be decided in the first instance by those knowledgeable in and charged with the primary responsibilities in that field. My view is not reached with any thought of evading or trying to sweep under the rug the necessity for constant consideration and efforts at solution of the immense and difficult problem of Negro improvement. There can be no question but that, even in the North, the Negro has not been accorded the full status and equal opportunity in so many fields to which he is thoroughly entitled as a citizen and an individual human personality. There has been and is prejudice against him in employment, housing and other avenues which has led in a vicious circle to the perpetuation of poverty and the ghetto, with all of their personal and social evils, and a feeling of inferiority, despair and hopelessness, with consequent damage to the whole of American life. Whites must take the initiative to reverse this condition by changes of heart and mind and concrete deeds. There must be continual affirmative action in all fields under

the cooperative and high minded direction of leaders of both races. The approach on both sides should be intelligent rather than emotional or adamant, to bring us all to an attitude of mutual respect and of living and working together in harmony in a multi-racial and multi-cultural democratic nation.

The improvement of educational achievement offers a principal means of breaking the vicious circle. Indeed, this goal applies to those of all races as the scope of current anti-poverty programs makes clear. It means and demands a lot more by way of pre-school and school programs than mere further mixing of the races in a school building, as the high-vision majority report of the Plainfield Lay Advisory Committee so cogently points out. Reducing racial imbalance in schools undoubtedly is an important and necessary element in the over-all picture, but when and how that tool should be utilized ought to be decided in the first instance by educators from the standpoint of furtherance of educational purpose and not by judges.

Although the majority opinion is rather imprecise with respect to its practical impact, the theme appears to run through it that the Commissioner must ultimately order the Plainfield board to adopt one of the Wolff plans. This implication is at least unfortunate. In view of the abstract question which petitioners put to the Commissioner, the merits and demerits of these plans as contrasted with the Sixth Grade Plan were not tried out. On what there is in the record concerning the Board's conclusions as to respective advantages and disadvantages under the enrollment situation on which the Commissioner decided the case in 1963, and assuming that only the heavily imbalanced Washington School educationally required correction then, I cannot say within the proper role of a judge, that the Board acted improperly, in the light of its responsibilities to the whole community, in adopting the Sixth Grade Plan or that the Commissioner and State Board were utterly wrong in approving that local exercise of discretion. Matters of building capacity and utilization, financial limitations, lengthy distances from home to school, and transportation and traffic hazard problems, among others, are considerations which a local board cannot overlook. Extensive bussing or long walks to school for young children are matters of concern to parents whether white or Negro.

I have said that I agree that this case must be remanded to the Commissioner for redetermination. There are two reasons. The first, to which I have already adverted, is that he should clearly decide whether denial of educational opportunity in the sense involved here results at a Negro pupil percentage of less than total or almost so, and, if so, at what point. In that connection, I strongly feel that this matter of vital state educational policy ought to be determined on a uniform guide line basis, by rule and regulation if you will, through the action of the State Board and the Commissioner in their respective spheres. To leave it to case-by-case development in adversary litigation, it seems to me, does a disservice to everyone. There can be no doubt of the power so to act at the state level and the subject would appear as important to the whole state as school building regulation and curriculum approval which are now controlled at the state level. This course has been followed, as the majority points out, in New York and California. It has the distinct advantage of letting all know in advance generally what must be done, when and how. It would lead to uniform operation and

enforcement without dependence merely on the individual initiative, or lack of it, of certain boards of education or interested groups. Even more significant, advance formulation of state policy would do much to avoid the tensions and adverse effects on community race relations which litigation inevitably produces. Such controversies can readily tear a community apart, almost beyond repair.

The Plainfield situation well illustrates the point. This controversy has obviously been festering and doing the city and all its people no good for about four years, with the litigation pending for almost three. When the Board adopted the optional pupil registration plan in July 1962, no state policy or decision on the problem had been announced. The leading out-of-state case at that time was *Taylor v. Board of Education of New Rochelle*, 294 F. 2d 36 (2 Cir.), cert. denied 368 U. S. 940, 82 S. Ct. 382, 7 L. Ed. 2d 339 (1961), where invidious action had been found and the right of open transfer from the heavily imbalanced school directed as the appropriate remedy. I would think that the Plainfield Board would also have been apprehensive as to what further it might legally do without running into the then unsettled problem of the possible violation of claimed rights of others than Negroes. *Morean* did not settle this aspect until May 1964. The Board's legal uncertainty is shown by its answer to the petition, where it set forth its doubts and sought the direction of the Commissioner. Nothing came from him apparently until May 1963, when he decided the Orange case requiring remedial measures only where one school was completely or almost exclusively Negro although three others had 50% or more Negro pupils. The Board then adopted the Sixth Grade Plan, a measure which had been used frequently elsewhere. It was in this posture that the Commissioner decided this case in June 1963, and matters have remained in *status quo* since. Advance promulgation of state policy would have avoided many of the present difficulties here. It is not too late to decide and announce it for the problem is or will be a live one in many New Jersey school districts for some time yet to come.

The second reason why the Commissioner must reconsider is that the enrollment situation in Plainfield has changed substantially since the litigation was commenced. In essence, the Commissioner decided one factual case, the State Board a different one, and this Court still a third. This is a further illustration of the distinct disadvantages of determining questions of this kind through case-by-case litigation. In 1962, Plainfield's total population of over 45,000 was about 25% Negro, as far as can be gathered from the record. The then elementary school enrollment of about 5,150 pupils was approximately 1,900, or 37%, Negro and 3,250 whites, allocated by residence among 11 schools, all of which accommodated grades kindergarten through six. One of them, Washington, had a Negro population of 95.1%. The next highest percentages were 64.8%, 59.5% and 57.3%. Two other schools were at 45.8% and 43.2%. These six schools accommodated about one-half of the total elementary enrollment. The other five had Negro percentages ranging from 24.1% to 0.

The Commissioner decided the case on the April 1, 1963 enrollment figures. By that time the total elementary population was about 5,400, with the Negro percentage at 40.4. The total number of Negro pupils had in-

creased by about 280 as contrasted with a slight decrease in the number of white pupils. The percentage of Negro enrollment had increased in every school but one. Washington was now at 96.2% and the next five schools at 72.1%, 67.6%, 65.5%, 58.9% and 44.9%.

The State Board determined the matter on the basis of the October 1963 figures which reflected the fact that the Sixth Grade Plan had been put in operation. The total enrollment still remained at 5,400, but there were now about 170 more Negro pupils than in the preceding April and a correspondingly less number of whites. The over-all Negro percentage stood at 43.6%. Over 500 Negro pupils in grades kindergarten through five in the Washington School had been transferred in September to other schools, although none to a school which at that time had more than a 50% Negro enrollment. Negroes now attended every school and every elementary classroom in the city. Sixth grade pupils throughout the city all now attended Washington School and the Negro percentage there had dropped to 36.6. The schools formerly over 50% to which no transfers had been made, and which still received pupils only on the basis of residence within their attendance zones, had risen to 76.4%, 65.2%, 67.1% and 66.1% Negro enrollment. Jefferson School, to which some transfers had been made, formerly at 44.9%, was now 52.1% Negro. The other five schools which had received the great bulk of the pupils transferred from Washington stood at 40.8%, 39.8%, 26.5%, 17.7% and 23.4% Negro.

The latest figures furnished us depict the enrollment as of October 1, 1964. The total was then about 5,500, of which 47.3% were Negroes. The Washington School percentage had become 42.1%. The Negro percentages in the next four which had received no pupils in the transfer stood at 75.7%, 65%, 78.6% and 71.3% Negro. The remaining schools had Negro percentages of 56.6%, 43.4%, 49.7%, 30.9%, 18.8% and 24%.

What had happened since the Commissioner decided the case on the basis of April 1, 1963 figures is that, while the total enrollment increased by but approximately 130, the number of Negro pupils had increased by over 400 and the white enrollment had dropped by about 300. This would seem to indicate further Negro migration into the city and withdrawal of white pupils from the public schools. While four schools now had Negro enrollments of between 65% and 78%, the increases therein were in no way due to the adoption of the Sixth Grade Plan, since no transfers were made to them, but rather appear ascribable to greater Negro residence in their zones and perhaps to certain residential areas of the city having become available to Negroes for the first time.

Be this as it may, the present enrollment picture is obviously very different from that which formed the basis of the Commissioner's decision. The sufficiency of the Sixth Grade Plan should clearly be reconsidered and decided, under the educational policy approach I have suggested, on up-to-date figures as well as the probabilities for the near future.

The majority directs a reversal of the State Board, and consequently of the Commissioner, as well as a remand and redetermination. It seems to me that whether the Sixth Grade Plan is an appropriate and adequate corrective measure for the Plainfield Board to continue or whether something

different is now educationally required in the light of current conditions depends on the Commissioner's redetermination, first, of when racial imbalance causes such educational detriment as to dictate remedial action, and second, of the nature of the corrective action indicated for Plainfield within those guidelines in the light of all considerations and of the responsibility and discretion reposed in the local board. The result so reached may be the same as that previously arrived at or it may not be. Remand for redetermination should be the limit of our disposition and reversal is not appropriate at this juncture.

I concur in the result reached by the majority insofar as remand to and redetermination by the Commissioner is ordered, but dissent as to the direction of reversal and as to the basis of redetermination for the reasons herein expressed.

Justice HANEMAN joins in this opinion.

45 N. J. 161

LEO S. HASPEL,

Petitioner-Appellant,

v.

STATE BOARD OF EDUCATION,

Respondent-Respondent,

AND

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN
IN THE COUNTY OF MIDDLESEX,

Intervenor-Respondent.

Decided by Commissioner of Education, February 20, 1963.

Decided by Commissioner of Education, January 20, 1964.

Decided by State Board of Education, October 7, 1964.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued June 7, 1965—Decided June 10, 1965.

Before Judges GOLDMANN, SULLIVAN AND LABRECQUE.

Mr. Leo S. Haspel, appellant, *pro se*.

Mr. Sam Weiss, for intervenor-respondent Board of Education of Metuchen (*Mr. William H. Eichling*, attorney).

Mr. Howard H. Kestin, Deputy Attorney General, filed a statement in lieu of brief for respondent State Board of Education (*Mr. Arthur J. Sills*, Attorney General, attorney).

PER CURIAM

We have reviewed the record in A-161-64 and find more than substantial evidence to support the determination of the administrative agency which resulted in an affirmance of the local school board's denial of salary increments to petitioner-appellant Haspel for the school years 1960-61 and 1961-62.

We reach a like conclusion in A-160-64 wherein Haspel appeals his dismissal from the Metuchen school system. We agree with the State Commissioner of Education that the facts offered in support of the charges brought against Haspel established his incompetence and inefficiency as a teacher sufficient to warrant his dismissal.

We find no merit in the claim that the assistant commissioner was disqualified from hearing the testimony in the dismissal case because he had presided at the hearing in the salary increment case which resulted in a decision unfavorable to the teacher. There is no showing of bias or prejudice on the part of the hearer.

Affirmed.

GEORGE I. THOMAS,

Petitioner-Appellant,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MORRIS,
IN THE COUNTY OF MORRIS,

Respondent.

Decided by Commissioner of Education, April 1, 1963.

Decided by State Board of Education, August 12, 1964.

DECISION OF SUPERIOR COURT, APPELLATE DIVISION

Argued October 11, 1965—Decided November 16, 1965.

Before Judges SULLIVAN, LEWIS AND KOLOVSKY.

Mr. Abraham Natovitz argued the cause for appellant.

Mr. Bertram Polow argued the cause for respondent.

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

This is an appeal by Dr. George I. Thomas, petitioner herein, under R. R. 4:88-8, from a final decision of the State Board of Education upholding the action of the respondent Board of Education of the Township of Morris terminating petitioner's employment as superintendent of schools.

On December 14, 1960, the Board of Education of the Township of Morris (Board), after the careful screening of some forty applicants, by unanimous vote selected Dr. Thomas as its superintendent of schools and entered into a two-year contract of employment with him commencing February 1, 1961. The contract provided that either party could terminate it prior to expiration by giving ninety days notice in writing. This contract did not give Dr. Thomas tenure, the two-year term thereof in effect being a probationary period.

On October 18, 1961, at a regular meeting of the Board, the majority bloc of five members adopted a resolution under which the two-year contract was cancelled, and Dr. Thomas was given a three-year contract of employment

from said date without any termination provision. The effect of the new contract was to clothe Dr. Thomas with tenure.

Said action was taken without prior notice to the four other Board members or the public. It appears, however, that the matter had been privately discussed in advance by the members of the majority bloc and by Dr. Thomas. Indeed, a statement extolling Dr. Thomas' accomplishments as superintendent of schools, which statement was read at the meeting, the resolution cancelling the old two-year contract and providing for a new three-year contract, and the three-year contract itself, were all prepared in advance of the October 18 meeting.

At said meeting, after the statement praising Dr. Thomas' accomplishments had been read and the resolution introduced, the two minority bloc members of the Board who were present (two others were absent) protested strongly against the proposed contract. One said:

"This action is premature. We are not well enough acquainted with Dr. Thomas, with his attitudes or abilities in relation to this community. We should not jump to conclusions. Every employee should have a full trial period."

The other added:

"This is a high-handed way to tie us up. It is most premature. It should have been discussed prior to this with all Board members. I certainly have some unanswered questions regarding Dr. Thomas. This gives him automatic tenure."

Without further discussion the question was moved and adopted by a five to two vote.

During the course of the meeting another member of the Board arrived, and when informed of what had transpired with regard to Dr. Thomas, said:

"It would have been a courtesy for the Board to have had an opportunity to discuss this matter in a conference session, as I was not aware it was coming. I believe it was wrong to do it at this time and I am absolutely opposed to it."

The three-year contract which, as heretofore noted, had been prepared in advance, was signed by Dr. Thomas and the president and secretary of the Board during the meeting.

A few months later, in February 1962, the terms of office of three members of the majority bloc expired. They stood for reelection but were defeated, whereupon the two remaining members of the former majority bloc resigned from the Board. At its regular meeting on March 21, 1962, the new Board unanimously adopted a resolution which, after reviewing the circumstances surrounding the October 18, 1961 action cancelling Dr. Thomas' original two-year contract and entering into a three-year contract with him, declared said action to be against public policy, invalid and of no force and effect. The resolution further stated that the new Board recognized the original two-year contract with Dr. Thomas expiring February 1, 1963, as the only valid and subsisting contract. Dr. Thomas who was present at the meeting made a statement that he had accepted the three-year contract in good faith

because of the protection it afforded him, and he expected the Board to "live up to" the new contract.

On June 21, 1962, at a regular meeting of respondent Board, a resolution was unanimously adopted exercising the ninety-day clause contained in the original two-year contract and terminating Dr. Thomas' employment as superintendent of schools.

Dr. Thomas appealed from respondent Board's action to the Commissioner of Education. The matter was presented on petition, answer and stipulation, no oral testimony being offered. The Commissioner upheld the Board's position that Dr. Thomas' three-year contract was invalid and that the only legal contract between the parties was the original two-year contract. In so ruling, the Commissioner found in the action taken by the Board at the October 18, 1961 meeting, "clear indication of the kind of private, final action, without full and open consideration and discussion, with timely opportunity for all members of the board and the public to be heard, which the Court condemned in *Cullum*." *Cullum v. Board of Education of the Township of North Bergen*, 15 N. J. 285 (1954).

A further appeal was taken by Dr. Thomas to the State Board of Education which affirmed the Commissioner's decision, holding that under the circumstances presented, the October 18, 1961 action of the Board was shown to be an abuse of discretion, arbitrary and contrary to public policy. The instant appeal followed.

The sole contention by Dr. Thomas on this appeal is that all of the evidence shows that the three-year contract of October 18, 1961 was a valid contract, validly entered into, so that the decision of the State Board of Education upholding respondent Board's termination of petitioner's employment must be reversed.

We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence. *Quinlan v. Board of Ed. of North Bergen Tp.*, 73 N. J. Super. 40 (App. Div. 1962); *Schinck v. Board of Ed. of Westwood Consol. School Dist.*, 60 N. J. Super. 448 (App. Div. 1960).

In the instant case our review of the entire record leads us to conclude that the State Board's determination as to the invalidity of the October 18, 1961 three-year contract is amply supported by substantial credible evidence.

A review of the essential facts and the inferences reasonably to be drawn therefrom is in order.

The selection of Dr. Thomas as superintendent of schools was the result of six months of investigation and deliberation by respondent Board. Some forty applications were screened and personal interviews had with those considered the most qualified. After careful consideration of all of the information collected, Dr. Thomas was selected. Even then the Board was unwilling to enter into a contract of employment with Dr. Thomas which

would have given him tenure but rather employed him on a probationary basis of two years. Undoubtedly the Board wanted to reserve to itself the right to consider Dr. Thomas' actual performance as superintendent of schools during the probationary period before committing itself to a tenure appointment. This arrangement was in effect a policy decision made by unanimous vote of all Board members.

The action taken by the Board on October 18, 1961, represented a dramatic change in that policy by reducing the probationary period to eight and one-half months. No prior notice of the proposed change was given to Board members or to the public which likewise had been led to believe that a decision as to whether or not Dr. Thomas should be given tenure employment would be made only after a two-year probationary period.

The resolution of October 18, 1961, which gave Dr. Thomas tenure employment manifestly had been privately discussed in advance by at least some of the members of the majority bloc and by Dr. Thomas. The preparation in advance of the meeting of the statement extolling Dr. Thomas' accomplishments, the resolution in question and the three-year contract of employment, indicates that the matter had been carefully planned.

The impact that the resolution had on the other Board members present can best be judged by the comments made. One member said that the action was premature because the Board was not well enough acquainted with Dr. Thomas' attitudes and abilities and that the full trial period should expire before a decision was made giving tenure to Dr. Thomas. Another member echoed the same sentiments adding that he had some unanswered questions regarding Dr. Thomas.

Despite the foregoing and, so far as the minutes of the meeting show, without affording an opportunity to the minority to even state what their unanswered questions regarding Dr. Thomas were, the motion was adopted by majority vote.

The *modus operandi* suggests that the real reason for the October 18, 1961 resolution was that the members of the majority bloc, mindful of the coming election, decided to give Dr. Thomas tenure while they could, even though it meant shortening his probationary period by almost two-thirds.

True, the action was taken at a regular public meeting of the Board. It is also true that no statute, administrative rule or regulation requires the giving of notice to board members, or to the public, of matters to be considered at such a meeting. It may even be assumed that the members of the majority bloc acted in the honest belief that it was in the best interests of the educational system to give Dr. Thomas tenure employment.

However, as heretofore noted, the fact is that the action taken represented a drastic modification of a policy decision which had been previously made by the Board after the most careful and deliberate consideration. The change was effected by a majority bloc of five members, three of which were serving terms that were to expire within a few months. The matter was privately discussed and planned in advance but notice thereof was withheld from the other Board members and the public. When the proposal was unveiled at the meeting, although the members of the minority bloc present objected and stated that they had some unanswered questions regarding Dr. Thomas, it does

not appear that they were even allowed to state what those questions were before the resolution was put to a vote and adopted.

The controversy here concerns the legality of the tenure employment of a superintendent of schools. This is one of the most vital and responsible duties that a board of education can perform. *Cullum v. Board of Education of the Township of North Bergen, supra*, at p. 292. The original selection of Dr. Thomas in December 1960 indicates that the Board recognized the importance of its action and acted accordingly. On the other hand, the October 18, 1961 episode, no matter how well intentioned, inasmuch as it involved a change in Board policy in such a vital matter, lacked the essential elements of notice, deliberation, and fair opportunity to be heard. In short, the action was not taken in good faith. As noted in *Cullum, supra*, at p. 294, "if a public meeting is to have any meaning or value, final decision must be reserved until fair opportunity to be heard thereat has been afforded."

We conclude that there was substantial credible evidence in the totality of facts and circumstances from which the State Board could have reasonably found that the October 18, 1961 action taken by the Board was an abuse of discretion, arbitrary and contrary to public policy.

Our dissenting colleague questions the procedure whereby the October 18, 1961 resolution and contract were declared invalid. This issue has not been raised by Dr. Thomas on appeal to this court. However, we conclude that, under the circumstances presented, the new Board acted promptly and expediently to clarify Dr. Thomas' employment status and that no legal prejudice to him resulted. He was told by the new Board that it recognized the original two-year contract, which still had almost a year to run, as the only valid and subsisting contract. It is his challenge of that declaration of status that necessarily involves the issue of the validity of the October 18, 1961 resolution and contract.

Affirmed.

KOLOVSKY, J. A. D. (dissenting)

The proceedings under appeal were not instituted to attack the validity of the October 18, 1961 resolution of the Township Board of Education (Board) and the contract between Dr. Thomas and the Board authorized thereby. On the contrary, the proceedings were instituted by Dr. Thomas in July 1962 for administrative review of the validity of two resolutions adopted by the Board on March 21, 1962 and June 21, 1962, respectively. The resolution of March 21, 1962 purported to determine that the contract of October 18, 1961 between the Board and Dr. Thomas and the Board's resolution which authorized it "are against public policy, invalid and of no force or effect" and that the Board would recognize only the December 15, 1960 contract. The June 21, 1962 resolution purported to exercise a 90-day termination option contained in the December 1960 agreement.

In my opinion, neither of the 1962 resolutions was valid and Dr. Thomas should have been given the relief which he prayed, an order so declaring.

It was not for the Board to pass in judgment, as it did in adopting its resolution of March 21, 1962, upon the validity of the October 18, 1961

resolution. *Montefiore Cemetery Co. v. Newark*, 3 N. J. Misc. 1100, 130 A. 730 (Sup. Ct. 1925); *First National Bank of Fort Lee v. Englewood Cliffs*, 123 N. J. L. 590, 594 (Sup. Ct. 1940).

As the Court said in the *First National Bank* case at 123 N. J. L. 594:

"We are entirely satisfied that the resolution of October 13th, 1938, is invalid and should be set aside. This resolution merely rescinded a prior resolution under date of July 8th, 1937. If the prior resolution was valid, and we are not to be understood as expressing any opinion on this score, prosecutors 'acquired vested rights thereunder which could not be taken from them.' (Citing cases.) And if, on the other hand, as respondents contend, the prior resolution was invalid, on which question as already indicated no opinion is expressed, 'it was not for the municipality to pass judgment on its own act.' (Citing cases.) In either circumstance, therefore, the resolution presently under attack, must fall."

As is true with respect to private parties, a municipal corporation cannot rescind or dissolve an existing contract binding upon it by merely adopting a resolution to that effect. See *East Rutherford v. Sterling Paper*, 21 N. J. Misc. 232, 236, 32 A. 2d 855, 857 (Cir. Ct. 1943); *Buckley v. Mayor, &c. of Jersey City*, 105 N. J. Eq. 470 (Ch. 1930) aff'd o. b. 107 N. J. Eq. 137 (E. & A. 1930).

The resolution adopted by the Board at the October 18, 1961 meeting provided for the termination of the existing employment agreement of December 15, 1960 and the substitution therefor of a new three-year contract. It is undisputed that the action taken was within the statutory power granted to a Board of Education which may employ a superintendent for a term not to exceed five years. N. J. S. A. 18:7-70. The October 18, 1961 contract was not void. It was binding upon both the Board and Dr. Thomas until avoided for good and sufficient legal reasons in proceedings brought for that purpose.

But no proceedings of any kind were taken to review the validity of the resolution and contract of October 18, 1961. Such review was available by appeal to the Commissioner of Education under N. J. S. A. 18:3-14. Although the statute has no provision as to the time within which the appeal to the Commissioner should be taken (compare with N. J. S. A. 18:3-15 providing that appeals from the Commissioner to the State Board are to be taken within 30 days), it is clear that "this statutory protection (should) be invoked with reasonable promptitude." *Board of Education of Garfield v. State Board of Education*, 130 N. J. L. 388, 393 (Sup. Ct. 1943).

If the minority of the Board or any affected citizen desired to attack the validity of the Board's action they should have proceeded to do so promptly. On the record before us, nothing was done. Such failure is not to be overlooked because an annual election for some of the members of the Board was to be held some four months later. The legality of municipal action is to be determined by applicable rules of law; it is not to be tested by the results of the next election.

Nor did the time for review of the prior resolution of the Board begin to run anew because of the change in the Board's membership. In any event, altogether apart from the question of delay or laches, if the new board was

of the view that the action taken some five months before was invalid for any reason, it should have with "reasonable promptitude" sought to have it judicially annulled, *cf. Marini v. Borough of Wanaque*, 37 N. J. Super. 32, 40 (App. Div. 1955), instead of proceeding without notice to Dr. Thomas, *cf. Nicholson v. Board of Education, Swedesboro*, 83 N. J. L. 36 (Supr. Ct. 1912), to attempt to destroy existing contract rights.

However, the validity of the agreement of October 18, 1961 and of the resolution of the Board authorizing it becomes an issue in this case because the parties stipulated that one of the "legal issues before the Commissioner" was "Is the contract of October 18, 1961, a valid contract, validly entered into?"

As to this issue, the majority opinion concludes that:

"there was substantial credible evidence in the totality of facts and circumstances from which the State Board could have reasonably found that the October 18, 1961 action taken by the Board was an abuse of discretion, arbitrary and contrary to public policy."

I cannot agree.

The only relevant evidence before the Commissioner and the State Board on the issue of the alleged invalidity of the October 18, 1961 agreement, an issue as to which the burden of proof was on the Board, were the minutes of the local Board's meetings of December 14, 1960 and October 18, 1961, the employment contracts of December 15, 1960 and October 18, 1961 and the stipulation that Dr. Thomas would "be unable to disprove the contention of three members of the Board of Education that they had no prior knowledge of the resolution of October 18, 1961, or that it would be presented for consideration that evening." The self-serving statements and recitals in the Board's resolution of March 21, 1962 were neither competent nor relevant evidence on this issue.

There was no oral testimony requiring factual determinations by the administrative agency which normally we would be required to accept. The Commissioner and the State Board were in no better position than are we to evaluate the written evidence. *Cf. 5 A C. J. S., Appeal & Error, sec. 1656(2), p. 442.*

In its conclusions, the State Board said:

"While we agree that the facts herein are distinguishable from those in *Cullum*, we nevertheless feel that the basic philosophy of that case well supports an invalidation of the action taken by the local Board on October 18, 1961. * * *

"In any event, we hold that under the circumstances here, where the local Board undertook to invalidate the previous contract, in dealing with a position such as the superintendency wherein it performed one of its 'most vital and responsible duties,' *Cullum supra*, the Board acted contrary to public policy in not informing all members of the Board that the matter would be considered at the meeting of October 18, 1961. In other words, there was such an abuse of discretion and arbitrary action as to invalidate the action taken."

In my opinion, the State Board's determination is not supported by the evidence nor by *Cullum v. Board of Education of the Township of North Bergen*, 15 N. J. 285 (1954). Further, while notice of a special meeting must state the purpose for which the special meeting is called, 4 *McQuillan, Mun. Corp.* (3rd Ed. 1949) sec. 13.37, there is no authority which supports the Board's ruling that notice should have been given of the items to be taken up at a regular meeting of the Board; and, as the majority opinion points out, "no statute, administrative rule or regulation requires the giving of notice to board members or to the public of matters to be considered at (a regular) meeting."

As I read *Cullum*, neither its philosophy, its factual complex nor its holding warrant invalidating the October 18, 1961 resolution and contract.

Unlike *Cullum*, the instant case does not involve a "lame duck" appointment (cf. *Higgins v. Denver*, 85 N. J. Super. 277 (App. Div. 1964)). Here the annual school board election was not to be held until February 1962, four months later. There the appointment was initiated by a Board member whose term expired on the very day of the special meeting at which the appointment was made. The appointment (of Cullum as superintendent) had been decided upon and made without any examination whatever of any applications on file." 15 N. J. at p. 289. And as the Supreme Court commented at p. 293:

"* * * elemental good faith and fairness demanded that the interested principals be duly notified so that their applications might be filed and passed upon before a selection was made. Although Mr. Cullum was told by Mr. Marck to file his application in anticipation of the special meeting, he was the only prospective applicant who was thus favored. * * *

And although the minority members, if they had attended, would presumably have had opportunity to speak before the vote was taken publicly, they likewise would have been faced with the fact that the majority had, in advance, agreed upon the appointee and signed the formal resolution of appointment.

The circumstances convince us that there was in the language of Justice Burling in the *Grogan* case, 'a lack of exercise of discretion and an arbitrary determination.' At no time did the majority consider the needs of the local community, or seek to ascertain and evaluate the identities, qualifications and experience of the available candidates, or deliberate on the course best calculated to serve the local school system. On the contrary, they seem to have permitted extraneous personal and petty political influences to dictate their action. The open meeting they had was nothing more than a sham."

Here, the stipulated record discloses a completely different atmosphere. The Board had, prior to the original appointment of Dr. Thomas on December 14, 1960, made a thorough survey of some 40 applicants for the position of superintendent, had interviewed eight and had finally selected Dr. Thomas. His original contract provided for a two-year period during which either party might terminate the contract on 90 days' notice. A decision by the Board as to whether or not it was to the school system's best interests to continue to have the benefit of Dr. Thomas' services as Superintendent of Schools

did not have to await the expiration of the two-year term. If the Board was not satisfied with Dr. Thomas' performance, it could have terminated the contract on 90 days' notice at any time within the two-year period, just as Dr. Thomas might have done if for any reason he concluded that he would be happier elsewhere. Similarly, there was no obstacle to the Board's determining before the expiration of two years that Dr. Thomas' performance was such that it should insure that he would stay on without an option to cancel, nor to its effecting that result by providing for a cancellation of the original contract and the substitution of a contract without any right of termination by either party.

The evidence in this case is uncontradicted that the majority of the Board, unlike the majority in *Cullum*, was concerned "with the needs of the local community" and selected a course which they believed "best calculated to serve the local school system." So the Chairman of the Education Committee stated that he

"had worked closely with Dr. Thomas for many months now and has come to know him well and to recognize that he is a most diligent worker";

and that while it was he who had on December 14, 1960 moved that Dr. Thomas be employed for two years,

"I have now seen enough of his work and what he can do that I have asked Mr. Mills (the Board's attorney) to prepare the following resolution which I wish to move."

There is nothing in the record to contradict the statement read by the President of the Board listing the many accomplishments of the Superintendent of Schools since he had taken over.

That the minority argued that a long enough trial period had not elapsed does not affect the determination of the majority that it had. There has been no showing of fraud or bad faith. Nor is such an inference to be drawn from anything in the record. Indeed, "when the proved or admitted facts are consistent with any reasonable theory of good faith and honest intent, they should be so construed." 37 *C. J. S. Fraud*, sec. 115, p. 438; see also *Federal Reserve Bank of Phila. v. Godfrey*, 120 *N. J. Eq.* 203, 206 (*E. & A.* 1936).

That, as is evident, some members of the majority had discussed the proposed action before the meeting but had not notified the minority that the proposal would be considered at the meeting does not, in my opinion, justify a finding that, in fact, the majority had reached private agreement, that "private final action" had been taken prior to the meeting. Such preliminary discussion is not prohibited. *Cullum*, *supra*, at p. 294. Nor is there any bar to the preparation in advance of a proposed resolution and contract. Many resolutions are prepared prior to, and introduced at municipal meetings; not all are adopted.

I would reverse the decision of the State Board and direct that judgment be entered vacating the local Board's resolutions of March 21, 1962 and June 21, 1962.

89 *N. J. Super.* 327.